

Case No: B2/2012/0793

Neutral Citation Number: [2013] EWCA Civ 157  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM Willesden County Court**  
**HHJ McDowell**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 06/03/2013

**Before :**

**LADY JUSTICE ARDEN**  
**LORD JUSTICE JACKSON**  
and  
**LORD JUSTICE BEATSON**

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**Between :**

**London Borough of Brent**  
**- and -**  
**Cheryl Tudor**

**Appellant**

**Respondent**

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**Christine Cooper** (instructed by **Brent Council Legal and Procurement Department**) for the  
**Appellant**

**James Sandham** (instructed by **TV Edwards Solicitors LLP**) for the **Respondent**

Hearing date : 27 February 2013  
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**Judgment**

## Lord Justice Beatson :

### *Introduction*

1. The London Borough of Brent (“the Council”) appeals the finding made by HHJ McDowell following a two day trial at the Willesden County Court on 14 and 15 March 2012 that a property at 7 Lydford Road, Cricklewood, occupied by the respondent, Cheryl Tudor, (“Cheryl”) was reasonably needed to accommodate her brother Christopher and two of Christopher’s children, Tashinga and Fidel as well as herself, and her disabled brother Valentine.
2. The principal ground is that it is submitted that the judge was wrong to find that the reasonable requirement for Cheryl and her household included two bedrooms for Christopher and his two sons. It is argued that the judge’s finding of fact was perverse. Alternatively, it is submitted that the judge failed to have regard to a number of relevant considerations, or, if he did, to give reasons for accepting or rejecting those considerations.
3. 7 Lydford Road is a six bedroomed property, one of only a very small number of such properties owned by the Council. Cheryl Tudor’s mother had been its secure tenant pursuant to a tenancy agreement dated 21 December 1981 until her death on 20 March 2009. As a member of the tenant’s family who resided with the tenant throughout the twelve month period ending with the tenant’s death, Cheryl was entitled to succeed to the tenancy pursuant to section 89 of the Housing Act 1985 (“the 1985 Act”).
4. Ground 16 of Schedule 2 to the 1985 Act provides that where a person succeeds to a tenancy by virtue of section 89 it is a ground for possession if the accommodation afforded by the property “is more extensive than is reasonably required by the tenant” and the requisite notice is served less than twelve months after the date of the previous tenant’s death.
5. To make an order pursuant to ground 16, it must be reasonable for the court to do so. Additionally, the court must be satisfied that suitable accommodation will be available for the tenant when the order takes effect: see *Wandsworth LBC v Randall* [2007] EWCA Civ 1126, [2008] 1 WLR 359 at [35] – [36], [38], and [39]. The 1985 Act provides that the court is to take into account, *inter alia* (a) the age of the tenant, (b) the period during which the tenant has occupied the dwelling-house as his only or principal home, and (c) any financial or other support given by the tenant to the previous tenant. It is also clear, see for example *Wandsworth LBC v Randall* and *Kensington and Chelsea RBC v Pascall* [2009] EWCA Civ 212, that the relevant date for considering ground 16 is the date of the hearing. It is on that date that the court will decide which members of the family are living at the premises and which of them the successor tenant reasonably requires to be accommodated. In considering the matter, the court will, in Sir Peter Gibson’s words in *Kensington and Chelsea RBC v Pascall* at [6], “be astute to look at the reality of the situation when new members of the tenant’s family have moved into the premises between the date of the death of the original tenant and the date of the hearing”. This reflected what Dyson LJ had said in *Randall’s* case at [28].

6. In July 2009 the Council served notice to quit on Cheryl and Cheryl applied to succeed to the tenancy, naming four members of her family as occupying the property with her at the time. Her local MP wrote on her behalf to the Council about a number of matters concerning the tenancy and the Lydford Road house. The Council's reply, dated 24 August 2009, referred to its view that the house was under-occupied. In October 2009 Cheryl made a further application, this time naming eight members of her family as occupying the property with her.
7. On 3 March 2010 the Council served a notice of seeking possession of the Lydford Road property, referring to ground 16 and under-occupation, and on 7 March 2011 the Council issued its claim for possession on the basis of ground 16 of Schedule 2 to the 1985 Act. It did so because, although it accepted that Christopher had lived at the Lydford Road property between October 2009 and early 2010 after his marriage broke down and he left the matrimonial home in Dartford, it had concluded that, at the material time, the only member of the Cheryl's family living with her at the property was Valentine. It alleged that, although Christopher had connections with Lydford Road, he lived with his partner Maria Mathura at 51 Sidcup Road in Lee.
8. In her defence, dated 18 April 2011, Cheryl maintained that the property was not more extensive than reasonably required because the bedrooms were occupied by her, Valentine, Christopher, Tashinga and Fidel aged 9 and 7, Christopher's daughter Saraiya, aged 18 months, Cheryl's niece Roberta, aged twelve, and carers for Valentine.
9. The court heard evidence from Ms O'Neil, of the Council's Audit and Investigations Unit, on behalf of the Council and from Cheryl, Christopher, and Mr and Mrs Bass. Mr Bass was Cheryl and Christopher's cousin. Mrs Bass was his wife.
10. It was accepted at the hearing that Roberta had in fact moved out of the property by the time the defence was lodged. It was claimed that Christopher had lived there since separating from his wife in 2007 and that his sons lived with him for the majority of the time from 2009.

### ***The judgment***

11. The judge found that four of the six bedrooms were reasonably required for Cheryl's household; that is Cheryl, Valentine, Christopher, Tashinga and Fidel. The judgment does not state whether the judge accepted Christopher's evidence that Saraiya lived at Lydford Road, but it appears from his response to questions after he delivered his judgment by Miss Cooper, who appeared on behalf of the Council, that he found there was no reasonable requirement to accommodate her or for a bedroom to be used for carers for Valentine.
12. The transcript of the judgment approved by the judge contains a number of passages marked "inaudible". The judge stated that counsel should be able to deal with at least some of these from their own notes. They have done their best, but the transcript still contains passages marked "inaudible" and "no note". It is not clear why the judge in this case was unable to complete rather more of the gaps in the transcript. In most cases, a judge will have sufficient notes from the hearing to resolve gaps in a

transcript without leaving the matter to counsel. A judge can, moreover, refresh his memory if needs be by asking for the case papers to be returned to him for the purpose of approving the transcript. Counsel's note of a judgment is generally used in this court only where there is no official recording. It is important to keep in mind that a defective transcript may lead to a party not being able to establish his case on appeal. For that reason, judges should assist the appeal process by completing gaps in transcripts themselves so far as reasonably possible.

13. The material parts of the judgment (numbers in square brackets are to its paragraphs) can be summarised as follows:

- (1) The question was whether, at the date of the hearing, "there is genuine occupation of the property ... by Christopher Tudor and [his children]": [3]. If someone is putting on a façade and is not genuinely living there at that time, the Court is allowed to ignore that: see [8].
- (2) The court's task was to say, on the balance of probability, where Christopher was living in reality: see [9].
- (3) Documents showed that "for a couple of years" Christopher was on the electoral register at the Sidcup Road property. The form stating Christopher was a resident was signed by Maria Mathura and it was established that she has not been claiming the single person's relief from Council tax, saying she had a partner. The judge stated that "in terms of the evidence I have heard there is no real suggestion that [the partner] could be anyone other than Christopher himself": see [5]. Christopher's evidence was that these matters were not his responsibility and he did not know why they had been done: see [6].
- (4) The judge referred to a letter in the papers indicating that Maria Mathura, who did not give evidence, is the mother of Christopher's daughter Saraiya. The letter stated that she "lived with the father at his house at some point and would consider joining him there to live a more conventional family life: see [6]. The judge stated this did "not sit terribly well with Christopher's own evidence that Maria wanted her own space and territory, as opposed to living in an extended family set-up": see [6].
- (5) There was evidence of an insurance form completed [by Christopher] as from the Sidcup Road address. The explanation given for this was said to be in order to reduce Maria's premium. The judge stated that "if the explanation is truthful, [it is credible if not creditable]": see [7].
- (6) There was also evidence that Christopher was spending money "in the area away from the Lydford Road property" which the judge said "can be very simply explained by the fact that his work has taken him to that part of the world and it was a matter of convenience": see [7].
- (7) Christopher had documents relating to the Lydford Road property. Some came into existence after his mother's death but, for example, his bank account was opened at a date well before these proceedings. "[G]oing back to 2007, there

was a telephone bill, his daughter's birth certificate, there was correspondence with the Child Support Agency and National Insurance, CRB checks, case notes and certain communications with his employer": see [8]. These documents mainly related to 2010 and 2011 (see [33] below).

- (8) Christopher was on the record as still being the owner of his former matrimonial home in Dartford, but it was not suggested that was somewhere he could insist on occupying: see [10].
- (9) The case of the Tudor family was not assisted by Cheryl's assertion in the defence that her niece Roberta was still at the property. That did not reflect any credit on her and may have some bearing on the issue of costs: see [11].
- (10) On the civil standard of proof, on the balance of probabilities, despite the arguments to the contrary, the judge was satisfied "that Christopher and his children are substantially living at the Lydford Road property and not at the Sidcup [Road] property": see [10].
- (11) He stated (at [10]) that "whether or not [Christopher] has (inaudible) rights to live there is something that can happen consistently with the main residence being Lydford Road". "There" is clearly a reference to Sidcup Road, but the unresolved inaudible word leaves an uncertainty as to precisely what the judge was saying. At [11], however, he stated that he was "satisfied on the balance of probability that Christopher and his children are presently occupying as their main residence 7 Lydford Road, and that they do not have rights elsewhere and that I may not be right for the Local Authority to say that the property is under-occupied".

### ***The appeal***

14. There are four grounds of appeal. The first is that the judge was wrong to find that the reasonable requirement for Cheryl and her household included rooms for Christopher and his two sons. Ground two contends that the manner in which the judge requested and admitted evidence about the Sidcup Road Lee address was procedurally unfair, *inter alia* because the Council was not given any proper opportunity to investigate the evidence. Ground three is that the judge did not give any reasons for accepting some parts of Christopher's evidence but rejecting other parts, for example that Saraiya needed to be accommodated with him. Ground four is that the judge did not give reasons as to why he rejected the evidence which contradicted Christopher's claim to have lived at the property since 2007.
15. These grounds either challenge the judge's findings of fact or his reasons. Aikens LJ, when refusing permission on the papers, stated he did not consider that this Court could be persuaded to set aside the judge's finding of fact that on the material date Christopher and his sons were living at 7 Lydford Road. At the renewed application, MacFarlane LJ stated ([2012] EWCA Civ 1818) that he gave permission to appeal a fact finding determination with a heavy heart. However, he had concluded that it was arguable that in this case the judge failed to engage sufficiently in the task of determining whether Christopher, who had a connection with an number of

properties, including a house in Sidcup Road Lee, where his former wife/partner Maria resides, lived in the Lydford Road property on the relevant date.

16. The hurdles in the path of an appeal against findings of fact are high, particularly where a case turns on credibility. The height of the hurdle is illustrated by two of the three cases decided by this court in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409. In *English's* case itself, this court stated (at [53] and [57]) that the first instance judgment “gave little indication of the process of reasoning that led to the result”, and that it took “the appellate process and the assistance of counsel who appeared at the trial to enable [the court] to follow the judge's reasoning”. However, having done so the appeal was dismissed.
17. In the *Withers Farms* case the court stated (at [74]) it did not find the section of the judgment dealing with causation easy to analyse; a number of different reasons for the judge's conclusions were not set out in logical order but intertwined. It also stated (at [89]) that on a number of occasions it had to consider the underlying material to which the judge referred in order to understand his reasoning and on one occasion it failed to follow his reasoning even with the benefit of the underlying material. But in this case also, since, at the end of the exercise the court was able to identify reasons for the judge's conclusions which justified his decision, this and the fact he made sufficient reference to the evidence that had weighed with him, enabled it to follow his reasoning and to dismiss the appeal based on inadequacy of reasons.
18. Miss Cooper, on behalf of the Council, submitted that, in the light of the evidence, no reasonable court could have accepted that Christopher's account of having lived at the property since 2007 was more likely than not to be true. She criticised the judge for making no finding as to when Christopher's occupation started and for not giving reasons for accepting parts of Christopher's evidence but not accepting other parts of it. These matters went to Christopher's credibility and put into question the evidence that pre-dated the death of the original tenant. Given the indication in the authorities that post-death evidence should be scrutinised particularly carefully lest a family was seeking to bolster its claim to occupy a large house by moving family members in for that purpose, Miss Cooper submitted that these were important failures.
19. Miss Cooper relied on a number of particular matters which ought to have influenced the judge's view of Christopher's credibility but did not. She contended that, taken together, they completely undermined Christopher's credibility and the judge's finding of fact in relation to that. He rejected significant parts of Christopher's evidence, but gave no consideration to what the effect of this was on other evidence given by him. He should have stood back and looked at the evidence in the round, and made an assessment of Christopher's overall credibility.
20. Her starting point was that Christopher's case was that he had occupied the Lydford Road property continuously since 2007 had been contradicted by Mr and Mrs Bass's evidence which, taken at its highest was that Christopher had been there for two years. This together with the evidence that his former wife only claimed the single person's discount on the former matrimonial home in Dartford from 2009 significantly undermined his case. The judge should have “grappled” with the implications of this.

21. The other matters she relied on included Christopher's completion of the car insurance form giving as his address the Sidcup Road property: see [13(5)]. Mr Sandham submitted that on the evidence before the judge it could not be concluded that this was fraud, but he accepted that giving a wrong address for that purpose was close to fraud. Miss Cooper submitted that, although the judge said this was not creditable, he did not take into account the implication of Christopher's statement that he was prepared to lie about where he lived where it suited him, for instance for financial reasons, in that case a saving of about £1,000 a year.
22. Miss Cooper also pointed to the fact Christopher had been registered at the Sidcup Road address for council tax and on the electoral register at that address for two years; 2011 and 2012 (see [12(3)]), that Maria was not claiming the single person's relief from council tax, saying she had a partner (see [12(3)]) and that she had informed Greenwich LBC that she had moved into the Sidcup Road address with her partner in April 2010. She submitted that it was wrong of the judge not to accord any weight to these matters, in particular the electoral register, a public record which exposed those giving false information to criminal prosecution. Given the financial detriment that resulted from Maria not claiming the single person's relief, it was wrong of him not to accord any weight to the fact that it was inherently unlikely that she would have told the Council Tax department that Christopher lived at Sidcup Road if he did not.
23. She also relied on the absence of an adequate reason as to why Maria did not give evidence, and the letter from Maria indicating that she was Saraiya's mother and that she lived with the father at "his home" which the judge stated (see [13(4)]) did "not sit terribly well with Christopher's own evidence that Maria wanted her own space and territory, as opposed to living in an extended family set-up" and the judge's failure to deal with where Saraiya lived in the judgment. Maria's letter, dated 5 May 2011, gave her address as 137 Vassall Road. That was her mother's address. She had in fact moved to the Sidcup Road address in 2010.
24. Miss Cooper also criticised the judge for failing to have regard to the fact that, although Christopher was given the opportunity to go home at lunchtime to collect whatever documents he had to support his case, he was unable to produce documents showing an address concerning two insurance policies, a TV licence and a Sky TV account for which he was making regular payments. It is clear from the evidence of the Sky disclosure admitted at the beginning of the hearing before us that the Sky TV account for which Christopher was paying £105 per month related to service provided at Sidcup Road.
25. She also argued that the judge did not take account of two other inconsistencies. The first is that Cheryl had originally stated that her niece Roberta lived at the property at the relevant date but admitted in evidence that Roberta had left the property by 2010, a year before the statement. The second was inconsistencies between the evidence of Mr and Mrs Bass as to how long Christopher had been at the Lydford Road address and how many children had been there with him. Mr Bass said he had been there with two children on and off for two years and permanently for six months. Mrs Bass said he had been there with three children for two years.
26. Miss Cooper also submitted that documents which were said to support Christopher's case did not all do so. For example, those relating to his employment and tax, and

those from the Child Support Agency were from 2010 and 2011, and did not go back as far as 2007. Christopher's registration with a GP using the Lydford Road address was not helpful as he accepted he had been so registered even when he lived with his wife in Dartford.

27. I do not consider other evidence which Miss Cooper submitted undermined Christopher's case as to his residence at the property since 2007 is of substantial assistance in determining his residence at the time of the hearing. Evidence in this category includes the fact that in legal proceedings against the late Mrs Tudor, Christopher's mother, in 2008, she stated she lived with Cheryl and Valentine but did not mention Christopher. The judge is criticised for not referring to this evidence or drawing appropriate inferences from Brent's social services record for Valentine in 2009 which recorded that the Lydford Road property was occupied by Valentine, the late Mrs Tudor and Cheryl. Neither of these matters is of substantial assistance to the Council, although they do bear on the credibility of Christopher's evidence as to the position in 2007 and 2008.
28. There was also other evidence linking Christopher to the Sidcup road Lee address. I have referred to his request for an insurance quotation giving that address. There was a BT telephone line in his name at the property which he had said he was helping Maria with. He had also set up a company, Safe N Sure Enterprise Ltd, apparently using an internet intermediary to register the company. He gave his address as the Sidcup Road property, although one document stated that this was the "service" address and another that it was the "registered office and address". The evidence of the only bank statement produced showed that most of Christopher's activity was in south east London and Kent, including a number of transactions at a garage a few doors away from the Sidcup Road Lee address. None of this evidence was rejected in the judgment and Miss Cooper complained that no reasons were given for preferring Christopher's largely uncorroborated testimony.

### ***Discussion***

29. The judge's determination is an extempore one, and is rough-hewn. The positive parts of it are that he identified the legal test correctly as whether at the date of the hearing there was genuine occupation of the Lydford Road property by Christopher and the children. His conclusion was reached after hearing evidence from Christopher and Cheryl, and after submissions in which he played an active part. However, the judgment is not clearly structured. The judge does not set out the reasons for his findings in an ordered manner or deal with the implications of his rejection of important parts of Christopher's evidence in a way that is understandable without extensive recourse to the underlying documentary material and the transcript of the proceedings. I am conscious of the pressures that face those presiding over cases in busy county courts but, in a case that lasted for more than a day, it should have been possible, after rising for a short time, to put together a more focussed judgment.
30. Miss Cooper's attractively formulated submissions have undoubted force, but, notwithstanding that, and despite what I have said about the judgment, and the omissions and the blemishes in it, having considered the underlying documentary material and the transcript of several parts of the evidence, I have concluded that on Ground 1 Mr Sandham's submissions are to be accepted. As in *English's* case, it



unfortunately took the appellate process and the assistance of counsel who appeared at the trial to enable the court to follow the judge's reasoning. But, having done so, I consider that, on the evidence before the judge, for the following reasons, it was open to him to reach the conclusion he did.

31. First, the judge acknowledged that there was evidence that undermined Christopher's evidence at the hearing that his occupation of the property commenced in 2007 and was maintained since then. This included the documents about the Sidcup Road property and the other matters I have referred to at [21] – [24] which apparently contradicted Cheryl's case that Christopher lived at Lydford Road. The judge did not accept Christopher's evidence that baby Saraiya should be counted as one of those for whom accommodation was reasonably required by Cheryl. The judge took account of and made general, although not specific reference to the inconsistencies. Thus, he said of Cheryl and Christopher that they had not helped their case "by making assertions which are either exaggerated or in some cases flat wrong": judgment at [3]. He referred to Maria's failure to give evidence and that the letter I have referred to at [12(4)] did not sit well with Christopher's evidence. He examined the explanation that the use of the Sidcup Road address was to reduce Maria's insurance premium and found it "credible", although not "creditabile".
32. Secondly, with respect to the evidence of Mr and Mrs Bass, although there were inconsistencies in it, they were both clear that Christopher and (at least some of) his children had been living at the property. There was no witness of fact with knowledge of the occupancy of the property who contradicted the factual case advanced on behalf of Cheryl.
33. Thirdly, it was the judge's doubts about Christopher's credibility, and the documents which appeared to contradict his account and pointed to the Sidcup Road property, which led the judge to examine other documentary evidence, which supported Christopher's assertion that he "migrated" to the Lydford Road property after the breakdown of his marriage and that lived there in 2010 and did so on the date of the hearing, and to give Christopher an opportunity to produce further documents. There were before the judge a considerable number of documents from a number of sources which supported Christopher's assertion. Most were from 2010 or 2011, although there was an O2 telephone bill from 2007 and Saraiya's birth certificate was from 2009. The other documents included a Notice including Christopher's name claiming the right to buy dated 30 March 2010, letters from the Child Support Agency and HMRC dated August and October 2010, a CRB certificate dated November 2010, letters from Jobcentre Plus and the Maidstone and Tunbridge Wells NHS Trust dated February 2011. Other documents including a wage slip dated February 2012 and a telephone bill dated March 2012 were dated very shortly before the hearing and, in themselves, were not of much weight in establishing "genuine" occupation.
34. It is apparent from the judge's overall conclusion that despite the weaknesses in Christopher's evidence and the fact that Christopher was not what Mr Sandham described as a "good historian", the judge accepted the key parts of Christopher's evidence. He considered that evidence was supported by the documents pointing to a migration to Lydford Road, despite regular visits to the Sidcup road area for work purposes, to visit Maria, and to take the children to school. It is clear both from the judgment and from the transcript of the proceedings, that the judge preferred the

documentary evidence putting Christopher in the Lydford Road property with his two children.

35. I turn to Ground 2. I do not consider that there is anything in the complaint that this evidence about the Sidcup Road Lee property was obtained during Mr Sandham's closing submissions in a procedurally unfair way. Mr Sandham had stated on instructions that the property had been marketed as a three bedroomed house, but that Cheryl's case was that the third bedroom was in fact a box room [192 §1443]. Miss Cooper submitted that the Council was not given any proper opportunity to investigate the evidence, and did not agree to that characterisation of it. She also submitted that there was no proper basis for the judge to find the property could not accommodate Christopher, Maria and the three children without difficulty. There is, however, no finding in the judgment to this effect although in the transcript of proceedings Miss Cooper had said [193 §1451] it was "a standard three bedroomed semi-detached house in which many families with three children live" and the judge stated (as the Council had contended) that its "an estate agents' three bed and as with all houses as Miss Cooper rightly says, it can accommodate someone there if forced to ...". It is therefore difficult to see how this issue adversely affected the Council.
36. Grounds 3 and 4 are that the judge did not give any reasons (a) for accepting some parts of Christopher's evidence but not other parts, for example that Saraiya needed to be accommodated with him, and (b) as to why he rejected the evidence which contradicted Christopher's claim to have lived at the property since 2007. It is clearly desirable for judges to give reasons for their decisions. But it is also clearly established, see eg *Knight v Clifton* [1971] Ch 700, at 721 and *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, 122 that there is no duty on a judge when giving his reasons to deal with every submission presented by counsel. What is important is for the parties to know why one has lost and the other has won. In *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [19] this court stated that this requirement:
- "... does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained."
37. In this case, after the examination of the documentary material before the judge and parts of the transcript of the proceedings we undertook with counsel, it has become apparent why the Council lost. The reason was that, notwithstanding his reservations, the judge preferred the documentary evidence putting Christopher in the Lydford Road property with his two children at the material time. The judge referred, albeit only in general terms, to the questions about Christopher's credibility, and to the documents which appeared to contradict his account and pointed to the Sidcup Road property. But in the light of the documentary evidence putting Christopher in the Lydford Road property with his two children, the judge was entitled to accept Christopher's oral evidence.
38. One question which emerged during the hearing has given me some pause for thought. This is whether, on a true analysis of paragraphs [10] and [11] of his judgment, the judge found that Christopher was occupying Lydford Road and had no rights in the Sidcup Road property, or whether he found that Christopher's main

residence was Lydford Road but he had a right to occupy the Sidcup Road property: see the extracts set out at [13(11)] above. Miss Cooper's understanding was the former and she opened the appeal on that basis. But, in view of Mr Sandham's submission that paragraph [10] left open the latter and given the different formulations in paragraphs [10] and [11] of the judgment, in her reply, she maintained that, if it was the latter the judge fell into an error of law in concluding that the Lydford Road property was not under-occupied. Such an error would have justified remission of the case because it must be an important factor in the court's consideration of whether the tenant "reasonably" requires the accommodation that the family member in question does not have other accommodation available to him or her. I have, however, concluded that the uncertainty as to what the judge was saying in paragraph [10], in part because of the inaudible word, coupled with the clarity of what he stated in [11] means that Miss Cooper's original understanding is correct. This point does not therefore arise.

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

**Lord Justice Jackson:**

40. I agree.

**Lady Justice Arden:**

41. I also agree.