CA on appeal from the Family Division (Mr Justice Singer) before Thorpe LJ, Waller LJ, Lady Justice Arden. 29th July 2004.

JUDGMENT : LORD JUSTICE THORPE:

1. The parties to this appeal are in their middle 50s. They commenced cohabitation in 1983. That was at a time when they were each married to another. After their respective marriages were dissolved, they married in 1987 in New York. There is one child of the marriage who was born in 1988, so she is accordingly 16 years of age.

2. They moved to this country in 1997 and the husband's employment provided the family with a substantial house at number 46 Thurloe Square. The parties are extremely affluent and in 1999 they bought a large and expensive house at Mougins in the South of France. Sadly, the marriage disintegrated, probably at some time in the course of last year, and the husband initiated divorce proceedings with a petition which he presented to the court in Grasse. His next hostile step was to give notice terminating his lease of 46 Thurloe Square. The contract required 60 days' notice so that his surrender of 24th May would take effect on 24th July.

3. On 1st June the wife issued her divorce petition in this jurisdiction and, in a separate application, she applied for an order under Part 4 of the Family Law Act 1996 for occupation rights in relation to 46 Thurloe Square. The proceedings in France took their course with a conciliation hearing originally set for mid-June, but subsequently held at the end of June. The wife's stance in the French proceedings was, I suppose, predictable. She did not participate in the conciliation process and disputed her husband's jurisdictional claim to habitual residence.

4. The 22nd June seems to have been a busy day in this jurisdiction. The husband applied without notice for a stay of the London petition in reliance on the provisions of Article 12 of Council Regulation 1347/2000 which is known to all as "Brussels II". The District Judge made an order that his stay application be listed together with the wife's Family Law Act application in the following month. That day also saw the issue of the wife's originating summons in wardship, and since the initiation of the wardship proceedings there have been a number of brief returns before judges of the Division.

5. The applications adjourned by the district judge were several times listed and not reached. After two such misfortunes, the President intervened and arranged for Singer J to take the applications on 12th July. He heard evidence or submissions over the course of two and a half days, delivering a judgment under some pressure on the afternoon of the 14th July. During the course of the hearing before him, the wife issued an originating application under section 27 of the Matrimonial Causes Act. The order made by Singer J dismissed the wife's applications under the Family Law Act but granted permission to appeal. He further provided that the husband's application for a stay should be the subject of more detailed preparation and that its further course should depend on the outcome of any appeal to this court. He specifically provided in paragraph 5 of his order: *"In the event that the wife is successful in her appeal and the Court of Appeal does not deal with the husband's application for a stay, the matter to be listed at first instance as a matter of urgency."*

6. The wife's notice of appeal was filed on 19th July and special arrangements were made for a hearing today, given the representations that were received as to the urgency of the issue. Much of the presentation of urgency focussed on 24th July, the date upon which the husband's contractual tenancy of 46 Thurloe Square was destined to terminate. However, on 22nd July there was a significant development for the French court. The court in Grasse upheld the wife's challenge declining jurisdiction, holding that the husband did not have the necessary residential qualification.

7. On Friday of last week there was another hearing in the wardship proceedings, and undoubtedly there are a number of entries in the Family Division's calendar for future hearings and future directions hearings, in relation to the numerous proceedings that are on foot. We have been told that the husband has issued, or shortly will issue, an appeal against the judgment of 22nd July. He has a right of appeal to the appellate court in Aix eu Provence and if he fails there he has a further right of appeal to the Court de Cassation. Mr Singleton Q.C. tells us that the Aix appeal would not be listed for about a year and any appeal beyond might not be listed for several years.

8. I pause to comment that the whole purpose and intent of the Brussels regulation was to head off competing proceedings in different European jurisdictions. This case is a sad illustration of the fact that the legislative intention is certainly capable of circumvention.

9. Mr Turner QC, for the wife, has candidly accepted that her application for relief under the Family Law Act 1996 is essentially artificial in that 46 Thurloe Square has no particular significance for her well-being and that its size far exceeds her current needs. He presents her case on the basis that it is an application of desperation. So long as the husband asserts the primacy of the French proceedings, and continues so to assert despite the recent judgment, then the wife's ordinary rights to apply in this jurisdiction for the full range of financial relief, going well beyond mere accommodation needs, are effectively stayed. She is equally, practically speaking, excluded from relief in France, since to issue or pursue any application in that jurisdiction would be to underline her fundamental challenge to the court's jurisdiction. So, says Mr Turner, all she can do in order to try and house herself and sustain herself whilst all this litigation proceeds to its eventual conclusion is to invoke the rights of occupation provided by the 1996 Act.

10. The case before Singer J proceeded on the basis that the husband held contractual rights and that it was open to the court to require him, by order under section 37 of the Supreme Court Act 1981, to withdraw his notice of surrender or to negotiate with the landlord the withdrawal of his notice of surrender. The restoration or revival of the contractual tenancy would then open the court's powers to provide for terms of occupation for the wife, including the discharge of all the costs of occupation. An issue that was debated before Singer J was whether the negotiated withdrawal of the notice of surrender would revive the old tenancy or create a fresh tenancy. There was clear Court of Appeal authority to the effect that the withdrawal of the notice of surrender would lead to the creation of a new tenancy. The notice of appeal and the skeleton argument presented by Mr Turner sought to debate that point. However, in the events that have since occurred, the point is of no surviving relevance and I need not refer to it further.

11. What, alternatively, Mr Turner sought to persuade Singer J to do was to order the husband to engage in a process that would create a new tenancy and then, upon that new tenancy Mr Turner sought to found his client's future security. Before us, the picture has changed radically. The husband's contractual tenancy has terminated and, as far as the landlords are concerned, he has departed from the picture. They have been induced to grant to the wife on 26th July what Mr Turner asserts is a contractual licence. The letter from the landlord's solicitors simply says:

> *"(1) Your client may stay in the property until 31st July. She must vacate on 31st July and the keys should be passed to the landlord's agents.*
>
> *(2) Such occupation is to be rent-free, conditional upon Mrs Moore vacating on 31st July.*
>
> *(3) We are instructed that our client does require possession on 31st July because our client has alternative plans for the property."*

Mr Singleton submits that that does not amount to a contractual licence. It is the mere grant of forbearance without any consideration and should be put from this court's further consideration.

12. Before coming to any conclusion on the respective submissions, it is, I think, important to emphasise that this court has taken this case as an emergency, and at some sacrifice to other waiting cases. It is important that we should limit our role today to that minimum which is necessary in order to dispose of the appeal for which Singer J granted permission. In my opinion, it is sufficient to concentrate on the point of construction which he considered carefully and to explain briefly why this court takes a different view. In my opinion it is not necessary to make any definitive ruling on the argument that has been advanced under section 37 of the Supreme Court Act 1981.

13. With that introduction, I turn to the relevant sections of the Family Law Act which are in contention. Mr Turner for the appellant concentrates his argument on the terms of section 33, the section which is headed *"Occupation Orders*". I read into this judgment, therefore, the whole of section 33(1) through to (5):

> *"(1) If --*
>
> *(a) a person ("the person entitled")--*
>
> *(i) is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation, or*

(ii) has matrimonial home rights in relation to a dwelling-house, and

(b) the dwelling-house --

(i) is or at any time has been the home of the person entitled and of another person with whom he is associated, or

(ii) was at any time intended by the person entitled and any such other person to be their home,

the person entitled may apply to the court for an order containing any of the provisions specified in subsections (3),(4) and (5).

(2) If an agreement to marry is terminated, no application under this section may be made by virtue of section 62(3)(e) by reference to that agreement after the end of the period of three years beginning with the date on which it is terminated.

(3) An order under this section may --

(a) enforce the applicant's entitlement to remain in occupation as against the other person ("the respondent");

(b) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;

(c) regulate the occupation of the dwelling-house by either or both parties;

(d) if the respondent is entitled as mentioned in subsection (1)(a)(i) prohibit, suspend or restrict the exercise by him of his right to occupy the dwelling-house;

(e) if the respondent has matrimonial home rights in relation to the dwelling-house and the applicant is the other spouse, restrict or terminate those rights;

(f) require the respondent to leave the dwelling-house or part of the dwelling-house; or

(g) exclude the respondent from a defined area in which the dwelling-house is excluded.

(4) An order under this section may declare that the applicant is entitled as mentioned in subsection (1)(a)(i) or has matrimonial home rights.

(5) If the applicant has matrimonial home rights and the respondent is the other spouse, an order under this section made during the marriage may provide that those rights are not brought to an end by --

(a) the death of the other spouse; or

(b) the termination (otherwise than by death) of the marriage."

14. Mr Turner submits that on a plain construction, section 33(1) covers three possible scenarios relevant to the present case. He submits that despite the termination of the husband's contractual right of occupation, his client has a present right of occupation within the terms of section 33(1)(a)(i) by virtue of the licence which he contends is sufficient to constitute a contractual entitlement to occupy. Accordingly, he says that she satisfies the provisions of section 33(1)(a), and equally satisfies the provisions of section 33(1)(b) because 46 Thurloe Square is a dwelling-house that *"is or at any time has been the home of the person entitled"*. That, he says, takes him to the concluding clause of the section, namely an entitlement to an order under subsections (3),(4) and (5). Once he has established an order under those subsections, then he has passed the gate into section 40 of the statute, which enables his client to apply for a wide range of financial reliefs in relation to the costs of occupation of Thurloe Square.

15. The second scenario advanced by Mr Turner is that the husband is prospectively entitled to occupy 46 Thurloe Square under a contract, since he asserts that the construction of section 37 of the Supreme Court Act 1981 is sufficiently unconfined to enable the court to require the husband to use his best endeavours to obtain from the landlord a new lease, perhaps at an enhanced rent but one that might take almost immediate effect. Then, of course, he says that his client would have matrimonial home rights under the terms of section 33(1)(a)(ii) and that, once again, the provisions of section 33(1)(b) would be satisfied since, again, 46 Thurloe Square is a dwelling-house that "is or at any time has been, the home of the person entitled".

16. His third prospective scenario is that his client might negotiate with the landlord a new lease of 46 Thurloe Square which would put her in precisely the same position as under the first considered scenario, namely she would be the person entitled to occupy by virtue of her contractual tenancy. So, says Mr Turner, the statutory language is plain. There is no reason at all why the combination of section 33, broadly construed, and section 37 of the Supreme Court Act should not enable the judge to do justice.

17. The mention of the word "justice" requires reference to Singer J's cautious appraisal of the merits during the course of his much longer involvement in this litigation. He was at pains to point out that it was quite impossible for this court to express any view as to the merits, as to who had acted creditably or who had acted discreditably during the course of the brief but extensive litigation hostilities.

18. The contrary argument on the construction of the statute advanced by Mr Singleton QC concentrates on the earlier section, section 30. Mr Singleton's essential argument is that you do not get into the territory of section 33 save through section 30, which declares matrimonial homes rights. He emphasises that section 30(1) applies if one spouse is entitled to occupy a dwelling house by virtue of:

"(1) a beneficial estate or interest or contract . . .
(b) the other spouse who is not so entitled."

But, says Mr Singleton, any construction of that subsection is heavily influenced by subsections (7) and (8) which follow. Subsection (7) provides: *"This section does not apply to a dwelling house which has at no time been, and which was at no time, intended by the spouses to be a matrimonial home of theirs."*

Subsection 8 provides: *"A spouse's matrimonial home rights continue --*
(a) only so long as the marriage subsists; and
(b) only so long as the other spouse is entitled, as mentioned in subsection (1) to occupy the dwelling house."

So, says Mr Singleton, it is quite plain that where, as here, the husband's right to occupy 46 Thurloe Square by virtue of the contract of tenancy has terminated, then subsection (8)(b) makes it plain that the matrimonial home rights have terminated with it, and it is quite unprincipled to suggest that there should be a revival of matrimonial home rights if the husband should subsequently, at any stage or for any reason, reacquire contractual rights in relation to the same property. Mr Singleton's submissions found favour with the judge. He considered that Mr Turner's contentions sought to enlarge the area of statutory protection in a way that was incompatible with the provisions of section 30(7) and (8).

19. Having heard the point argued relatively briefly, but after the submission of most thorough and erudite skeletons on both sides, I have reached the conclusion that I differ from the position taken by Singer J. I do not read subsections (7) and (8) of section 30 as having the restriction for which Mr Singleton contends. This is, of course, an entirely exceptional case for which this statutory protection is not really designed. It has been forced into the aperture, as Mr Turner has frequently conceded, simply because more relevant remedies are temporarily in suspension or under question, due to the international stage on which this drama is being played out. But in relation to the more ordinary case for which this statutory protection is designed, it seems to me important that the limitation for which Mr Singleton contends should not be upheld. There may well be any number of circumstances in which the nature of the contract by which one of the spouses is entitled to occupation changes. So long as the basic conditions required by the statute are met - that the dwelling-house in question must be, or at some time have been the home of the person entitled and the marriage must subsist - then the applicant is entitled to protection. I would not construe the statuet to deny protection simply because there had been a shift in the nature of the qualifying contract.

20. I would also accept Mr Turner's submissions on his third scenario that on the language of section 33, it might be open to the wife to negotiate a fresh contract with the landlords and so assert section 33 rights under the combination of section 33(1)(a)(i) and section 33(1)(b)(i). The submission that the wife has a present entitlement, Mr Turner's first scenario, is much less attractive. I cannot, for my part, see that the letter from the landlord's solicitors can be elevated to the height of contractual licence and even if it could, a contractual licence of some four days duration is simply too insubstantial to found an application under section 33. The suggestion that the court might require the husband to use his best endeavours to take a fresh lease seems to me so implausible on the facts and circumstances of this case as to render it unnecessary to consider Mr Turner's submissions as to the extent of the court's jurisdiction under section 37 of the Supreme Court Act 1981. Perhaps it is enough to say that to hold for Mr Turner on this point would be to carry the authorities a long way beyond their existing limit.

21. So where does my opinion on these points leave the parties? In theory, the wife might be able to leave this court, contract with the landlords, make an application under section 33, persuade a judge that that was necessary in order to obtain some relief under section 33(3)(d (such as an order prohibiting, suspending or restricting the exercise by the husband of any rights in relation to Thurloe Square) and then to move from there into the territory of section 40. But that last stage would involve a full merit investigation as a prelude to the exercise of a broad discretion. Against her, it would surely be said that her action in negotiating a new tenancy at an enhanced rent was purely tactical and disregarded her

obligation to restrain herself to the proper provision of her realistic housing needs. The wife might also immediately seek relief under section 22 or section 27 of the Matrimonial Causes Act 1973, but she will there be met with the argument that until the husband's prior commenced French proceedings are ultimately dismissed, this jurisdiction must defer to France. That would require consideration of the judgments of this court in **Wermuth v Wermuth** [2003] 1 WLR 942. Whichever way the court went at first instance, it would not be fanciful to assume that the losing party would seek permission to appeal to this court in what is a difficult and interesting area of law.

22. Then there is the whole question of the husband's unresolved application for a stay, and paragraph 5 of Singer J's order would be triggered. Then there are the continuing wardship proceedings. Obviously, the parties have choices but it does seem to me important that this court should take advantage of its involvement and urge the parties to consider whether their interests and the interests of their child would not be better served by entering into the Court of Appeal's mediation scheme rather than to continue expensive litigation on wide fronts and in two jurisdictions.

23. This court would appoint a mediator. The mediation would be under the supervision of this court, and this court would ensure that the process of mediation was made available to the parties without delay. The court has no power to impose this on the parties but judges in the court of trial might well consider whether pending applications or applications yet to be issued should be given time in the court calendar, and particularly whether they should be given priority in the court calendar unless the parties have first availed themselves of the Court of Appeal's invitation to mediate.

24. To the extent, indicated only, I would recognise Mr Turner's success in this appeal.

LORD JUSTICE WALLER

25. I agree and will only add a short word in relation to the point on which my Lord expressed a different conclusion from that of Singer J.

26. That point relates to Singer J's conclusion that even if the husband in this case attained a new tenancy, the provisions of the 1996 Act would not be engaged. The merits of this particular case are irrelevant to what is an important point of construction, as my Lord has explained. Assume husband and wife living together in a rented house over a period of many years but the marriage coming apart just as the tenancy is running out. Assume the husband negotiating for the renewal but leaving home with a week to run on the old tenancy. Assume he then completes the negotiation of the new tenancy after he has left the home and signs a new lease. Mr Singleton's argument involves the wife having no rights to occupy the matrimonial home under the Family Law Act 1996.

27. His argument turns on the proper construction, as my Lord has said, of section 30 subsections (7) and (8). He has to argue, as I understand it, that once the husband has left home, either the marriage no longer subsists or, under subsection (8)(b), that once the rights have ceased to exist then if the husband has left home, there can be no renewal. In my view that is not the proper construction of section 30(8). The section is looking at the period of the marriage subsisting. It is recognised that while the husband and wife lived together, an ending of a lease and renewal of a lease would restore the matrimonial home rights. Where the renewal takes place after separation, the same consequences follow. This does not, in my view, cut across subsection (7) provided that it is the same matrimonial home in relation to which the rights previously existed.

28. That is all I wish to say because I agree entirely with the rest of what my Lord has said on all other matters.

LADY JUSTICE ARDEN:

29. I agree with both judgments.

Order: Appeal Dismissed. 50 per cent of costs awarded in favour of the Respondent.

MR J TURNER QC AND MS R BAILEY HARRIS (instructed by Hughes Fowler Carruthers) appeared on behalf of the Appellant

MR B SINGLETON QC AND MR P J MARSHALL (instructed by Payne Hicks Beach) appeared on behalf of the Respondent