A House of Lords

Fitzpatrick *v* Sterling Housing Association Ltd

1999 April 13, 14; Oct 28

Lord Slynn of Hadley, Lord Nicholls of Birkenhead, Lord Clyde, Lord Hutton and Lord Hobhouse of Woodborough

B *Landlord and tenant — Rent restriction — Death of tenant — Man living with tenant in homosexual relationship — Whether living as "his . . . wife or husband" — Whether "member of the original tenant's family" — Rent Act 1977 (c 42) (as amended by Housing Act 1988 (c 50), s 39(2), Sch 4, Pt I, paras 2, 3), Sch 1, paras 2(2), 3(1)*

The plaintiff had lived with the protected tenant of a flat of which the defendant C was the landlord, in a stable and permanent homosexual relationship since 1976. On the tenant's death in 1994 the plaintiff applied to take over the tenancy but the defendant, although willing to provide smaller accommodation, refused. The plaintiff's application to the county court for a determination that he was entitled to succeed to the tenancy was dismissed on the grounds that the plaintiff had neither lived with the original tenant "as his . . . wife or husband" within paragraph 2(2) of D Schedule 1 to the Rent Act 1977[1] nor was "a member of the original tenant's family" within paragraph 3(1). The Court of Appeal, by a majority, upheld the judge's decision.

On appeal by the plaintiff—

Held, (1) that Parliament, in inserting paragraph 2(2) of Schedule 1 to the Rent Act 1977 so as to extend, for the purpose of succession to statutory tenancies under the Act, the meaning of "spouse" to include persons not legally married but who had E been living with the original tenant "as his or her wife or husband", had used gender-specific words connoting a relationship between a man and a woman; and that, accordingly, paragraph 2(2) did not apply to a same-sex relationship (post, pp 34B–D, 43E–G, 47D–F, 57D–E, F–G, 69C–D).

Harrogate Borough Council v Simpson (1984) 17 HLR 205, CA approved.

(2) Allowing the appeal (Lord Hutton and Lord Hobhouse of Woodborough dissenting) that in conferring rights of succession on persons other than a spouse, F Parliament had sought to protect from eviction those who had shared their lives with the original tenant in a single family unit; that since the word family had been left undefined it fell to the courts to determine which relationships fell within its ambit for that purpose; that, by regard having been had to changes in social habits and opinions, associations other than those based on consanguinity or affinity had come to be recognised as capable of constituting a family and, on an application of the G same rationale, a same-sex partner of a tenant was now to be recognised as capable of being a member of the tenant's family for the purposes of paragraph 3(1) of Schedule 1 to the 1977 Act; and that, accordingly, on the judge's findings of fact, the plaintiff qualified under paragraph 3(1) as a person entitled to succeed to the tenancy (post, pp 35B–D, 38A–D, 39B, 41A–B, E–F, 43G–44B, 45G–46A, G–H, 49C, 50A–C, 51H–52B, D–F, 54G–55A).

Dyson Holdings Ltd v Fox [1976] QB 503, CA and *Joram Developments Ltd v* H *Sharratt* [1979] 1 WLR 928, HL(E) considered.

Decision of the Court of Appeal [1998] Ch 304; [1998] 2 WLR 225; [1997] 4 All ER 991 reversed.

[1] Rent Act 1977, Sch 1, para 2(2): see post, p 32B–C.
Para 3(1): see post, p 32C–D.

The following cases are referred to in their Lordships' opinions:

Barclays Bank Plc v O'Brien [1994] 1 AC 180; [1993] 3 WLR 786; [1993] 4 All ER 417, HL(E)
Braschi v Stahl Associates Co (1989) 544 NYS2d 784
Brock v Wollams [1949] 2 KB 388; [1949] 1 All ER 715, CA
Campbell College, Belfast (Governors of) v Northern Ireland Valuation Commissioner [1964] 1 WLR 912; [1964] 2 All ER 705, HL(NI)
Canada (Attorney-General) v Mossop (1993) 100 DLR (4th) 658
Chios Property Investment Co Ltd v Lopez (1987) 20 HLR 120, CA
Cossey v United Kingdom (1990) 13 EHRR 622
Crake v Supplementary Benefits Commission [1982] 1 All ER 498
Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653; [1975] 2 WLR 641; [1975] 1 All ER 913, HL(NI)
Dyson Holdings Ltd v Fox [1976] QB 503; [1975] 3 WLR 744; [1975] 3 All ER 1030, CA
Egan v Canada (1995) 124 DLR (4th) 609
El-Al, The Israeli Airlines Ltd v Danilowitz (unreported) 4 May 1994, Supreme Court of Israel
Gammans v Ekins [1950] 2 KB 328; [1950] 2 All ER 140, CA
Grant v South-West Trains Ltd (Case C-249/96) [1998] ICR 449, ECJ
Harrogate Borough Council v Simpson (1984) 17 HLR 205, CA
Hawes v Evenden [1953] 1 WLR 1169; [1953] 2 All ER 737, CA
Helby v Rafferty [1979] 1 WLR 13; [1978] 3 All ER 1016, CA
Jones v Whitehill [1950] 2 KB 204; [1950] 1 All ER 71, CA
Joram Developments Ltd v Sharratt [1979] 1 WLR 3; [1978] 2 All ER 948, CA; [1979] 1 WLR 928; [1979] 2 All ER 1084, HL(E)
Kerkhoven and Hinke v The Netherlands (application no 15666/89) 19 May 1992 (unpublished), European Commission of Human Rights
Langdon v Horton [1951] 1 KB 666; [1951] 1 All ER 60, CA
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
Price v Gould (1930) 46 TLR 411
R v Howe [1987] AC 417; [1987] 2 WLR 568; [1987] 1 All ER 771, HL(E)
R v Ireland [1998] AC 147; [1997] 3 WLR 534; [1997] 4 All ER 225, HL(E)
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] 1 All ER 257, CA
Rees v United Kingdom (1986) 9 EHRR 56
Ross v Collins [1964] 1 WLR 425; [1964] 1 All ER 861, CA
Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800; [1981] 2 WLR 279; [1981] 1 All ER 545, CA and HL(E)
S v United Kingdom (1986) 47 D & R 274
Salgueiro da Silva Mouta v Portugal (application no 33290/96) 1 December 1998 (unpublished), European Commission of Human Rights
Salter v Lask [1925] 1 KB 584, DC
Sefton Holdings Ltd v Cairns (1987) 20 HLR 124, CA
Sheffield and Horsham v United Kingdom (1998) 27 EHRR 163
Standingford v Probert [1950] 1 KB 377; [1949] 2 All ER 861, CA
Stewart v Mackay, 1947 SC 287
T, Petitioner, 1997 SLT 724
W (A Minor) (Adoption: Homosexual Adopter), In re [1998] Fam 58; [1997] 3 WLR 768; [1997] 3 All ER 620
Wakim, In re; Ex p McNally (1999) 73 ALJR 839
Watson, John decd, In re the Estate of The Times, 31 December 1998
Watson v Lucas [1980] 1 WLR 1493; [1980] 3 All ER 647, CA
X, Y and Z v United Kingdom (1997) 24 EHRR 143

A The following additional cases were cited in argument:

G v F (Contact and Shared Residence: Applications for Leave) [1998] 2 FLR 799
Leng, Jee Wah, In re (unreported) 2 December 1993, Australian Immigration Review Tribunal
Longford, The (1889) 14 PD 34, CA
National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (unreported) 12 February 1999, High Court of South Africa
B *Quilter v Attorney-General of New Zealand* (1997) 3 BHRC 461
Rent Stabilization Association of New York City Inc v Higgins (1993) 608 NYS 2d 930
Rosenberg v Attorney-General of Canada (unreported) 23 April 1998, Court of Appeal of Ontario
Simpson v Teignmouth and Shaldon Bridge Co [1903] 1 KB 405, CA
Sutherland v United Kingdom (1997) 24 EHRR CD 22
C *Vriend v Alberta* (1998) 4 BHRC 140

APPEAL from the Court of Appeal

This was an appeal, by leave of the House of Lords (Lord Browne-Wilkinson, Lord Nicholls of Birkenhead and Lord Hutton), by the plaintiff, Martin Fitzpatrick, against the order of the Court of Appeal (Waite and Roch LJJ, Ward LJ dissenting) dismissing his appeal from the judgment of D Judge Colin Smith QC given on 19 April 1996 in the West London County Court whereby the judge had dismissed the plaintiff's originating application for a declaration against the defendant, Sterling Housing Association Ltd, that he had succeeded to the tenancy of 75A, Ravenscroft Road, London, W6, which was a dwelling house to which the provisions of the Rent Act 1977 applied.

E The facts are stated in the opinions of Lord Slynn of Hadley and Lord Hobhouse of Woodborough.

Nicholas Blake QC and *Jan Luba* for the plaintiff. Parliament intended the term "living with the original tenant as his or her wife or husband" in paragraph 2(2) of Schedule 1 to the Rent Act 1977 to be interpreted by the courts on an incremental basis so as to include any relationship akin to F marriage and not just that between partners of the opposite sex. Even were the terminology to be read as excluding relationships akin to marriage of people of the same sex, the fact that it is akin to marriage can still qualify the relationship as being familial in character so that the partner can be said to be a member of the original tenant's family within paragraph 3(1) of the Schedule. The features of a relationship akin to marriage include (1) a mutual G intention to form an indefinite or permanent intimate and exclusive relationship; (2) a commitment to the emotional, social and economic support of each other; (3) residence in a common household, usually with some pooling of resources and sharing of liabilities; and (4) the capacity for sexual intimacy even if the parties choose to abstain from such activity. [Reference was made to *Stewart v Mackay* 1947 SC 287 and *Standingford v Probert* [1950] 1 KB 377.]

H Where the ordinary meaning of a word in common usage can change with the passage of time and changing social attitudes, the judge will apply the use and scope of the ordinary word at the time of judgment: *Dyson Holdings Ltd v Fox* [1976] QB 503. The term "family" falls to be interpreted liberally, in accordance with the social purposes of the legislation, to provide security

of tenure to a class of persons resident with the original tenant in intimate relations of mutual dependency: see *Reg v Ireland* [1998] AC 147, 158–159; *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822; *Bennion, Statutory Interpretation*, 3rd ed (1997), p 686; *Halsbury's Laws* (4th ed reissue) vol 44(1) (1995), para 1473; *Brock v Wollams* [1949] 2 KB 388; *Jones v Whitehill* [1950] 2 KB 204; *Hawes v Evenden* [1953] 1 WLR 1169; *Ross v Collins* [1964] 1 WLR 425; *Watson v Lucas* [1980] 1 WLR 1493; *Chios Property Investment Co Ltd v Lopez* (1987) 20 HLR 120; *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 and *In re the Estate of John Watson, decd* The Times, 31 December 1998.

The re-evaluation by society of its attitudes to same-sex partners has been acknowledged by the English courts and in other jurisdictions: see *R v Ministry of Defence, Ex p Smith* [1996] QB 517; *Barclays Bank Plc v O'Brien* [1994] 1 AC 180; *T, Petitioner* 1997 SLT 724; *G v F (Contact and Shared Residence: Applications for Leave)* [1998] 2 FLR 799; *In re W (A Minor) (Adoption: Homosexual Adopter)* [1998] Fam 58; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143; *Sutherland v United Kingdom* (1997) 24 EHRR CD 22; *Braschi v Stahl Associates Co* (1989) 544 NYS 2d 784; *Rent Stabilization Association of New York City Inc v Higgins* (1993) 608 NYS 2d 930; *Egan v Canada* (1995) 124 DLR (4th) 609; *Vriend v Alberta* (1998) 4 BHRC 140; *Rosenberg v Attorney-General of Canada* (unreported) 23 April 1998; *El-Al, The Israeli Airlines Ltd v Danilowitz* (unreported) 30 November 1994; *Quilter v Attorney General of New Zealand* (1997) 3 BHRC 461; *In re Leng Jee Wah* (unreported) 2 December 1993, Australian Immigration Review Tribunal and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (unreported) 12 February 1999. It follows that in applying a broad and purposive approach to the statutory terms under consideration regard must be had to the considerable number of people who live in a non-traditional family in a same-sex relationship.

Vivian Chapman for the defendant. The plaintiff could not have been living with the deceased tenant within the meaning of paragraph 2(2) of Schedule 1 to the 1977 Act since "husband" and "wife" are gender-specific words: see *Harrogate Borough Council v Simpson* (1984) 17 HLR 205; sections 3 and 4 of the 1976 Rent (Agriculture) Act; sections 35 and 49 of the Agricultural Holdings Act 1986; sections 87–89 and 113 of the Housing Act 1985 and section 17 of the Housing Act 1988. Legislation in areas other than tenancy succession similarly makes clear that only a man and a woman can live together as husband and wife.

Paragraph 3(1) of the Schedule requires that in order to qualify as a member of the deceased tenant's family the claimant, if not connected by birth, marriage or adoption, must at least be a de facto family member. Nobody can be regarded as a de facto member of a family unless he or she conforms to the core concept of the family, i e, appears and acts as someone related to the deceased tenant by blood, marriage or adoption. As homosexual partners cannot marry they cannot conform to the core concept. To dispense with the requirement for a familial nexus of kinship, adoption or marriage would make it hard to exclude any house-sharing relationship, whether sexual or platonic. [Reference was made to *Brock v Wollams* [1949] 2 KB 388; *Gammans v Ekins* [1950] 2 KB 328; *Ross v Collins* [1964] 1 WLR 425; the *Dyson Holdings* case [1976] QB 503; *Helby*

v Rafferty [1979] 1 WLR 13; *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928; *Watson v Lucas* [1980] 1 WLR 1493 and *Sefton Holdings Ltd v Cairns* (1987) 20 HLR 124.]

In *Grant v South West Trains Ltd* (Case C-249/96) [1998] ICR 449 it was held that Community law does not regard stable homosexual relationships as equivalent to marriages or to stable relationships outside marriage between persons of the opposite sex. For the purposes of article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) it has been recognised that marriage may legitimately be restricted under national laws to union between a biological man and a biological woman: *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 181. Further, under the Canadian Human Rights Act 1985, "family status" does not include a homosexual relationship: *Atorney General of Canada v Mossop* (1993) 100 DLR (4th) 658.

The object in construing a statute is to ascertain the intention of Parliament as expressed in the Act. The words must be taken to be used in the sense they bore at the time the legislation was passed: *The Longford* (1889) 14 PD 34 and *Simpson v Teignmouth and Shaldon Bridge Co* [1903] 1 KB 405. The "updating" principle of statutory construction (see *Bennion, Statutory Interpretation*, 3rd ed, p 686 and *Halsbury's Laws* (4th ed reissue), vol 44(1), para 1473) applies to novel factual situations falling within the scope of the original parliamentary intention. It does not permit the words of a statute to be construed in a way not intended by Parliament. Since the existence of stable homosexual relationships was well known when the first tenancy succession provision was enacted in section 12(1)(g) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, it is clear that Parliament had not intended to afford homosexual partners any rights of succession to Rent Act tenancies.

Blake QC replied.

Their Lordships took time for consideration.

28 October. **LORD SLYNN OF HADLEY** My Lords, throughout this century Parliament has provided statutory protection for residential tenants and for certain persons with what can be called derived rights from those tenants. The categories of those persons have varied from time to time. Thus those persons were initially successors in title: sections 1(3) and 2(1)(d) of the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. By sections 5(1) and 12(1)(f)(g) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 protection was extended to (a) the widow of a tenant dying intestate who was residing with him at the date of his death and (b) where a tenant dying intestate left no widow or was a woman, such member of the tenant's family residing with the tenant at death as might be decided in default of agreement by a county court. From 1933 it had to be shown that the latter category (b) but not the former had filled a six months' residential qualifying period: section 13 of the Rent and Mortgage Interest Restrictions (Amendment) Act 1933.

By section 13 of the Rent Act 1965 rights of succession were also given to the widow and members of the family of the first person benefitting from the protection.

The Rent Act 1977 consolidated the existing law but section 76 of the Housing Act 1980 extended the rights to take over the tenancy to a surviving

spouse of either sex and not just to the widow. The 1977 Act was amended by the Housing Act 1988. The result was that at the relevant time for the present case by Schedule 1 to the 1977 Act, as amended, an "original tenant" was defined as the person: "who, immediately before his death, was a protected tenant of the dwelling-house or the statutory tenant of it by virtue of his previous protected tenancy" (paragraph 1). Then it is provided in paragraphs 2 and 3 that:

> "2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence. (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. (3) If, immediately after the death of the original tenant, there is, by virtue of sub-paragraph (2) above, more than one person who fulfils the conditions in sub-paragraph (1) above, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be treated as the surviving spouse for the purposes of this paragraph.
>
> "3(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of two years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession."

It is unnecessary for present purposes to set out the remainder of the Schedule. It is however to be noted that since the 1988 Act it is only the spouse (actual or deemed) who gets a statutory tenancy. Other family members get an assured tenancy which does not pass on to that person's successor whereas in the case of the spouse there may be a further succession.

There are differences between this legislation and the Housing Acts dealing with public sector housing but it does not seem to me necessary to set out those provisions here.

Mr John Thompson was the "original tenant" of a flat known as 75A, Ravenscourt Road, London, W6 from 1972 until his death in his 60's on 9 November 1994. That flat is part of a two-flat building of which the respondent landlord is the registered freehold owner. Mr Martin Fitzpatrick, the appellant plaintiff in these proceedings, lived with Mr Thompson in the flat from 1976 until the latter's death and has continued to live there since. It is agreed between the parties that the plaintiff and the deceased had been partners in a longstanding, close, loving and faithful, monogamous, homosexual relationship.

The plaintiff sought a declaration that he had succeeded to the tenancy under the Rent Act 1977, as amended. He claimed that he was "a spouse" of the deceased in that he had been living with Mr Thompson "as his or her wife or husband" or alternatively that he was a member of Mr Thompson's family.

Judge Colin Smith QC in a sensitive and sympathetic judgment found the relationship to have been of the description agreed by the parties to which I have referred. He related an accident in 1986 when Mr Thompson fell

A down the stairs and sustained a blood clot to the brain which led to his being in a coma for some months. When he came round he never spoke again. As the judge said:

> "Eventually, after various unfortunate incidents at the hospital, the plaintiff took Mr Thompson home in April 1986 to care for him full time himself. The plaintiff took over the total care 24 hours a day for
B Mr Thompson, feeding him and nursing him until his death in 1994. The plaintiff gave up his job and received benefit because he was unable to work, due to his full time care of Mr Thompson. Despite the loving and dedicated care of the plaintiff, Mr Thompson died in November 1994."

The judge held, however, that the plaintiff could not succeed to the tenancy under either of the ways he put his claim. Waite and Roche LJJ
C [1998] Ch 304 agreed with him in the result though expressing considerable sympathy and understanding of the position in which same-sex partners living together found themselves under the legislation as they, and in the case of Roche LJ with hesitation in respect of the second way of putting the claim, held it to be. They both considered that there were matters which Parliament ought to consider. Ward LJ in a trenchant and detailed judgment
D concluded that the plaintiff succeeded as a spouse of, but, if not, then as a member of the family of, the original tenant.

On this appeal to your Lordships' House the plaintiff put forward both grounds but he relies in the first place on paragraph 2 of the Schedule to the 1977 Act, as amended. "Spouse" he says, is to be interpreted in the present climate as including two persons of the same sex intimately linked in a relationship which is not merely transient and which has all the indicia of a
E marriage save that the parties cannot have children. In the second place he says that the intimacy of the relationship of two persons living together as he and Mr Thompson were is such that they should be regarded as constituting a family.

It has been suggested that for your Lordships to decide this appeal in favour of the plaintiff would be to usurp the function of Parliament. It is trite
F that that is something the courts must not do. When considering social issues in particular judges must not substitute their own views to fill gaps. They must consider whether the new facts "fall within the Parliamentary intention": *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822 per Lord Wilberforce. Thus in the present context if, for example, it was explicit or clear that Parliament intended the word "family" to have a narrow meaning for all
G time, it would be a court's duty to give effect to it whatever changes in social attitudes a court might think ought to be reflected in the legislation. Similarly if it were explicit or clear that the word must be given a very wide meaning so as to cover relationships for which a court, conscious of the traditional views of society might disapprove, the court's duty would be to give effect to it. It is, however, for the court in the first place to interpret each
H phrase in its statutory context. To do so is not to usurp Parliament's function; not to do so would be to abdicate the judicial function. If Parliament takes the view that the result is not what is wanted it will change the legislation.

The question is, therefore, was the plaintiff the spouse of or a member of the family of Mr Thompson within the meaning of this Act? I stress "within

the meaning of this Act" since it is all that your Lordships are concerned with. In other statutes, in other contexts, the words may have a wider or a narrower meaning than here. I refer to the judgment of McHugh J in *In re Wakim* (1999) 173 ALJR 839, 850 in the High Court of Australia which recognises that changes in attitudes and perceptions may require a wider meaning to be given to a word such as "marriage", at any rate in some contexts.

The first question then is whether the plaintiff was the "spouse" of Mr Thompson within the meaning of paragraph 2 of Schedule 1 to the 1977 Act, as amended. I recognise that if the non-gender specific noun "spouse" stood alone the matter might be more debatable as Mr Blake contends, though the ordinary meaning is plainly "husband" or "wife". In the context of this Act, however, "spouse" means in my view legally a husband or wife. The 1988 amendment extended the meaning to include as a "spouse" a person living with the original tenant "as his or her wife or husband". This was obviously intended to include persons not legally husband and wife who lived as such without being married. That prima facie means a man and a woman, and the man must show that the woman was living with him as "his" wife; the woman that he was living with her as "her" husband. I do not think that Parliament as recently as 1988 intended that these words should be read as meaning "my same sex partner" rather than specifically "my husband" or "my wife". If that had been the intention it would have been spelled out. The words cannot in my view be read as the plaintiff contends. I thus agree as to the result with the decision in *Harrogate Borough Council v Simpson* (1984) 17 HLR 205. The plaintiff accordingly fails in the first way he puts his appeal. Whether that result is discriminatory against same-sex couples in the light of the fact that non-married different sex couples living together are to be treated as spouses so as to allow one to succeed to the tenancy of the other may have to be considered when the Human Rights Act 1998 is in force. Whether the result is socially desirable in 1999 is a matter for Parliament.

Is it fatal to a claim to be a member of the family of the original tenant that the plaintiff cannot show that he was living with Mr Thompson as his husband or wife, the nearest family relationship he asserts? In my view it is not. If a person does not succeed on the first he may still succeed on the second category. Here the partner fails because the first category requires partners of different sexes. That he cannot satisfy. If he satisfies the definition of family he may still qualify.

I turn then to the second question which I, at any rate, have found a difficult one—difficult largely because of preconceptions of a family as being a married couple and, if they have children, their children; difficult also because of the result in some of the earlier cases when applying the law to the facts. It is, however, obvious that the word "family" is used in a number of different senses, some wider, some narrower. "Do you have any family?" usually means "Do you have children?" "We're having a family gathering" may include often distant relatives and even very close friends. "The family of nations", "the Christian family" are very wide. This is no new phenomenon. Roman law, as I understand it, included in the familia all members of the social unit though other rights might be limited to spouses or heirs.

A It is not an answer to the problem to assume (as I accept may be correct) that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been "No". That is not the right question. The first question is what were the characteristics of a family in the 1920 Act and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word "family". An B alternative question is whether the word "family" in the 1920 Act has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920: see *R v Ireland* [1998] AC 147, 158, per Lord Steyn; *Bennion, Statutory Interpretation*, 3rd ed (1997), p 686 and *Halsbury's Laws of England*, 4th ed reissue, vol 44(1) (1995), p 904, para 1473.

If "family" could only mean a legal relationship (of blood or by legal C ceremony of marriage or by legal adoption) then the plaintiff must obviously fail. Over the years, however, the courts have held that this is not so.

In the first place it has been said that the ordinary meaning of the word is to be taken; "family" where it is used in the Rent Acts is not a term of art: *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928, 931 per Lord Diplock, though the meaning for Viscount Dilhorne, at p 932, is a question D of law and "family" is not the same as "household".

In the second place it has been accepted that de facto relationships can be recognised as constituting a family. Thus in *Brock v Wollams* [1949] 2 KB 388, a child adopted in fact who lived with the tenant for many years, but who was not adopted under the Adoption of Children Act 1926, was held to be a member of his family living with him at his death within the meaning of the Act 1920. Bucknill LJ, at p 393, cited with apparent approval the E judgment of Wright J in *Price v Gould* (1930) 46 TLR 411 where he said in relation to wills and settlements that the legislature had used the word "family" "to introduce a flexible and wide term" so that brothers and sisters of the tenant were family for the purposes of the Act. Bucknill LJ had no doubt that both de facto adopted and illegitimate children were included as family. Denning LJ added, at p 396:

F > "It seems to me that 'members of the tenant's family' within section 12(1)(g) of the 1920 Act, include not only legitimate children but also step-children, illegitimate children and adopted children, whether adopted in due form of law or not."

In *Ross v Collins* [1964] 1 WLR 425 the defendant had acted as the original tenant's housekeeper in return for which he remitted her rent. They G had never addressed each other by their Christian names and there was no question of an intimate personal relationship. Russell LJ, with whose speech Lord Diplock in the *Joram* case [1979] 1 WLR 928, 931 agreed, said, at p 432:

> "Granted that 'family' is not limited to cases of a strict legal familial nexus, I cannot agree that it extends to a case such as this. It still requires, it seems to me, at least a broadly recognisable de facto familial nexus. H This may be capable of being found and recognised as such by the ordinary man—where the link would be strictly familial had there been a marriage, or where the link is through adoption of a minor, de jure or de facto, or where the link is 'step-', or where the link is 'in-law' or by marriage. But two strangers cannot, it seems to me, ever establish

artificially for the purposes of this section a familial nexus by acting as brothers or as sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such and even if they refer to each other as such and regard their association as tantamount to such. Nor, in my view, would they indeed be recognised as familial links by the ordinary man."

In the application of this "ordinary meaning", "de facto" approach there are not surprisingly decisions on both sides of the line. In *Helby v Rafferty* [1979] 1 WLR 13, the court refused to hold that a man who had lived with a woman tenant for five years before her death, but they had deliberately opted to retain their formal independence and they had not been recognised as being married, were part of the same family. In *Watson v Lucas* [1980] 1 WLR 1493, on the other hand, the Court of Appeal by a majority held that a woman who had lived with a man, although he remained married to his wife, was a member of his family for the purpose of Schedule 1 to the 1977 Act because of the lasting relationship between them. In *Hawes v Evenden* [1953] 1 WLR 1169, the claimant was an unmarried woman who had lived with the deceased tenant for 12 years and had had two children with him. The court held that there was evidence that the claimant and the tenant and the children had lived together as a family and she was therefore a member of his family for the purposes of the 1920 Act. In *Chios Property Investment Co Ltd v Lopez* (1987) 20 HLR 120 the court stressed the importance of a "sufficient state of permanence and stability" having been reached in the relationship so as to constitute family. In *Jones v Whitehill* [1950] 2 KB 204, a woman who out of love and kindness went to live with her aunt and uncle, was held on the uncle's death to be a member of his family.

The high water mark one way is *Gammans v Ekins* [1950] 2 KB 328. There the claimant had lived with a woman tenant and they were regarded in the neighbourhood as man and wife. It was held that he could not be a member of her family for the 1920 Act. Asquith LJ, at p 331, said that if their relationship was sexual "it seems to me anomalous that a person can acquire a 'status of irremovability' by living or having lived in sin, even if the liaison has not been a mere casual encounter but protracted in time and conclusive in character". Lord Evershed MR saw considerable force in the claimant's argument but finally agreed in the result. He added, at p 334:

> "It may not be a bad thing that by this decision it is shown that, in the Christian society in which we live, one, at any rate, of the privileges which may be derived from marriage is not equally enjoyed by those living together as man and wife but who are not married."

The high water mark the other way is *Dyson Holdings Ltd v Fox* [1976] QB 503. This decision has however been confined to its own facts or doubted by Roskill LJ in *Helby v Rafferty* [1979] 1 WLR 13, 23–24 and by Oliver LJ in *Watson v Lucas* [1980] 1 WLR 1493, 1503–1504. In the *Dyson* case the defendant had lived with the tenant for 21 years until his death. They were unmarried and had no children. Reversing the county court judge, the Court of Appeal ruled that she was a member of his family

A Lord Denning MR [1976] QB 503, 509 held that *Gammans v Ekins* [1950] 2 KB 328 was wrongly decided and that it was absurd to distinguish between two couples on the basis that one had children and the other did not. James LJ said, at p 511:

> "The popular meaning given to the word 'family' is not fixed once and for all time. I have no doubt that with the passage of years it has changed.
> B The cases reveal that it is not restricted to blood relationships and those created by the marriage ceremony. It can include de facto as well as de jure relationships. The popular meaning of 'family' in 1975 would, according to the answer of the ordinary man, include the defendant as a member of Mr Wright's family. This is not to say that every mistress should be so regarded. Relationships of a casual or intermittent character
> C and those bearing indications of impermanence would not come within the popular concept of a family unit."

He accepted that *Gammans v Ekins* was authority for the meaning of "family" in 1949 but not in 1975. Bridge LJ said, at pp 512–513:

> "Now, it is, I think, not putting it too high to say that between 1950 and 1975 there has been a complete revolution in society's attitude to
> D unmarried partnerships of the kind under consideration. Such unions are far commoner than they used to be. The social stigma that once attached to them has almost, if not entirely, disappeared. The inaccurate but expressive phrases 'common law wife' and 'common law husband' have come into general use to describe them. The ordinary man in 1975 would, in my opinion, certainly say that the parties to such a union,
> E provided it had the appropriate degree of apparent permanence and stability, were members of a single family whether they had children or not."

The facts of *Gammans v Ekins* would now be covered by the 1988 amendment "living as his or her husband or wife", but in any event it seems to me that the claimant there was a member of the tenant's family both in
F 1949 and in 1975.

The question has been raised as to whether your Lordships are bound by the decision of the House in *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928 to reach the conclusion that this plaintiff must fail. In my view your Lordships are not so bound. In that case it was held that two people, one 75 and one 24, could not establish a familial relationship by acting together as aunt and nephew. It was a decision on the facts. Lord Diplock
G stressed at the beginning of his speech, at p 930:

> "The facts of the instant case, if they are not unique, are certainly most unusual, and for that reason they do not, in my opinion, provide a suitable occasion for this House to undertake a general consideration of what persons may be included in the expression 'a member of the original tenant's family' where at the time of the tenant's death there did exist
> H between him and the claimant to a statutory tenancy by succession a relationship of one or other of the various kinds to which I have referred above. In particular, the difficult question posed by *Dyson Holdings Ltd v Fox* [1976] QB 503 as to the extent, if any, to which changed social attitudes towards cohabitation between unmarried couples and the

offspring of such liaisons may have enlarged the meaning of the expression 'family' in the Rent Act 1968 does not arise in the instant case and is best left for consideration in the light of the actual facts of a case in which it does arise." A

The issue is in my view open for your Lordships to decide.

Given, on the basis of these earlier decisions that the word is to be applied flexibly, and does not cover only legally binding relationships, it is necessary B to ask what are its characteristics in this legislation and to answer that question to ask further what was Parliament's purpose. It seems to me that the intention in 1920 was that not just the legal wife but also the other members of the family unit occupying the property on the death of the tenant with him should qualify for the succession. The former did not need to prove a qualifying period; as a member of the tenant's family a two-year C residence had to be shown. If more than one person qualified then if no agreement could be reached between them the court decided who should succeed.

The hall marks of the relationship were essentially that there should be a degree of mutual interdependence, of the sharing of lives, of caring and love, of commitment and support. In respect of legal relationships these are presumed, though evidently are not always present as the family law and D criminal courts know only too well. In de facto relationships these are capable, if proved, of creating membership of the tenant's family. If, as I consider, this was the purpose of the legislation, the question is then who in 1994 or today (I draw no distinction between them) are capable in law of being members of the tenant's family. It is not who would have been so considered in 1920. In considering this question it is necessary to have E regard to changes in attitude. The point cannot have been better put than it was by Sir Thomas Bingham MR in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 552–554 when, although dealing with the validity of an administrative decision rather than the meaning of a few words in a statute, he said, after referring to changes of attitude in society towards same-sex relationships:

"I regard the progressive development and refinement of public and professional opinion at home and abroad, here very briefly described, as an important feature of this case. A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z Public and professional opinion are a continuum." F

If "meaning" is substituted for "opinion" the words are no less appropriate. G In *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 198 Lord Browne-Wilkinson (with whom other members of the House agreed) said that in relation to the equity arising from undue influence in a loan transaction:

"But in my judgment the same principles are applicable to all other cases where there is an emotional relationship between cohabitees. The 'tenderness' shown by the law to married women is not based on the H marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this."

A In particular if the 1988 amendment had not been made ("as his or her wife or husband") I would have had no hesitation in holding today when, it appears, one-third of younger people live together unmarried, that where there is a stable, loving and caring relationship which is not intended to be merely temporary and where the couple live together broadly as they would if they were married, that each can be a member of the other's family for the purpose of the 1977 Act.

B If, as I think, in the light of all the authorities this is the proper interpretation of the Act of 1920 I hold that as a matter of law a same-sex partner of a deceased tenant can establish the necessary familial link. They are capable of being in Russell LJ's words in *Ross v Collins* [1964] 1 WLR 425, 432: "A broadly recognisable de facto familial nexus." It is then a question of fact as to whether he or she does establish the necessary link.

C It is accordingly not necessary to consider the alternative question as to whether by 1999 the meaning of the word in the 1920 Act needs to be updated. I prefer to say that it is not the meaning which has changed but that those who are capable of falling within the words have changed.

We have been referred to a number of authorities in other jurisdictions. I wish to mention only two. Your Lordships' attention has been drawn to *Braschi v Stahl Associates Co* (1989) 544 NYS2d 784. There the issue was

D as to the meaning of the New York City Rent and Eviction Rulations which provided that a landlord might not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased's tenant's family who has been living with the tenant". The majority of the New York Court of Appeals held, at pp 788–789:

> E "The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterised by an emotional and financial commitment and interdependence."

F In law therefore a same-sex partner of the deceased tenant was, it was held, able to qualify if he could produce the necessary evidence.

The second case to which I refer is *El-Al, The Israeli Airlines Ltd v Danilowitz* (unreported) 4 May 1994; National Journal of Sexual Orientation Law, vol 1, pp 307–308. That was a case involving the provision of airline tickets for a married spouse and an unmarried cohabitant of a different sex. It was not provided to same-sex partners.

G Vice-Chief Justice Barak, sitting in the Supreme Court of Israel, said:

> "The benefit is thus provided to a lasting 'living-together' partnership which displays a strongly tied up social relationship. It is therefore obvious, in my view, that to take this benefit away from homosexual spouses constitutes a discriminatory violation of the equality principle. The differentiating reason standing behind this decision has to do with
>
> H sexual orientation. But this latter fact was both immaterial and unfair . . . Does a homosexual cohabitation differ from a heterosexual one, as far as partnership, unity and a social-cell relationship are concerned?"

I refer to these judgments in order to show the attitudes being adopted in other jurisdictions and there are other examples. On the other hand, the

European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) refers to family and family life in articles 8 and 12 and the Court of Human Rights has not so far accepted claims by same-sex partners to family rights. Leaving aside the fact that these cases are still in an early stage of development of the law and that attitudes may change as to what is acceptable throughout Europe, I do not consider that these decisions impinge on the decision which your Lordships have to take on a specific statutory provision.

In this regard I refer to *Attorney-General of Canada v Mossop* (1993) 100 DLR (4th) 658 where the High Court of Canada held by a majority of four to three that the term "family status" in the Canadian Human Rights Act does not include a homosexual relationship between two individuals. Lamer CJC (of the majority), however, concluded, at p 674:

> "Nor should this decision be interpreted as meaning that homosexual couples cannot constitute a 'family' for the purposes of legislation other than the CHRA In this regard, each statute must be interpreted in its own context."

Sopinka and Iacobucci JJ agreed with Lamer CJC.

It seems to be suggested that the result which I have so far indicated would be cataclysmic. In relation to this Act it is plainly not so. The onus on one person claiming that he or she was a member of the same-sex original tenant's family will involve that person establishing rather than merely asserting the necessary indicia of the relationship. A transient superficial relationship will not do even if it is intimate. Mere cohabitation by friends as a matter of convenience will not do. There is, in any event, a minimum residence qualification; the succession is limited to that of the original tenant. Far from being cataclysmic it is, as both the judge in the county court and the Court of Appeal appear to recognise, and as I consider, in accordance with contemporary notions of social justice. In other statutes, in other contexts, the same meaning may or not be the right one. If a narrower meaning is required, so be it. It seems also to be suggested that such a result in this statute undermines the traditional (whether religious or social) concept of marriage and the family. It does nothing of the sort. It merely recognises that, for the purposes of this Act, two people of the same sex can be regarded as having established membership of a family, one of the most significant of human relationships which both gives benefits and imposes obligations.

It is plain on the findings of the judge in the county court that in this case, on the view of the law which I have accepted, on the facts the plaintiff succeeds as a member of Mr Thompson's family living with him at his death.

On that ground I would allow the appeal.

LORD NICHOLLS OF BIRKENHEAD My Lords, this appeal raises an important point on the interpretation of a provision in the Rent Acts. For many years certain residential tenants have enjoyed the benefits of fair rentals and protection from eviction conferred by successive Rent Acts. Ever since the earliest days of this legislation in 1920, these benefits have not been confined to the original tenant. Under section 12(1)(g) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 "tenant" included the widow of a tenant in certain circumstances and, in other cases, such

A "member of the tenant's family" residing with him when he died as might be agreed or decided by the court. In addition to protecting the tenant personally, Parliament has always been concerned to protect the family unit of which the deceased tenant was part.

The language chosen for this purpose was the undefined expression "family". This expression is not a term of art; that is, it is not a technical B term with a specific meaning. It is a word in ordinary usage, with a flexible meaning. The statutory succession provisions have been amended several times, but to this day family has remained unamended, undefined and unparticularised. Parliament has left it to the courts to determine, in any given case, whether a particular individual falls within the description. The current legislative provisions are to be found in Schedule 1 to the Rent Act 1977, as amended by the Housing Act 1988. The relevant phrase in C paragraph 3 is "a person who was a member of the original tenant's family . . . residing with him in the dwelling-house at the time of and for the period of two years immediately before his death". There are differences between the extent of the protection enjoyed by a surviving spouse as a statutory tenant under paragraph 2 and the more limited protection now accorded to a member of the original tenant's family as the holder of an D assured tenancy under paragraph 3. Nothing turns on this distinction for present purposes.

Family is a word with several different meanings. In some contexts family means children ("when shall we start a family?"). In other contexts it means parents and children ("accommodation suitable for families"). It may mean all persons connected, however remotely, by birth, marriage or adoption ("family tree"). The present context is statutory protection of the occupancy E of a dwelling house that is a family home. On the death of the tenant his family cannot be evicted without further ado.

Herein lies the key to the meaning of family in this context. The key is the statutory juxtaposition of membership of the tenant's family and residence with the tenant. The legislation seeks to provide a measure of protection for members of a family who are sharing their lives together as a single family in F one home. In this context children will readily qualify. More remote blood relations of the tenant may also qualify if they satisfy this "sharing" criterion. For instance, a nephew or niece, the child of a deceased brother or sister, might have come into the tenant's home at an early age and become part of his family. Or a widowed or unmarried man might live with his married brother and the brother's wife and children. Or an unmarried G brother and sister might have lived together throughout their lives. Thus, in the early decision of *Price v Gould* 46 TLR 411 Wright J decided that sisters and brothers living together qualified for protection.

This, then, is the first point to note. Although there are hints of a different view in some of the cases, in the context of the purpose of this legislation blood relations are not divided into fixed categories, with near relations ranking as family and more distant relations not. The closer the blood H relationship, the easier it may be for the court to identify the existence of the necessary family relationship or familial nexus, as it is sometimes described. More remote kin are not excluded, although in practice the more remote the kinship the less frequently will they be found sharing their lives together as a family in one home. *Langdon v Horton* [1951] 1 KB 666 is an instance of

this. First cousins, sharing a residence for purposes of convenience, were held not to qualify. A

The second point to note is that membership of a family for this purpose is not confined to blood relations. The relationship may be one of marriage. Indeed, the paradigm family unit was, and still is, a husband and wife and their children. The wife, as well as the children, is a member of the husband's family. Conversely, the husband and the children are members of the wife's family. But children are not essential for the existence of a family for the present purpose. The purpose of the legislation requires that, even in the absence of children, a spouse may qualify. This accords with one of the earliest decisions on these provisions. In 1925, before a widower of the tenant was expressly mentioned in the legislation, Salter J held that the tenant's husband came within the statute: see *Salter v Lask* [1925] 1 KB 584. This also accords with the provisions applicable when a lessor seeks a possession order on the ground that alternative accommodation is available for the tenant. Alternative accommodation must be reasonably suitable for the needs of the tenant and his "family": see section 98(1)(a) of, and Part IV of Schedule 15 to, the Rent Act 1977. It would be absurd if the tenant's wife did not count as family for this purpose. B C

The next point to note is that family is not limited to blood relations and the tenant's spouse. "In-law" relationships may qualify. "Welcome to the family" is a customary greeting to the bride or groom on the wedding of a son or daughter. A daughter-in-law, living with the tenant, must be able to qualify as much as the son of the tenant to whom she is married. A son in-law may likewise qualify. In *Jones v Whitehill* [1950] 2 KB 204 a niece-in-law was held entitled to succeed. The Court of Appeal expressly rejected the argument that family was confined to blood relations. "Step" relationships such as step-children may also qualify, as may children who have been formally adopted. Parliament cannot intend that the tenant's own child may qualify but a duly adopted child or a step-child may not. D E

Having regard to the purpose of the legislation, the width of the meaning borne by the expression family does not stop here. As one might expect, the authorities have not drawn a rigid line at this point. A child who is adopted in fact, although not in law, may be as much a member of the tenant's family as a duly adopted child. The Court of Appeal so decided in 1949 in *Brock v Wollams* [1949] 2 KB 388. More pertinent for present purposes, a man and woman, unmarried but living together as husband and wife, are capable of constituting family. In *Hawes v Evenden* [1953] 1 WLR 1169 the Court of Appeal upheld a decision of a county court judge that the mistress of a man by whom she had had two children was a member of his family for this purpose. The court held there was evidence justifying the judge's finding that they had all lived together as a family. Somervell LJ, at p 1171, identified this as the key factor. Given that factual finding, the court's conclusion must surely be right. A man and woman living together with their children constitute a family for this purpose even though they are unmarried. F G

Three years earlier, in *Gammans v Ekins* [1950] 2 KB 328, the Court of Appeal reached the contrary conclusion regarding a childless couple. A quarter of a century later, in 1975, the Court of Appeal had to consider again the position of an unmarried childless couple. In *Dyson Holdings Ltd v Fox* [1976] QB 503 a man and woman had lived together as husband and H

A wife for nearly 20 years. The court preferred the approach adopted in *Hawes v Evenden*. Expressing himself with his customary simplicity and cogency, Lord Denning MR trenchantly criticised a distinction based on the mere absence of children. He said, at p 509:

> "That means this: if the couple had a baby 19 years ago which died when a few days old, or as a young child, the woman would be a 'member B of the tenant's family'; but if the baby had been still-born, or if the woman had a miscarriage 19 years ago, she would not be a member of his family. Yet for the last 19 years they had lived together as man and wife. That seems to me a ridiculous distinction. So ridiculous, indeed, that it should be rejected by this court: and that we should hold that a couple who live together as man and wife for 20 years are members of the same family, whether they have children or not."

C

In my view the approach adopted in the *Dyson* case, as set out above, is unanswerably correct. The legislative purpose, of protecting members of a family unit in their occupation of a house, requires that a couple living together but without children should be as capable of qualifying for protection as a couple living together with a child. The *Dyson* approach has been followed in several reported cases and, no doubt, numerous unreported D decisions. All the reported cases rightly stress the need for a permanent and stable relationship: see, for instance *Helby v Rafferty* [1979] 1 WLR 13, *Watson v Lucas* [1980] 1 WLR 1493 and *Chios Property Investment Co Ltd v Lopez*, 20 HLR 120. Since then Parliament has made express provision, by the Housing Act 1988, for this type of case. The surviving spouse of the original tenant, if living in the house at the tenant's death, becomes the E statutory tenant. For this purpose "a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant"; see paragraph 2(2) of Schedule 1 to the Rent Act 1977, as inserted by section 39(2) of, and paragraph 2 of Part I of Schedule 4 to, the Housing Act 1988.

I interpose that, in agreement with all your Lordships, I do not accept F that the plaintiff falls within the extended meaning given to spouse by paragraph 2(2). The surviving spouse of the original tenant was the person to whom the original tenant was married when he or she died. Paragraph 2(2) extends this to include persons who conducted themselves as husband and wife although they were not married. Marriage, spouse, husband and wife are all terms connoting a relationship between a man and a woman, that is, between two persons of opposite sex. A husband is a man G and a wife is a woman. These are, in this context, gender-specific words. This approach accords with the view of the Court of Appeal in *Harrogate Borough Council v Simpson*, 17 HLR 205. The court was considering a phrase in section 30 of the Housing Act 1980 that is different in detail but substantially to the same effect ("if they live together as husband and wife").

This is the background against which a decision has to be made in the H present case. The above discussion shows that the courts have given a wide and elastic meaning to family in the present context. Rightly so, because the legislation would fail to cover the whole of the target intended to be protected if family were given a narrow or rigid meaning. Such a meaning would fail to reflect the diverse ways people, in a multicultural society, now live together in family units.

The question calling for decision in the present case is a question of statutory interpretation. It is whether a same sex partner is capable of being a member of the other partner's family for the purposes of the Rent Act legislation. I am in no doubt that this question should be answered affirmatively. A man and woman living together in a stable and permanent sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women. Where a relationship of this character exists, it cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family for Rent Act purposes, a homosexual partnership cannot. Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same sex relationships as in heterosexual relationships. In sexual terms a homosexual relationship is different from a heterosexual relationship, but I am unable to see that the difference is material for present purposes. As already emphasised, the concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit living in one house.

A similar conclusion was reached in 1989 by the New York Court of Appeals in its majority decision in *Braschi v Stahl Associates Co*, 544 NYS2d 784. The New York non-eviction legislation was expressed in terms substantially the same as the Rent Act legislation of this country.

I must refer to one further authority: the decision of this House in *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928. This was the only occasion on which your Lordships have previously considered the meaning of family in the Rent Act legislation. A widow aged 75 developed a platonic relationship with a young man aged 24. He lived in her flat for nearly 20 years until she died. They treated themselves as aunt and nephew. The trial judge held that through their relationship this elderly lady and young man achieved a familial nexus, meaning thereby a nexus such as one would only find within a family. The Court of Appeal reversed the judge's decision, and held that on the facts the relationship was not within the permissible limits of the meaning of the phrase "a member of the . . . tenant's family". This House upheld the decision of the Court of Appeal. Lord Diplock delivered the leading speech. He agreed with observations of Russell LJ in *Ross v Collins* [1964] 1 WLR 425, 432 to the effect that an adult man and woman who establish a platonic relationship cannot establish a family nexus by acting as a devoted brother and sister or father and daughter would act. This is so, even if they address each other as such and even if they refer to each other as such and regard their association as tantamount to such.

On this appeal your Lordships have not been invited to depart from your Lordships' decision in the *Joram* case. This does not preclude your Lordships from deciding this appeal to the effect I have already indicated. Had it done so, I would have wished to consider afresh the decision in that case. The reason why the decision in *Joram* is not an impediment is this. In *Joram* [1979] 1 WLR 928, 930 Lord Diplock stated that the facts of the case did not provide a suitable occasion for the House to undertake a general consideration of what persons may be included in the expression "a member

A of the . . . tenant's family". Further, he disavowed any intention to review the decision in the *Dyson* case [1976] QB 503, stating that this was best left for consideration in the light of the actual facts of a case in which it arises. The present case, like *Dyson*, but unlike *Joram*, is a sexual partnership case. I do not understand the House in the *Joram* case to have been expressing any views regarding this type of case.

B I must also mention the "ordinary person" test enunciated by Cohen LJ in *Brock v Wollams* [1949] 2 KB 388, 395. He suggested that the trial judge should ask himself this question: would an ordinary person, addressing his mind to the question whether the defendant was a member of the family, have answered "Yes" or "No"? This oft-quoted test has tended to bedevil this area of the law. It may be useful as a reminder that family is not a term of art. But the test gives uncertain guidance when, as here, the members of C the Court of Appeal and also your Lordships are divided on how the question should be answered. Contrary to what seems implicit in this form of question, the expression family does not have a single, readily recognisable meaning. As I have emphasised, the meaning of family depends upon the context in which it is being used. The suggested question does not assist in identifying the essential ingredients of the concept of family in the present context.

D In the course of a well-reasoned and attractively presented argument, Mr Chapman submitted that homosexual relationships have always existed and that at the inception of the Rent Act regime in the 1920s a homosexual partner would not have been regarded as a member of the tenant's family. In those days homosexual acts between men constituted a criminal offence. This remained so until they were decriminalised by the Sexual Offences Act E 1967.

This submission raises the question whether the word family as used in the Rent Acts may change its meaning as ways of life and social attitudes change. Can the expression family legitimately be interpreted in 1999 as having a different and wider meaning than when it was first enacted in 1920? The principles applicable were stated cogently by Lord Wilberforce in *Royal* F *College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822. A statute must necessarily be interpreted having regard to the state of affairs existing when it was enacted. It is a fair presumption that Parliament's intention was directed at that state of affairs. When circumstances change, a court has to consider whether they fall within the parliamentary intention. They may do so if there can be detected a clear purpose in the legislation which can only be fulfilled if an G extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it was expressed.

In the present case Parliament used an ordinary word of flexible meaning and left it undefined. The underlying legislative purpose was to provide a secure home for those who share their lives together with the original tenant in the manner which characterises a family unit. This purpose would be at H risk of being stultified if the courts could not have regard to changes in the way people live together and changes in the perception of relationships. This approach is supported by the fact that successive Rent Acts have used the same undefined expression despite the far-reaching changes in ways of life and social attitudes meanwhile. It would be unattractive, to the extent of

being unacceptable, to interpret the word family in the Rent Act 1977 without regard to these changes. A

The change in attitudes towards unmarried couples cohabiting as husband and wife exemplifies this point. In *Gammans v Ekins* [1950] 2 KB 328 the court's decision was affected by its perception of the immorality of such a relationship. An immoral relationship did not come within the ambit of family in the Rent Acts. Asquith LJ, at p 331, said it would be anomalous that a person could acquire protection by living in sin even if the liaison was protracted in time and conclusive in character. Jenkins LJ, at p 332, described the relationship as no more than a liaison between two elderly people who chose to pose as husband and wife when they in fact were not. Evershed MR, at p 334, was more hesitant, but his conclusion was that it might be no bad thing to show that one of the privileges derivable from marriage was not equally enjoyed by those living together as man and wife but in fact unmarried. B C

In one respect of crucial importance there has been a change in social attitudes over the last half-century. I am not referring to the change in attitude toward sexual relationships between a man and woman outside marriage or toward homosexual relationships. There has been a widespread change in attitude toward such relationships, although differing and deeply felt views are held on these matters. These differing views are to be recognised and respected. The crucial change to which I am referring is related but different. It is that the morality of a lawful relationship is not now regarded as relevant when the court is deciding whether an individual qualifies for protection under the Rent Acts. Parliament itself made this clear in 1988, when amending the Rent Acts in the Housing Act 1988. Paragraph 2(3) of Schedule 1 envisages that more than one person may be living with the tenant as a surviving spouse under the extended definition. In so enacting the law Parliament was not expressing a view, either way, on the morality of such relationships. But by this provision Parliament made plain that, for purposes of Rent Act protection, what matters is the factual position. The same must be true of homosexual relationships. D E

It is for this reason that I do not accept the argument that the inclusion of a tenant's homosexual partner within the ranks of persons eligible to qualify as members of his family is a step which should be left to Parliament. It really goes without saying that in cases such as this the courts must always proceed with particular caution and sensitivity. That is not to say the courts can never proceed at all. That is not what the Court of Appeal did in 1975 when deciding the *Dyson* case [1976] QB 503. Nor should this course commend itself to your Lordships in the present case. F G

In this regard, at the risk of repetition, it is necessary to stress the limited nature of the decision in this case. The courts have already decided that the undefined expression "family" is to be given a wide meaning in the context of the Rent Acts. The courts have already decided that family includes relationships other than those based on consanguinity or affinity. To include same sex partners is to do no more than apply to them the same rationale as that underlying the inclusion of different sex partners. The decision goes no further than this. The decision leaves untouched questions such as whether persons of the same sex should be able to marry, and whether a stable homosexual relationship is within the scope of the right to respect for family H

life in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

I would allow this appeal. It is not disputed that if a same sex partner can qualify as a member of the tenant's family, the plaintiff does in fact qualify. He and the original tenant, until the latter's death, lived together for many years in a stable homosexual relationship. The judge found they enjoyed a very close, loving and monogamous homosexual relationship. In my view the plaintiff falls within paragraph 3.

LORD CLYDE My Lords, the late John Thompson was the statutory or protected tenant of a flat owned by the respondent landlord from 1972 until his death in 1994. Since 1976 the plaintiff had lived in the flat with him in what is described in the agreed facts as a long-standing, close, loving and faithful monogamous homosexual relationship. The plaintiff claims to be entitled to succeed to the tenancy on the death of his partner as a statutory tenant by succession under the Rent Act 1977. For this purpose he has to bring himself within the provisions of Part I of Schedule 1 to that Act which sets out the provisions for determining who is the statutory tenant by succession after the death of a protected or statutory tenant. The plaintiff founds on two particular provisions.

The first of these is contained in paragraph 2(2) of the Schedule which was added by section 39 of and Schedule 4 to the Housing Act 1988. Prior to that addition the paragraph referred only to a spouse of the original tenant. It has not been suggested that the plaintiff could qualify as a spouse. Sub-paragraph (2) extended the scope of the paragraph by stating: "For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant." It is on this extension of the scope of the provision relating to spouses that the plaintiff bases the first branch of his argument.

I am not persuaded that the plaintiff qualifies under this provision. The language here plainly indicates a biological distinction between the sex of the original tenant and that of the successor. The careful use of the words "his" and "her" and the phrase "wife or husband" point to a heterosexual relationship. I see no difference between the language used and the phrase "his wife or her husband" and I cannot read the language as if it had said "his or her partner". Taking the words in their ordinary sense, the sub-paragraph does not in my view include a homosexual relationship. That was the view taken by the Court of Appeal in *Harrogate Borough Council v Simpson*, 17 HLR 205 and I consider that that decision was correct.

The alternative view which was adopted by Ward LJ in the present case involves a construction of the word "as" which fastens too narrowly on a consideration of the manner of the cohabitation and ignores considerations of form, appearance and capacity. Even if the word "as" does not require a complete equation, nevertheless the approximation must be a closer one than can exist in the case of a homosexual couple. The essential characteristic of the relationship of husband and wife is the bond of marriage. The paragraph in my view is simply seeking to cover situations where the couple are husband and wife in every respect except that they are not married. Thus merely living in the same household will not be sufficient; the manner of their living together and the reason for their so doing may also have to be explored: *Crake v Supplementary Benefits Commission* [1982]

1 All ER 498. I would only add that the view which I take of this head of the argument appears to accord with *El-Al, The Israeli Airlines Ltd v Danilowitz* 4 May 1994, where the respondent before the Supreme Court of Israel did not attempt to challenge the view taken by the state tribunal that a homosexual partner did not qualify as a "spouse (husband or wife)" nor as "a cohabitant publicly known as his/her wife/husband". That case, like that of *Egan v Canada* (1995) 124 DLR (4th) 609, where the relevant statute defined "spouse" as including a person of the opposite sex, was concerned primarily with a question of discrimination; but that question is not directly raised in the present appeal.

The plaintiff then turns to paragraph 3 of the Schedule. The relevant part of that paragraph in its amended version reads:

> "(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for a period of two years immediately before his death then, after his death, that person . . . shall be entitled to an assured tenancy of the dwelling-house by succession."

The plaintiff meets the requirement of residence at the time of the death and for the two years immediately prior thereto. So the question comes to be, was the plaintiff a member of the original tenant's family?

The word "family" connotes essentially some grouping, usually of persons, who are connected with each other by some particular kind of bond. But the precise content of the group depends upon the context in which the term is used. In some contexts it may require to be restricted to members who are linked by ties of consanguinity or affinity or both consanguinity and affinity. A family so linked may be said to exist even although they do not live together or even meet each other. On a narrower view the context may in some cases even require the group to consist only of children. On the other hand the tie may in particular circumstances consist of a close and intimate degree of companionship between people who are living together in one dwelling even if no relationship of blood or marriage exists between them.

The word "family" in the context of the rent legislation can be traced to section 12(1)(g) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. The meaning of the word "family" in the context of the Rent Acts was explored long ago by Wright J in *Price v Gould* 46 TLR 411 where it was recognised that the word was a "popular, loose and flexible expression, and not a technical term". In *Stewart v Mackay* 1947 SC 287 in relation to the phrase "the needs of the tenant and his family" it was considered that domestic servants and even lodgers might fall within the description if they had a sufficient degree of permanence and the general relationship. In *Brock v Wollams* [1949] 2 KB 388 the narrow meaning of relations by blood or marriage was rejected, so also was the idea that "family" could be equated with "household". A bond which goes no further than the fact that the group are living under the same roof is not enough. The preferred meaning was that formulated by the "Cohen question" which was repeated by its author as a fair test in *Standingford v Probert* [1950] 1 KB 377, 383. The test involves the artificiality of an imaginary recourse to a hypothetical representative of the general public; in substance it requires the application of the ordinary popular sense of the word. Once the test is established, the

problem seems to me to be one of the application of the word rather than its construction. But, as was pointed out in *Sefton Holdings Ltd v Cairns*, 20 HLR 124, the question is whether the person was a member of the family, not whether he was living as a member of the family.

Some of the most close family relationships may be created by choice, between persons who may otherwise have been strangers to each other. Marriage is the obvious example. Adoption of children is another. The element of a free mutual choice of a close intimate relationship and the voluntary determination to spend one's life with another is one form of a family bond. The kind of relationship with which the present case is concerned is one where the parties of their own choice live together in a situation of actual or potential sexual intimacy. Beyond that kind of case and the case of a relationship akin to that of parent and child the element of choice does not seem to operate to achieve a family bond. One cannot choose to become a brother or a sister, an aunt or an uncle. Some may choose to be a family member. Others have it thrust upon them.

It can be seen from the decided cases that the concept of "family" developed over time so as to extend to unmarried heterosexual couples. In *Gammans v Ekins* [1950] 2 KB 328 the Court of Appeal firmly rejected the proposition that a man who had lived for 20 years with a female tenant, "masquerading" as Asquith LJ put it, as husband and wife, was a member of the tenant's family. On the other hand where the couple had had children and they all lived in the house together it was held that the mother was a member of the father's family: *Hawes v Evenden* [1953] 1 WLR 1169. A quarter of a century after the *Gammans* case, in *Dyson Holdings Ltd v Fox* [1976] QB 503, it was held that in the changed social conditions then prevailing the unmarried female partner of a male tenant who had lived with him for 21 years was a member of the tenant's family, even although there were no children of their association. Indeed the same result was reached in *Watson v Lucas* [1980] 1 WLR 1493 where the parties could not have been legally married to each other because the male partner was already married. On the other hand in *Helby v Rafferty* [1979] 1 WLR 13 the relationship between a heterosexual couple who had lived together was held to lack the permanence and stability necessary to constitute a family relationship. Usually a long period of cohabitation is required. But even that is not always an essential. In *Chios Property Investment Co Ltd v Lopez* 20 HLR 120 cohabitation for two years still enabled the woman to qualify as a member of the tenant's family. Neither in that case nor in *Dyson* did the absence of any children prevent the person from ranking as a member of the other's family. The recognition by the courts that heterosexual partnerships should rank as families for the purpose of the succession to statutory tenancies was taken up by Parliament and made a matter of express enactment in paragraph 2 of Schedule 4 to the Housing Act 1988, inserting paragraph 2(2) into Schedule 1 to the Rent Act 1977.

The judges in *Helby v Rafferty* [1979] 1 WLR 13 had difficulty in accepting that a word which had been repeated throughout the successive Rent Acts could change its meaning from time to time. But as matter of construction I see no grounds for treating the provisions with which we are concerned as being in the relatively rare category of cases where Parliament intended the language to be fixed at the time when the original Act was passed. The rule of contemporary exposition should be applied only in

relation to very old statutes: *Governors of Campbell College, Belfast v Northern Ireland Valuation Commissioner* [1964] 2 All ER 705. The general presumption is that an updating construction is to be applied: *Bennion, Statutory Interpretation*, 3rd ed, p 686. Such an approach was recently adopted by this House in *R v Ireland* [1998] AC 147. But in any event in relation to the problem in the present case the meaning of the word "family" in its sense of a group united by some tie or bond such as blood, marriage or personal affection may not have as matter of language altered. What has changed are the precise personal associations to which the concept may now be applied. The essential meaning of the word has not changed over the intervening years, but changes in social habits and opinions may affect the propriety of its application to new circumstances. Thus the test for its application comes to be the ordinary popular understanding of the word at the date when its falls to be applied. That in the present case is the date of the death of the original tenant.

In *Ross v Collins* [1964] 1 WLR 425, where an unpaid housekeeper was held not to be a member of the tenant's family, there being no evidence to establish a relationship of father and daughter, Russell LJ observed, at p 432:

> "But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or as sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such and even if they refer to each other as such and regard their association as tantamount to such. Nor, in my view, would they indeed be recognised as familial links by the ordinary man."

In that case Russell LJ recognised that "family" was not limited to cases of a strict legal familial nexus, but that it still required "a broadly recognisable de facto familial nexus". He considered that that could be found:

> "where the link would be strictly familial had there been a marriage, or where the link is through adoption of a minor, de jure or de facto, or where the link is 'step-', or where the link is 'in-law' or by marriage."

Certainly it has proved difficult to establish a family relationship where the connection is usually by blood, other than in cases where there is a relationship like that of parent and child. We are not concerned in the present case with the problems of the extent to which persons not in a relationship of sexual intimacy may qualify as members of a family. But it may be observed that in relation to these other kinds of case, blood and adoption have not been prescribed as limits. In *Brock v Wollams* [1949] 2 KB 388 the defendant had resided with the tenant since her childhood and had continued to reside with him until his death apart from a period of some three years. She had not been legally adopted by him but was nevertheless held to be a member of his family. In *Jones v Whitehill* [1950] 2 KB 204 a niece of the tenant's wife went to live with her aunt and her aunt's husband, the tenant, to look after them in their declining years. It was held that in accordance with the ordinary use of language she was a member of the tenant's family, essentially, as it would seem, on account of her dedication to caring for them, although, as was pointed out in *Ross v Collins* [1964]

A 1 WLR 425, 431, there was the pre-existing relationship of being a niece of the tenant's wife. In *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928 a young man of 24 formed a friendship with a widow of 75 and lived with her on terms which were described as platonic and filial. His mother was alive and would not accept that the widow should speak of him as her son, and he referred to the widow as his aunt. Lord Diplock expressly refrained from any general consideration of the scope of the statutory phrase or the B extent to which changed social attitudes might have enlarged the meaning of the word "family". The decision must accordingly be regarded purely as one turning on its own facts. It may be noted that, as appears from the report of the decision in the Court of Appeal [1979] 1 WLR 3, no suggestion was made in argument of any change in the meaning of the phrase "member of the tenant's family" in relation to the facts in that particular case.

C In so far as some more general guidance is sought to be found from the observations by Russell LJ in *Ross v Collins* [1964] 1 WLR 425, 432–433 I do not find it altogether helpful in seeking the substance of the bond which constitutes a group as a family to use the expression "familial nexus" which still leaves the word "familial" to be explained. Nor do I regard his list of examples where the nexus may be found as intended to be comprehensive or exhaustive. It is however to be noted that he does not exclude the possibility D of two strangers establishing a "familial nexus" as a cohabiting couple, whether heterosexual or homosexual, although a relationship which was merely artificial would not suffice, and a platonic relationship might have difficulty in qualifying. Problems may yet arise with regard to relationships other than the kind of relationship which is before us in the present case. I do not find it necessary to explore the further application of family membership E beyond such cases and I find little guidance in the cases, such as the *Joram* case [1979] 1 WLR 928, which have been concerned with other kinds of relationship.

The problem in the present case is to determine what, short of blood or marriage, may evidence the common bond in a partnership of two adult persons which may entitle the one to be in the common judgment of society a member of the other's family. It seems to me that essentially the bond must F be one of love and affection, not of a casual or transitory nature, but in a relationship which is permanent or at least intended to be so. As a result of that personal attachment to each other, other characteristics will follow, such as a readiness to support each other emotionally and financially, to care for and look after the other in times of need, and to provide a companionship in which mutual interests and activities can be shared and G enjoyed together. It would be difficult to establish such a bond unless the couple were living together in the same house. It would also be difficult to establish it without an active sexual relationship between them or at least the potentiality of such a relationship. If they have or are caring for children whom they regard as their own they would make the family designation more immediately obvious, but the existence of children is not a necessary element. Each case will require to depend eventually upon its own facts.

H The concept of the family has undergone significant development during recent years, both in the United Kingdom and overseas. Whether that is a matter for concern or congratulation is of no relevance to the present case, but it is properly part of the judicial function to endeavour to reflect an understanding of such changes in the reality of social life. Social groupings

have come to take a number of different forms. The form of the single parent family has been long recognised. A more open acceptance of differences in sexuality allows a greater recognition of the possibility of domestic groupings of partners of the same sex. The formal bond of marriage is now far from being a significant criterion for the existence of a family unit. While it remains as a particular formalisation of the relationship between heterosexual couples, family units may now be recognised to exist both where the principal members are in a heterosexual relationship and where they are in a homosexual or lesbian relationship.

In *T, Petitioner* 1997 SLT 724 an adoption order was made where the petitioner was proposing to bring up the child jointly with another person with whom he was cohabiting in a homosexual relationship. Such a group can readily be described as constituting a family. But just as in regard to heterosexual couples the existence of children was not a necessary factor for entitling the couple to qualify as a family, so also, as it seems to me, the couple should qualify by themselves, just as they would continue to do after the adopted child had grown up and started an independent life. In this connection it is interesting to note the use of the word "family" in the judgment of Singer J in *In re W (A Minor) (Adoption: Homosexual Adopter)* [1998] Fam 58, 59 where he said in relation to the placement of the child whose adoption was in dispute: "The family in question comprises two women living together in lesbian relationship." He there recognises the couple as constituting a family. That language seems to me to reflect what is now an ordinary usage. In my view a homosexual couple can qualify as a family for the purposes of paragraph 3 of Schedule 1 to the 1977 Act and if that is possible I have no doubt at all that in the circumstances of the present case the plaintiff does qualify as a member of the former tenant's family. On the facts before us such a conclusion is irresistible.

The conclusion which I have reached seems to me to accord with the purpose of the legislation. The main objects of the Rent Acts are the giving to tenants of fair rents and a security of tenure: *Megarry, The Rent Acts,* 11th ed (1988), vol 1, p 18. The purpose of the statutory provisions on succession, in their various formulations, may be taken to be to ensure that the security of tenure is not weakened by the inability of those closely bound to him to remain in residence by right after his death. The view which I have taken in the present case seems at least consistent with the evident purpose of the legislation.

The view which I have taken finds some support in the decision of the Court of Appeals in New York in *Braschi v Stahl Associates Co* 544 NYS2d 784. That case concerned landlord and tenant legislation forbidding the eviction of a "member of the deceased tenant's family who has been living with the tenant". The court looked to the general social purpose of the statute, the protection of tenants, the prevention of dislocation and the preservation of family units. The court stated, at p 789:

> "In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterised by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units . . ."

A This approach is in conformity with that which commends itself to me, that the concept of "family" is now to be regarded as extending to a homosexual partnership.

I should stress that the present case is to be distinguished from that of spouses or unmarried couples living in a relationship where marriage may be possible. I am not holding that a homosexual partnership is like or is akin to such a relationship. Indeed, as I have already held, I do not consider that B paragraph 2(2), as presently worded, can be extended to cover such a case. So the cases to which we were referred where a matter of discrimination was raised between the position of heterosexual and homosexual couples is not in my view of direct assistance. Nor does it seem to me useful to employ such expressions as a relationship "akin to marriage". Indeed the plaintiff has in his written case expressly declared that the present case does not give C rise to questions about any right on the part of persons of the same sex to marry or to acquire a particular legal status. It would be wrong to regard the present case as one about the rights of homosexuals. It is simply a matter of the application of ordinary language to this particular statutory provision in the light of current social conditions.

Furthermore the present case is to be distinguished from cases concerned with the idea of family status, such as the Canadian case of *Attorney-* D *General of Canada v Mossop* 100 DLR (4th) 658. In that case the Supreme Court held, on the narrow base on which the case was argued, that the expression "family status" did not include a homosexual relationship. But the definition of "family status" may be narrower than the word "family". In the Court of Appeal Marceau JA observed, quoted at p 667 of the report: "Even if we were to accept that two homosexual lovers can constitute E 'sociologically speaking' a sort of family, it is certainly not one which is now recognised by law as giving its members special rights and obligations." Lamer CJC, at p 674, observed of the Supreme Court's decision that it "should [not] be interpreted as meaning that homosexual couples cannot constitute a 'family' for the purposes of legislation other than the CHRA. In this regard, each statute must be interpreted in its own context."

Nor does the decision which I have reached conflict with the F jurisprudence of the European Court of Justice or the European Court of Human Rights. As was recognised by the European Court of Justice in *Grant v South-West Trains Ltd* (Case C-249/96) [1998] ICR 449, 478, para 35:

> "in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as G equivalent to marriages or stable relationships outside marriage between persons of the opposite sex."

Thus the European Court of Human Rights has in *Rees v United Kingdom* (1987) 9 EHRR 562 and *Cossey v United Kingdom* (1991) 13 EHRR 622 confined the application of article 12 of the European Convention on Human Rights to the traditional marriage between persons of opposite H biological sex. Article 12 refers to the right "to marry and to found a family" and in that context it is easy to understand that the word "family" may be restricted in its scope. Article 8 provides the right "to respect for his private and family life". In this context the Commission has held that a stable homosexual relationship between two men does not fall within the scope of

the right to respect for family life, but that such a relationship may be a matter affecting private life: *S v United Kingdom* (1986) 47 D & R 274. Some protection for such a relationship is thus recognised in the human rights jurisprudence. Moreover in the developing jurisprudence of the European Court of Human Rights it is recognised that family life is not confined to families based on marriage but may encompass other de facto relationships such as that in *X, Y and Z v United Kingdom* (1997) 24 EHRR 143 where X had by gender reassignment surgery come to live as a man with Y, who was a woman, and her child, Z, who had been born through AID treatment. In *Salgueiro da Silva Mouta v Portugal* (application no 33290/96) 1 December 1998 (unpublished), a homosexual claimed that an award of custody of his daughter to her mother was an unjustified interference with his right to respect for family life, and also with his right to respect for his private life since he was required in respect of his right of access to his daughter to conceal from her his homosexuality. His claim was held admissible. That the relationship in the present case may not as the law currently stands constitute "family life" for the purposes of article 8 of the Convention does not require a restrictive meaning to be given to the reference to a tenant's family in the legislation before us.

It was suggested that if the present appeal was allowed there would be great uncertainty in the ascertainment of successors to statutory tenancies. I am not persuaded that such fears are justified. There may at present be need on occasion to explore the facts of particular cases to discover whether a person was living with the original tenant "as his or her wife or husband". In relation to the word "family", it is difficult to devise a construction which will obviate inquiry unless a very restrictive view of the scope of a family is taken. Once it is accepted, as it has been in the cases, that the application extends beyond the scope of strictly legal relationships, some inquiry may well be involved into the facts which are alleged to be sufficient to constitute the necessary nexus. It does not seem to me that the recognition that a person living together with another in a homosexual relationship may qualify as a member of the other's family is likely to lead to any significant uncertainties in the application of the statutory provision.

Ward LJ expressed an anxiety that he might be exceeding the limits of the judicial function in reaching his decision. Judicial activism certainly has to be tempered by due restraint, and the drawing of the boundary of the judicial task is often delicate and sometimes controversial. I do not consider that the boundary is being passed in the present case. What we are concerned with is the application of a word recognised as being loose and flexible. Parliament has in other contexts provided definitions of the kind of relationships which it intends should be affected by particular provisions. For example under section 113 of the Housing Act 1985 a person was a "member of another's family" if he was the spouse of that person, or if he and that person lived together as husband and wife, or if he was that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece. In marked distinction to that kind of approach Parliament has in relation to protected tenancies under the Rent Act 1977 left the word "family" to be applied by the courts without the guidance of statutory definition. The court in *Dyson Holdings Ltd v Fox* [1976] QB 503 accordingly applied the word as was appropriate to the social circumstances prevailing at that period, innovating on its earlier application. If, as I believe, the word is now appropriate to

A cover a homosexual partnership of the kind which existed in the present case, it seems to me consistent with the intention of Parliament that it should be so applied.

I would allow the appeal.

LORD HUTTON My Lords, the plaintiff, Mr Martin Fitzpatrick, was the homosexual partner of the late Mr John Thompson and lived with him in his B flat, of which he was the statutory or protected tenant under the Rent Acts, from 1976 until the latter's death in 1994. The relationship between the plaintiff and his partner was close, loving and faithful and after Mr Thompson suffered a stroke in 1986 the plaintiff nursed him with devotion and constant care until he died.

The landlord of the flat was the respondent defendant, Sterling Housing C Association Ltd, which is a charity providing accommodation for families and individuals at affordable rents. After Mr Thompson's death the plaintiff applied to become the tenant of the flat (which comprised four rooms, together with a kitchen and a bathroom) but the defendant, although willing to rehouse him in smaller accommodation in another of its properties, was not prepared to agree to him taking over the tenancy.

The plaintiff applied to the West London County Court for a D determination that he was entitled to succeed to the tenancy of the flat, but his application was dismissed in a careful judgment by Judge Colin Smith QC and his decision was upheld by a majority of the Court of Appeal [1998] Ch 304 (Waite and Roch LJJ; Ward LJ dissenting).

After a number of amendments Schedule 1 to the Rent Act 1977 now reads, so far as relevant:

E "1 Paragraph 2 . . . below shall have effect, subject to section 2(3) of this Act, for the purpose of determining who is the statutory tenant of a dwelling-house by succession after the death of the person (in this Part of this Schedule referred to as 'the original tenant') who, immediately before his death, was a protected tenant of the dwelling-house or the statutory tenant of it by virtue of his previous protected tenancy.

F "2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence. (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original G tenant. (3) If, immediately after the death of the original tenant, there is, by virtue of sub-paragraph (2) above, more than one person who fulfils the conditions in sub-paragraph (1) above, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be treated as the surviving spouse for the purposes of this paragraph.

"3(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the H dwelling-house at the time of and for the period of two years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession."

Sub-paragraph (2) of paragraph 2 was inserted by section 39(2) of, and Schedule 4, paragraph 2 to, the Housing Act 1988.

Two issues arise in relation to the plaintiff's application. The first issue is whether the plaintiff was "living with the original tenant as his or her wife or husband" within the meaning of those words in paragraph 2(2) of Schedule 1. If the answer to this question is in the negative, the second issue is whether the plaintiff "was a member of the original tenant's family . . . residing with him in the dwelling house at the time of and for the period of two years immediately before his death" within the meaning of paragraph 3(1) of the Schedule.

The central thrust of the argument advanced by Mr Blake on behalf of the plaintiff was that the intention of Parliament was to give protection to a person living with the deceased tenant in a close personal relationship and that a broad and purposive approach should be given to paragraphs 2(2) or 3(1) of the Schedule. It was submitted that there is now widespread public acceptance of homosexuality and public recognition that homosexuals live together in stable, loving and permanent unions in the same way as men and women live together. A permanent and loving union between homosexuals is akin to marriage and therefore should come within the protection which Parliament gives to a person who has lived with a tenant as his or her wife or husband or to a person who was a member of the tenant's family residing with him.

These arguments were rejected by the majority of the Court of Appeal. All three judgments in the Court of Appeal subjected the issues arising in this difficult case to detailed analysis and made a careful survey of the history of the relevant legislation and of the numerous authorities. At the conclusion of his judgment Waite LJ, whilst recognising the devoted and faithful life shared by Mr Thompson and the plaintiff, stated [1998] Ch 304, 318:

> "The survey which I have undertaken in this judgment shows, however, that the law in England regarding succession to statutory tenancies is firmly rooted in the concept of the family as an entity bound together by ties of kinship (including adoptive status) or marriage. The only relaxation, first by court decision and then by statute, has been a willingness to treat heterosexual cohabitants as if they were husband and wife."

Roch LJ concluded his judgment, at p 324:

> "I agree with both Waite and Ward LJJ that the terms of Schedule 1 should be reconsidered with a view to bringing cases such as the present within the protection of the Schedule. No doubt Parliament will consider whether the protection should be that afforded by paragraph 2 or that afforded by paragraph 3 of the Schedule. Nevertheless, I am convinced that it is for Parliament to make the necessary changes after debate when considerations which may not have been raised in this appeal and which may not be apparent to this court can be taken into account."

Applying a functionalist approach to the construction of paragraphs 2(2) and 3(1) the conclusion of Ward LJ on the first issue was, at p 338: "I would say there is no essential difference between a homosexual

A and a heterosexual couple and, accordingly, I would find that the plaintiff had lived with the deceased tenant as his husband or wife." On the second issue he stated, at p 339:

> "The test has to be whether the relationship of the plaintiff to the deceased was one where there is at least a broadly recognisable de facto familial nexus. I would not define that familial nexus in terms of its
B structures or components: I would rather focus on familial functions. The question is more what a family does rather than what a family is. A family unit is a social organisation which functions through its linking its members closely together. The functions may be procreative, sexual, sociable, economic, emotional. The list is not exhaustive. Not all families function in the same way. Save for the ability to procreate, these functions were present in the relationship between the deceased and the
C plaintiff."

The first issue: paragraph 2(2) of Schedule 1

The primary submission advanced on behalf of the plaintiff to this House was that Parliament intended the words "living with the original tenant as his or her husband or wife" to be a broad term to be interpreted by the courts
D on an incremental basis to include any relationship akin to marriage and not just a relationship between partners of opposite sexes. I share the opinion of all your Lordships that the plaintiff is not entitled to claim that he was living with Mr Thompson as his wife or husband within the meaning of paragraph 2(2). A person can only live with a man as his wife when that person is a woman, and accordingly the plaintiff cannot claim to have been living
E with Mr Thompson as his wife. Similarly a person can only live with another person as a husband when that other person is a woman, and accordingly the plaintiff cannot claim to have been living with Mr Thompson as his husband. In *Harrogate Borough Council v Simpson*, 17 HLR 205 the Court of Appeal held that the expression "living together as husband and wife" in section 50 of the Housing Act 1980 is not apt to include a lesbian relationship and I am in agreement with the opinion of Ewbank J, at p 210,
F that: "The essential characteristic of living together as husband and wife, in my judgment, is that there should be a man and a woman and that they should be living together in the same household."

Accordingly I am unable to agree with the conclusion of Ward LJ because I consider that it fails to take account of the essential requirement of paragraph 2(2) which is that the claimant must have been living with a
G male original tenant as his wife or with a female original tenant as her husband.

The second issue: paragraph 3(1) of Schedule 1

The secondary submission advanced on behalf of the plaintiff was that if the wording of paragraph 2(2) excludes the relationship of a couple of the same sex, the consideration that that relationship is akin to marriage
H nevertheless qualifies it as being familial in character so that within the meaning of paragraph 3(1) the plaintiff was a member of Mr Thompson's family. In considering this submission it is relevant at the outset to have regard to the scheme of Schedule 1 to the Rent Act 1977. Whilst in earlier provisions in the Rent Acts legislation a distinction was not drawn between a

widower of the tenant and a member of the tenant's family so that under the Act of 1920 it was held that a widower was a member of the tenant's family (see *Salter v Lask* [1925] 1 KB 584), it is apparent that Schedule 1 to the Act of 1977 deals separately with the surviving spouse of the tenant and a person living with the tenant as his or her wife or husband on the one hand and with a member of the tenant's family on the other hand. If the plaintiff were entitled to claim the protection given by Schedule 1 it would appear appropriate that he should obtain protection under paragraph 2 and not under paragraph 3, because the essence of his claim is that the relationship which he shared with Mr Thompson was the same relationship as that shared between a husband and wife or a couple living together as husband and wife, save that the relationship was homosexual and not heterosexual. Therefore if (as I would hold) Parliament did not intend that a homosexual partner should obtain protection under paragraph 2, it would appear to be a somewhat strained and artificial construction to hold that the plaintiff is entitled to obtain protection under paragraph 3.

In *Harrogate Borough Council v Simpson* 17 HLR 205, 210 Watkins LJ stated:

> "Mrs Davies, who appears for the plaintiffs, contends that, if Parliament had wished homosexual relationships to be brought into the realm of the lawfully recognised state of a living together of man and wife for the purpose of the relevant legislation, it would plainly have so stated in that legislation, and it has not done so. I am bound to say that I entirely agree with that."

If it was the intention of Parliament that a homosexual partner should have the same protection under the Rent Acts as a heterosexual partner I think that in 1988 Parliament would have used express words in paragraph 2(2) of Schedule 1 to place a homosexual partner in the same position as an unmarried heterosexual partner rather than leave it to the courts to extend the meaning of the phrase "a member of the original tenant's family" in paragraph 3(1) to include a homosexual relationship. Instead in paragraph 2(2) Parliament used terminology similar to that recently held by the Court of Appeal in the *Simpson* case to be confined to a heterosexual relationship.

It is also necessary to recognise that the construction of paragraph 3(1) is, in part, a question of law. The meaning given to the word "family" may vary depending upon the context in which it is used and the popular meaning given to the word may change to some extent with the passage of the years, but the decision of this House in *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928 makes it clear that in the context of paragraph 3(1) the meaning given to the word "family" cannot be extended beyond the limits permitted by the law. In *Joram*, referring to the judgment of Megaw LJ in that case in the Court of Appeal, Lord Diplock said, at p 931:

> "Megaw LJ after quoting the 'Cohen question' went on to say, in my view quite correctly [1979] 1 WLR 3, 7: 'it is for this court to decide, where such an issue arises, whether, assuming all the facts found by the judge to be correct, the question may, as a matter of law, within the permissible limits of the meaning of the phrase a member of the tenant's family, be answered "Yes" '."

A And Viscount Dilhorne said, at p 932:

> "My Lords, the meaning to be given to the words 'a member of the original tenant's family' in Schedule 1, paragraph 3 to the Rent Act 1968 is in my view a question of law. 'Family' is a word the content of which varies with the context in which it is used. When used in a statute, it has not in my opinion the same meaning as the word 'household'. While a
> B household may consist only of members of a family, it can include persons not capable of being so regarded. I accordingly cannot accept the argument that 'family' in the Act can be read as meaning 'household'. While the question which Cohen LJ said in *Brock v Wollams* [1949] 2 KB 388, 395 the county court judge should have asked himself, namely: 'Would an ordinary man, addressing his mind to the question whether
> C Mrs Wollams was a member of the family or not, have answered "yes" or "no",' has not infrequently been posed, the answer to the question is not likely to extract any more than the judge's personal view. It is to the highest degree unlikely that a judge would ever say: 'I think the answer is "Yes" but I think an ordinary man would say "No",' and if a judge did that he would in my opinion be wrong. It is for the judge to construe the statute and it is for him to state his conclusion as to the meaning to be
> D given to the word 'family' in the context in which it appears, giving it, unless the context otherwise requires, its ordinary natural meaning."

As Viscount Dilhorne then stated that he would have been content to agree with the judgment of Megaw LJ and the speech of Lord Diplock it is clear that when he said that it was for the judge to give the word "family" its
E ordinary natural meaning he accepted that it was within the limits permitted by the law, as is also clear from his first sentence.

Therefore I turn to the speech of Lord Diplock in the *Joram* case (with which Lord Elwyn-Jones, Lord Fraser of Tullybelton and Lord Russell of Killowen agreed) to determine whether the law as there stated permits the answer that the plaintiff was a member of Mr Thompson's family. In that case there was a close platonic relationship between the elderly tenant and a
F young man and they treated themselves as aunt and nephew and were so regarded by others. In his judgment the county court judge said:

> "He stuck by her to the end. Nobody else in her family did so. Had it not been for the presence of the defendant, in the last five years she would have been obliged to enter a nursing home or else her family would have had to arrange to receive her into their midst. She was able to remain in
> G her home, to be looked after by a much younger person . . . Their relationship was sensitive, loving, intellectual and platonic."

and his conclusion was that:

> "Lady Salter and this defendant achieved through their relationship what must surely be regarded in a popular sense, and in common sense, as
> H a familial nexus. That is to say, a nexus such as one would find only within a family. I am sure Shakespeare's man would say: 'Yes, it is stranger than fiction, but they established a familial tie. Everyone linked to her through the blood was remote by comparison with the defendant.' "

The Court of Appeal reversed this decision and the decision of the Court of Appeal was upheld by this House. The reason for upholding the decision of the Court of Appeal was stated by Lord Diplock, at p 931:

> "*Gammans v Ekins* was a case of cohabitation by an unmarried couple, a relationship which raises questions upon which I find it unnecessary and inappropriate to enter for the purpose of disposing of the instant appeal. *Ross v Collins*, on the other hand, was much like the instant case, save that the sexes of the older party, who was devotedly cared for, and the younger party who did the caring, were reversed. As my reason for dismissing the instant appeal, I would not seek to improve upon what was said there by my noble and learned friend (then Russell LJ), at p 432: 'Granted that "family" is not limited to cases of a strict legal familial nexus, I cannot agree that it extends to a case such as this. It still requires, it seems to me, at least a broadly recognisable de facto familial nexus. This may be capable of being found and recognised as such by the ordinary man—where the link would be strictly familial had there been a marriage, or where the link is through adoption of a minor, de jure or de facto, or where the link is "step-", or where the link is "in-law" or by marriage. But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or as sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such and even if they refer to each other as such and regard their association as tantamount to such. Nor, in my view, would they indeed be recognised as familial links by the ordinary man.' "

Accordingly for a claimant to be a member of the tenant's family there must be a relationship to the tenant by marriage or blood or adoption, or a link which resembles such a relationship and which can be broadly recognised as such, and in that case it was not sufficient that there was a loving, caring and supportive relationship between the young man and the tenant, Lady Salter.

It can be argued with some force that the adoption by Lord Diplock of the passage from the judgment of Russell LJ in *Ross v Collins* [1994] 1 WLR 425 does not constitute a ratio decidendi binding upon your Lordships in the present appeal. This is because at the commencement of his speech Lord Diplock stated that the appeal concerned a relationship where there had been no connection by way of regular sexual intercourse (past or present) between the claimant and the tenant and he then stated [1994] 1 KB 928, 930:

> "The facts of the instant case, if they are not unique, are certainly most unusual, and for that reason they do not, in my opinion, provide a suitable occasion for this House to undertake a general consideration of what persons may be included in the expression 'a member of the original tenant's family' where at the time of the tenant's death there did exist between him and the claimant to a statutory tenancy by succession a relationship of one or other of the various kinds to which I have referred

A above. In particular, the difficult question posed by *Dyson Holdings Ltd v Fox* [1976] QB 503 as to the extent, if any, to which changed social attitudes towards cohabitation between unmarried couples and the offspring of such liaisons may have enlarged the meaning of the expression 'family' in the Rent Act 1968 does not arise in the instant case and is best left for consideration in the light of the actual facts of a case in which it does arise."

B

I consider that the reference to "cohabitation between unmarried couples and the offspring of such liaisons" shows that Lord Diplock's earlier reference to connection by way of regular sexual intercourse referred to a heterosexual couple and not to a homosexual couple. However, if it is not a binding decision, in my opinion the passage from the judgment of Russell LJ C adopted by Lord Diplock gives clear guidance as to the approach which should be taken by your Lordships in determining the limits of the term "family" in paragraph 3(1), and I consider that the plaintiff does not qualify as a member of Mr Thompson's family because he had no relationship with Mr Thompson by marriage or blood or adoption and no link with him which was broadly recognisable as creating de facto such a relationship.

Mr Blake relied on the decision of the Court of Appeal in *Dyson Holdings* D *Ltd v Fox* [1976] QB 503 in support of the submission that the term "family" is a word of flexible meaning which can change with the passage of the years, and that in the light of the changed public attitude to homosexuality the term should now include a stable and lasting homosexual relationship. In that case a woman had lived with the tenant of a house as if she were his wife for 21 years until his death, but they had never married and had no children. E The Court of Appeal held that the woman was a member of the tenant's "family" within the meaning of the Rent Acts. In the judgments reference was made to the earlier decision of the Court of Appeal in *Gammans v Ekins* [1950] 2 KB 328 where it was held that a man who had lived for 20 years with a female tenant did not acquire the status of membership of the tenant's family. Referring to *Gammans v Ekins* James LJ said, at p 511:

F "The strongly expressed view was that as at 1949, the relevant date, the popular meaning of 'family' did not include the male consort of a female tenant whose relationship had all the incidence of a marriage short of the birth of a child and all the outward appearances of marriage. Between 1950 and 1975 there have been many changes in the law effected by statute and decisions of the courts. Many changes have their foundation in the changed needs and views of society. Such changes have G occurred in the field of family law and equitable interests in property. The popular meaning given to the word 'family' is not fixed once and for all time. I have no doubt that with the passage of years it has changed. The cases reveal that it is not restricted to blood relationships and those created by the marriage ceremony. It can include de facto as well as de jure relationships. The popular meaning of 'family' in 1975 would, H according to the answer of the ordinary man, include the defendant as a member of Mr Wright's family."

In my opinion the decision in the *Dyson* case [1976] QB 503 does not assist the plaintiff's case and does not support an argument that because the Court of Appeal brought a stable and lasting heterosexual relationship

outside marriage within the ambit of the term "family," a court should now, in the light of society's changed attitudes, bring a stable and lasting homosexual relationship within the ambit of that term. A

Parliament has recognised the decision in the *Dyson* case but did so in 1988 in paragraph 2(2) of Schedule 1 to the 1977 Act by words which expressly confine the relationship outside marriage to a heterosexual relationship. Moreover in his judgment in *Dyson,* at p 511, James LJ said: B

> "The cases reveal that [the word 'family'] is not restricted to blood relationships and those created by the marriage ceremony. It can include de facto as well as de jure relationships."

Therefore, notwithstanding that in the *Joram* case [1979] 1 WLR 928, 930 Lord Diplock reserved comment on the *Dyson* case, the decision can be regarded as coming within the principle stated by Russell LJ in *Ross v Collins* [1964] 1 WLR 425, 432 that "'family' . . . requires . . . at least a broadly recognisable de facto familial nexus." In the *Dyson* case [1976] QB 503 the relationship was recognisable as a de facto marriage and therefore could be regarded as a family relationship. Stephenson LJ stated the point, correctly in my opinion, in the following way in *Watson v Lucas* [1980] 1 WLR 1493, 1501: C D

> "The ordinary man has to consider whether a man or a woman is a member of a family in the light of the facts, and whatever may have been held before *Dyson Holdings Ltd v Fox* [1976] QB 503 I do not think a judge, putting himself in the place of the ordinary man, can consider an association which has every outward appearance of marriage, except the false pretence of being married, as not constituting a family. If it looks like a marriage in the old and perhaps obsolete sense of a lifelong union, with nothing casual or temporary about it, it is a family until the House of Lords declares (as Mr Semken reserves his right to ask them to declare) that *Dyson Holdings Ltd v Fox* was wrongly decided because the reasoning of the majority was wrong. The time has gone by when the courts can hold such a union not to be 'familial' simply because the parties to it do not pretend to be married in due form of law." E F

In *Gammans v Ekins* [1950] 2 KB 328 Jenkins LJ had considered the relationship of an unmarried heterosexual couple who had children and, at p 332, had stated the matter in the same way as Stephenson LJ: "The situation assumed would present de facto what might be described as the equivalent of a marriage, with the natural consequences of a marriage." Therefore I consider that for there to be a de facto family relationship there must be the outward appearance of a de jure family relationship to which it is equivalent, but because the essence of marriage is a relationship between a man and a woman there is no de jure family relationship to which a homosexual relationship is equivalent and, moreover, paragraph 2(2) makes it clear that a homosexual relationship is not to be regarded as a de facto equivalent of marriage. G

The approach advocated on behalf of the plaintiff was adopted by the Court of Appeals of New York in *Braschi v Stahl Associates Co,* 544 NYS2d 784 which held that the term "family" in legislation protecting from eviction a person who had been living with a deceased tenant, included an adult lifetime partner of the same sex as the tenant whose relationship was long H

A term and characterised by emotional and financial committal and interdependence. In the majority judgment Titone J stated, at pp 788–789:

> "The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult
B lifetime partners whose relationship is long term and characterised by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units . . ."

He then cited definitions of "family" from Webster's Dictionary—"a group of people united by certain convictions or common affiliation" and from
C Black's Law Dictionary—"primarily, the collective body of persons who live in one house and under one head or management", and stated: "Hence, it is reasonable to conclude that, in using the term 'family', the legislature intended to extend protection to those who reside in households having all of the normal familial characteristics."

The definitions cited by Titone J accord with the second meaning of
D family given by the Oxford English Dictionary (the first meaning being "the servants of a house; the household"): "The body of persons who live in one house or under one head, including parents, children, servants, etc." but not with the third and narrower meaning: "the group consisting of parents and their children whether living together or not; in wider sense all those who are nearly connected by blood or affinity". In my opinion in this jurisdiction it would be contrary to Lord Diplock's judgment in the *Joram* case [1979]
E 1 WLR 928 to give the wider meaning to the term "family" and accordingly I would not follow the approach of the New York Court.

It was implicit in Mr Blake's argument that when protection was given in 1920 to a member of the tenant's family by the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 the courts would not have held that a homosexual partner was a member of the tenant's family. Mr Blake's
F submission was that the term "family" is always speaking and having regard to the greatly changed public attitude towards homosexuality it can now be given a meaning which includes a homosexual couple. In support of this submission Mr Blake relied on the speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822:

G
> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary
H intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of

the enactment, and the strictness or otherwise of the words in which it has been expressed." A

In my opinion this passage does not assist Mr Blake. In 1920 the fact of homosexuals living together in permanent relationships was known to Parliament, and if a homosexual couple was not intended by Parliament to come within the term "family" at that date I do not consider that changed public attitudes towards homosexuality mean that a new state of affairs has B come into existence which extends the meaning of that term.

A further difficulty which confronts the argument on behalf of the plaintiff is that if it is correct and if the underlying purpose of the legislation is to provide a secure home for a person who shares his or her life with the tenant in a relationship of mutual affection, commitment and support, it is difficult to see why two elderly spinsters who live together for mutual support and companionship in old age without any sexual element in their C relationship and who give each other devoted care should not qualify as members of the same family. I do not consider that the absence of a sexual relationship distinguishes such a case from the present one. The sexual relationship between a couple is a very important and enriching part of their life together, but I am unable to accept that there is such a distinction between an elderly homosexual couple who once had an active sexual D relationship and two elderly spinsters who never had a sexual relationship that the homosexual couple should be regarded as members of each other's family and the spinsters should not. If the courts depart from the requirement of the link described by Russell LJ and adopted by Lord Diplock it is difficult to discern what criterion would include one person residing with the tenant and exclude another.

The jurisprudence of the European Commission of Human Rights and of E the European Court of Justice does not assist the submissions advanced on behalf of the plaintiff. In *X, Y and Z v United Kingdom* 24 EHRR 143, 153, para 53 the European Commission stated:

"The Commission recalls that in a previous case it held that the relationship of a woman with the child of her long-term lesbian partner did not fall within the scope of family life, despite her sharing of a F parental role. The Commission found that despite the evolution of attitudes towards homosexuality, a lesbian relationship did not fall within the scope of the term 'family life'. Accordingly, article 8 did not import a positive obligation on a state to grant parental rights to a woman who was living with the mother of a child. While homosexual relationships could raise issues under the concept of 'private life', the G Commission found that the restriction complained of did not reveal any curtailment of the enjoyment of their private life."

In *Grant v South-West Trains Ltd* (Case C-249/96) [1998] ICR 449, 477–478 the European Court of Justice stated:

"33. The European Commission on Human Rights for its part considers that despite the modern evolution of attitudes towards H homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under article 8 of the Convention (see in particular the decisions in *X and Y v United Kingdom* (1983) 32 D & R 220, *S v United Kingdom* (1986) 47 D & R 274, 277–

278, para 2, and *Kerkhoven and Hinke v The Netherlands* (application no 15666/89), 19 May 1992 (unpublished), para 1), and that national provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to article 14 of the Convention, which prohibits, inter alia, discrimination on the ground of sex (see *S v United Kingdom* pp 279–280, para 7; *C and LM v United Kingdom* (application no 14753/89) 9 October 1989 (unpublished), para 2, and *B v United Kingdom* (1990) 64 D & R 278, 283–284, para 2)."

"35. It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex."

It was submitted on behalf of the plaintiff that the decision in the present case would be confined to the construction to be given to the term "family" in the Rent Acts and that a decision allowing the appeal would not have wider implications. I am unable to accept that submission. I am of the opinion that a decision in the context of the Rent Acts by your Lordship's House that because of changing ways of life and social attitudes the homosexual partner of a deceased tenant was a member of the latter's family could have considerable implications for the social life of this country and in other spheres of the law. In *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 the issue was whether the defence of duress was open to a person charged with murder as a principal in the second degree. In dissenting judgments (which were subsequently followed in the unanimous decision of this House in *R v Howe* [1987] AC 417) Lord Simon of Glaisdale said, at pp 695–696:

"I am all for recognising frankly that judges do make law. And I am all for judges exercising this responsibility boldly at the proper time and place—that is, where they can feel confident of having in mind, and correctly weighed, all the implications of their decision, and where matters of social policy are not involved which the collective wisdom of Parliament is better suited to resolve (see *Launchbury v Morgans* [1973] AC 127, 136F–137A, 137G)."

and Lord Kilbrandon said, at p 700:

"It will not do to claim that judges have the duty—call it the privilege—of seeing to it that the common law expands and contracts to meet what the judges conceive to be the requirements of modern society. Modern society rightly prefers to exercise that function for itself, and this it conveniently does through those who represent it in Parliament."

I consider that those observations apply with equal force to the issue in the present case and that the decision whether for the purposes of the Rent Act 1977 a homosexual is now to be regarded as a member of his partner's family or whether the law should be changed in some other way to protect a homosexual partner on the death of the tenant is a matter for Parliament to decide.

I fully recognise the strength of the argument, eloquently stated at the conclusion of Waite LJ's judgment [1998] Ch 304, 318–319, that Parliament should change the law to give protection to the homosexual partner of a deceased tenant and also to other persons who lived with and gave devoted care to deceased tenants. But in my opinion such changes can only be made by Parliament and accordingly I would dismiss the appeal.

LORD HOBHOUSE OF WOODBOROUGH My Lords, in this action the plaintiff, Mr Fitzpatrick, claims a declaration that he has succeeded to the tenancy of the late Mr Thompson of the ground floor and basement flat at 75A, Ravenscourt Road, London W6. He submits that he has this entitlement by virtue of paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977, as amended by the Housing Acts 1980 and 1988:

> "*Statutory Tenants by Succession.* 1. Paragraph 2 . . . below shall have effect, subject to section 2(3) of this Act, for the purpose of determining who is the statutory tenant of a dwelling-house by succession after the death of the person (in this Part of this Schedule referred to as 'the original tenant') who, immediately before his death, was a protected tenant of the dwelling-house or the statutory tenant of it by virtue of his previous protected tenancy.
>
> "2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence. (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. (3) If, immediately after the death of the original tenant, there is, by virtue of sub-paragraph (2) above, more than one person who fulfils the conditions in sub-paragraph (1) above, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be treated as the surviving spouse for the purposes of this paragraph.
>
> "3(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of two years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession."

He primarily submits that he is the "surviving spouse" of Mr Thompson because he was living with him "as his or her wife or husband" (paragraph 2(2)). Alternatively, he submits that he was residing with Mr Thompson "as a member of [his] family" (paragraph 3).

The relevant facts are not in dispute. The plaintiff and Mr Thompson were wholly unrelated. They had first met in June 1969 when the plaintiff did some gardening jobs for Mr Thompson. In 1972 Mr Thompson became the tenant of the flat, entitled to the statutory protection of the Rent Acts. In late 1976, by which time they had become close friends and lovers, the plaintiff moved in to live with Mr Thompson. Mr Thompson worked as a silversmith; the plaintiff had a job as a security guard. In 1982 Mr Thompson (now in his late fifties) was made redundant and could not get

A another job. The plaintiff changed his job to running a mobile snack bar, with which Mr Thompson helped. In January 1986, Mr Thompson had a bad fall injuring his head. He never recovered. He suffered a severe stroke. He was in a coma for a long time and after that never spoke again. He required constant care. The plaintiff was dissatisfied with the care which Mr Thompson was getting in hospital and in April 1986, having given up his job, took Mr Thompson back to the flat. Save for a short interruption, he B continued to care for Mr Thompson himself until he died in November 1994.

Their relationship was that of close friends and (at least up to January 1986) homosexual lovers. The depth of the relationship was demonstrated by the sacrifices which the plaintiff made during the later years and the loving care he gave Mr Thompson up to his death. It appears that C Mr Thompson had no relations or other friends to help care for him. No case of financial dependency in either direction has been alleged.

The statutory provisions upon which Mr Fitzpatrick relies form part of a scheme for the transfer of protected tenancies following the death of the original tenant which Parliament has substantially revised from time to time. Since legislation of this type was first introduced in 1915, the provisions have gone through a number of versions and most of the decided cases have D inevitably dealt with those earlier versions. In my judgment, the current wording must be construed having regard to the revised scheme of which it now forms part. Parliament has from time to time considered and decided to what extent the rights of succession should be increased or varied, most recently in 1988, and has amended the Act. The Act is social legislation. There are competing social policies and choices that are relevant to the E decision what statutory rights of succession should be granted. The situation is complex. There are conflicting interests; indeed the subject matter of these provisions is private law property rights. Inevitably, boundaries have to be drawn which may on occasions give rise to hard cases.

I mention this aspect not only because it is important but also because it is possible to have sympathy for those in the position of the plaintiff. A social argument can be made on their behalf for sympathetic treatment. They are F at least as meritorious as some of those who clearly come within the scheme. But likewise they are no more meritorious than some of those who clearly fall outside the scheme—devoted and caring friends who have lived for a long time with the tenant in the premises but have never engaged in sexual relations with the tenant. Similarly, some may argue that, in view of changing social attitudes to homosexual relationships, the time has come as G a matter of policy to equate such relationships with heterosexual ones. But such matters are for Parliament, not the courts. It is an improper usurpation of the legislative function, for a court to adopt social policies which have not yet been incorporated in the relevant legislation.

In the present case, the courts have been urged to extend by a process of liberal interpretation the concept of family to cover homosexual relationships and relationships of close long lasting friendship. It is H submitted that the usage of the word "family" may vary from time to time and that it has no constant meaning: that accordingly it should now in 1999 be given an up-to-date meaning: that spouse includes a homosexual relationship "akin" to marriage: that immigration law has recently been revised to take account of such relationships. This type of argument and its

proper limits were considered in the speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822, to which we were referred by Mr Blake, who appeared for the plaintiff on this appeal. Lord Wilberforce said:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair assumption that Parliament's policy or intention is directed to that state of affairs . . . when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made . . . In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case—not being one in contemplation—if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself."

Applying this to the present case, the relevant Act was passed in 1977 and has been amended since. On any view it is difficult to see what fresh set of facts has since come into existence. Homosexual relationships have been known about and existed throughout any relevant period of time and homosexual couples have shared accommodation. Not much has changed; the highest that it can be put is that the public attitude to such relationships has changed. This has nothing to do with any social policy concerning statutory tenancies by succession. If, contrary to what I have just said, it does have relevance, it is a matter for Parliament to consider not for the courts to ask themselves: "What would Parliament do now?" But even then one has to take into account that this legislative scheme was amended as recently as 1988. What Parliament then chose to do was to amend paragraph 2 of the Schedule in terms which, as I will explain, are directly contrary to the main submission of the plaintiff and affirm the necessarily heterosexual nature of the relevant relationship.

In the Court of Appeal [1998] Ch 304, 318–319, 324, Waite and Roch LJJ declined the invitation to adopt an extended interpretation of the statute. I would happily quote what Waite LJ said in full but as it is already set out in the published reports will refrain from doing so. Waite LJ expressly accepted the criticisms of the Act but then went on to refer to some of the difficult policy decisions which would have to be made if the Act was to be revised to give effect to these criticisms. He asked: "If succession rights are to be extended to couples of the same sex in a sexually based relationship, would it be right to continue to exclude friends?" He concluded that:

> "Few would support the potential for unfairness involved in a law which gives automatic succession rights to wives, however faithless, and children, however feckless, and at the same time denies any hope of succession to friends, however devoted their loyalty to the joint household. The judge was nevertheless right, in my view, to resist the

A temptation to change a bad law by giving it a new linguistic twist. He correctly acknowledged that such changes could only be made by Parliament."

I consider that Waite and Roch LJJ were, like the judge, right to resist the temptation.

But Ward LJ was unable to do so. He, by contrast, felt at liberty to give B effect to his own views and to make his own value judgments as to the appropriate treatment of homosexual relationships having regard to the changes in social attitudes. He also felt that he was entitled to refer to and take into account parliamentary debates and other material subsequent to 1980 notwithstanding that no warrant for such an approach was given by *Pepper v Hart* [1993] AC 593 nor by any accepted canon of construction of C statutes. His judgment serves to reinforce the correctness, and wisdom, of what was said by the majority.

No argument has been advanced in the present case based upon any submission that the legislation is improperly discriminatory. Such questions may arise hereafter but the arguments in the present case are based solely upon submissions as to the correct construction of the statute as amended.

As regards the first way in which the plaintiff puts his case—that he was D Mr Thompson's "spouse" or was living with Mr Thompson "as his or her wife or husband"—I agree with what has already been said by your Lordships. They were living together as a homosexual couple. *Harrogate Borough Council v Simpson* 17 HLR 205, where the Court of Appeal had to consider the parallel provisions in Part IV of the Housing Act 1980, was rightly decided and remains good law. To accept the submission of the E plaintiff would be an exercise of legislation, not interpretation. I therefore need not say more about the argument which the plaintiff put in the forefront of his case on this appeal.

I must however say something more about paragraph 2 since, as already observed, it has been preceded by different provisions. The Rent Act 1977 and its predecessors used the word "widow". The Housing Act 1980 amended the right to succession to cover surviving spouses; i e it was F extended to widows and widowers. The gender distinction was removed. Then in 1988, it was amended again to cover a person living with the tenant as his or her wife or husband. This extension brought in de facto relationships and removed the requirement that the parties should have been legally married. It thus subsumed the decision of the Court of Appeal in *Dyson Holdings Ltd v Fox* [1976] QB 503. But it still required a G heterosexual relationship equivalent to marriage. Parliament did not go so far as to extend the provision to homosexual relationships akin to marriage nor to friendships, however close or long lasting, not accompanied by the additional factor of living together as husband and wife. The criterion of as "husband and wife" was retained and confirmed. (See also *In re the Estate of John Watson (Deceased)* The Times, 31 December 1998, cited by Mr Blake, where Neuberger J used reasoning wholly inconsistent with extending the H category beyond heterosexual relationships.)

The policy disclosed by the 1988 revision is thus to recognise factual as well as legal relationships but to continue to require that they correspond to the heterosexual concept of legal marriage. This policy appears to adopt and conform to the decision and statements of principle in the speech some years

earlier of Lord Diplock (agreed to by the other members of the House) in *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928, to which I will come shortly.

As will already be apparent from my reference to Part IV of the Housing Act 1980 and the *Harrogate* case 17 HLR 205, there were precedents for the type of language used for the 1988 amendment. Another was Schedule 1 to the Supplementary Benefits Act 1976. In *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498, Woolf J had to consider that Schedule and whether the relevant person was living with the applicant as husband and wife. The facts were that the man was a longstanding friend of the applicant who, after she had been seriously injured in a road accident and her daughter was no longer able to look after her, moved in to her home and lived there, looking after her and the house, indeed doing all the things that a husband would do for a sick wife. It was not a commercial arrangement. But they had no sexual relationship; they were not living as husband and wife. Therefore the claim to the supplementary allowance failed. The functional argument was rejected.

Turning now to paragraph 3, it covers (and gives certain limited rights to) a person who does not come within paragraph 2 but is a member of the tenant's family. Following through the policy of the legislation, this extension covers those who are in a legal or de facto relationship to the tenant of blood or affinity. The legal relationships are thus the parents and grandparents, the issue, natural and adopted, of the tenant or of his or her spouse, their respective siblings, nephews and nieces and the spouses of such persons. The factual relationships are the same—informally adopted children and (usually) children for whom the tenant has parental responsibility—and persons with whom the tenant would have had a relationship of affinity if the tenant was legally married to the person with whom he or she is living as his or her husband or wife.

But, for the purposes of paragraph 3, the relationship, whether of blood or affinity, must be an actual one. The person must actually be a member of the tenant's family; it is not enough that he or she be living with the tenant *as if* he or she was a member of the tenant's family: *Sefton Holdings Ltd v Cairns* 20 HLR 124. This is not in dispute.

In *Joram Developments Ltd v Sharratt* [1979] 1 WLR 928, the defendant whom the landlord was seeking to dispossess was in no blood relationship to the deceased tenant, an elderly widow with whom he had gone to live 18 years earlier. Their relationship was one of close friendship, platonic and filial. He had been 24 when he first came to know her. She would have liked to speak of him as her son but this was not acceptable to him because his mother was still alive. He therefore called her Aunt Nora. He was financially independent of her; his motive during the 18 years he lived with her in her flat was simply kindness and affection. The county court judge had decided in favour of the defendant on the ground that he was a member of her family. The Court of Appeal reversed that decision.

In the House of Lords, Lord Diplock opened his speech by saying, at p 929:

> "My Lords, the only question in this appeal is one of construction of the Rent Act 1968. It is whether a person between whom and the deceased statutory tenant of a dwelling house there is no connection by way of consanguinity, of affinity, of adoption (de jure or de facto) during

A minority or of regular sexual intercourse (past or present) can be a member of the tenant's family within the meaning of Schedule 1, paragraph 3 to the Act, so as to entitle him to become the statutory tenant of the dwelling house by succession to the deceased."

Lord Diplock is thus listing the established parameters of the concept of family and saying that the House has to decide whether they should be B extended. He refers to two de facto categories: that which arises from adopting a child during its minority and that which arises from regular sexual intercourse past or present. This last category has now been subsumed into living "as his or her wife or husband". A sexual relationship not amounting to living together as husband and wife will not suffice but living together as husband and wife will suffice even if the parties choose not C to have sexual intercourse (as may also be the case in a legal marriage). Lord Diplock declined to enter upon a discussion of the correctness of the decision of the Court of Appeal in *Dyson Holdings Ltd v Fox* [1976] QB 503 and as I have said that particular question has now been resolved by statutory amendment. There are other cases which illustrate the position summarised by Lord Diplock.

D Some early cases under the legislation equated membership of a tenant's family with membership of his household. On this reasoning it could even extend to his servants or lodgers: *Stewart v Mackay* 1947 SC 287. But these opinions were clearly wrong and cannot be sustained; they would amount to substituting a judicial policy for that contained in the legislation. They cannot now be supported nor did the plaintiff seek to do so. They are clearly inconsistent with later and superior authority. See, for example, *Ross v* E *Collins* [1964] 1 WLR 425, where a devoted housekeeper of many years standing was held to be not entitled to succeed to the tenancy: "there was no family relationship of any kind": p 430, per Pearson LJ.

The word "family" is as has often been said not a term of art but describes a unit which has the familial characteristics. One such characteristic is the existence of blood relationships. Thus, in *Hawes v Evenden* [1953] 1 WLR F 1169, a group which consisted of the tenant, his mistress of some 12 years and their two children was easily recognised as being a family. (cf *Gammans v Ekins* [1950] 2 KB 328.) In *Brock v Wollams* [1949] 2 KB 388, a woman, who had at the age of 5 in 1912 been informally adopted by the tenant and brought up as his daughter and who returned later in her life (after her husband had died) to live with the tenant, was held to be a member of his G family, even though not a blood relation. It was his de facto adoption of her whilst a child that made her a part of his family.

The limits upon the ambit of the word family were most forcefully expressed in the case of *Gammans* [1950] 2 KB 328. A childless couple were living together as man and wife but they had not married. The woman was not part of the man's family. Asquith LJ, using language which would scarcely be acceptable today, unequivocally rejected the idea that mere H friendship or a sexual relationship between two people of the same or a different sex could amount a family. He and the other members of the Court of Appeal affirmed that the concept of family must involve blood or affinity. The only exception was relationships whereby one person becomes in loco parentis to another, for example *Brock v Wollams* [1949] 2 KB 388.

Returning to the speech of Lord Diplock in the *Joram* case [1979] 1 WLR 928, 930 he left open the questions raised by *Dyson Holdings Ltd v Fox* [1976] QB 503. As I have already observed, the legislature has, by the amendments which it has chosen to make to the 1977 Act, already addressed the implications of that decision. Lord Diplock's ratio decidendi follows on a reference to *Gammans v Ekins* [1950] 2 KB 328 and *Ross v Collins* [1964] 1 WLR 425. Lord Diplock, at p 931, chose to adopt as his own what was said by Russell LJ in the second of those cases, at p 432:

> "Granted that 'family' is not limited to cases of a strict legal familial nexus, I cannot agree that it extends to a case such as this. It still requires, it seems to me, at least a broadly recognisable de facto familial nexus. This may be capable of being found and recognised as such by the ordinary man—where the link would be strictly familial had there been a marriage, or where the link is through adoption of a minor, de jure or de facto, or where the link is 'step-', or where the link is 'in-law' or by marriage. But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or as sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such and even if they refer to each other as such and regard their association as tantamount to such. Nor, in my view, would they indeed be recognised as familial links by the ordinary man."

This ratio decidendi is binding upon your Lordships. It is inconsistent with the arguments of the plaintiff. Living together as homosexual lovers is not a familial relationship. It is a different relationship: for present purposes, as counsel said, no better and no worse—no less or more meritorious, just different. At one stage of his submissions Mr Blake expressly disavowed any reliance upon the existence of sexual relations between the plaintiff and Mr Thompson. But Mr Blake would have been wrong to abandon, if this was what he was doing, this plank of his case. Absent a sexual relationship, the relationship would have been no more than one of caring friendship which on any view does not suffice. He has to be able to say that the existence of a (formerly active) homosexual relationship makes all the difference. Stripped of that feature he cannot, on the English authorities, succeed.

It is understandable why Mr Blake shrank from putting his client's case in that way. It would expose the degree of the extension of the previous authorities for which he has to contend and points up the lack of support for his argument in the drafting of paragraphs 2 and 3 of the Schedule. If Parliament had wished to take this further radical step, extending the rights of succession to protected tenancies, it would have given some hint of its intention in the amendments which it made after 1977. It has manifested no such intention. The *Dyson* decision [1976] QB 503 has been recognised by the legislature in its amendment of paragraph 2. The argument of Mr Blake would seem to treat as family two persons of the opposite sex living together in the same flat or house who have or have had a long term stable sexual relationship but do not choose to be known as man and wife. Regardless of

A the reason for their choice, paragraph 2(2) makes it essential that each should be living as the wife or husband of the other. If your Lordships are being asked to say that nevertheless the survivor should still qualify as family under paragraph 3 on the strength of the decision in the *Dyson* case the invitation should in my judgment be rejected. The amendment to paragraph 2 has laid down the relevant criterion which the relationship must satisfy. By a parity of reasoning, the *Dyson* case does not now provide the plaintiff with B a route down which he can pass asserting an equivalence between homosexual and heterosexual relationships.

The word "family", as I have previously observed, is not a term of art. It is a word which is used to refer to a scheme of relationships having certain characteristics. All those characteristics may not be present in every case; this is the nature of descriptive words. But in any case there must be C sufficient of the relevant characteristics to justify the application of the descriptive term. In deciding a legal question it is necessary to decide on which side of the line the individual case falls. This exercise is not one of choosing what social policy to support. It involves looking at the language of the statute construed in its legislative context and having regard to the previous decisions of the courts. The decided authorities have told us what the relevant characteristics are. The legislative context has been made clear D by the history of the amendments made. The fundamental difficulty for the plaintiff is that he is seeking to establish a legal right against the owners of the property, the defendant in the action, based upon the advocacy of a social policy which may one day be adopted by the legislature but which has not yet been incorporated in legislation and which anticipates the essential policy and drafting decisions which would have to be taken by the E legislature.

Finally, I should shortly refer to certain legal decisions from other jurisdictions upon which Mr Blake sought to rely. These citations did not assist the plaintiff's case.

Mr Blake strongly relied upon the approach of the Court of Appeals of New York in *Braschi v Stahl Associates Co* 544 NYS2d 784. In a similar context, occupancy rights to a rent controlled apartment, the court adopted F a broad approach to the application of the word family as being a relationship characterised by emotional and financial commitment and interdependence and not limited to persons connected by blood or law. However, the reasoning of the judgment of Judge Titone shows, unsurprisingly, that the law of New York is inconsistent with decided English cases. At p 789, he adopted definitions of "family" from Webster's G Dictionary—"a group of people united by certain convictions or common affiliation"—and from Black's Law Dictionary—"the collective body of persons who live in one house and under one head or management". By such criteria households of close friends are to be treated as families; this is not the law of England nor is it suggested that it is.

The other class of citation made by Mr Blake was from decisions of the European Court of Human Rights and the European Court of Justice. In *X, Y and Z v United Kingdom* 24 EHRR 143, it was alleged that the refusal to H register a female to male transsexual "X") as the father of a child ("Z") born to the woman ("Y") with whom the transsexual was living was a breach of article 8 of the Convention guaranteeing the right to family life. The child had been conceived by AID from an anonymous donor. The court

recognised that the previous decisions of the court had not gone so far as to hold that a homosexual relationship was a family relationship: see p 153, paras 52 and 53, of the Commission's opinion, p 166, para 34, of the judgment and *Kerkhoven and Hinke v The Netherlands* (application no 15666/89), 19 May 1992 (unpublished). The court held that there was a family unit in the case before it because of the fact that the couple were living as husband and wife and the presence of the child Z with whom X was living as her father. The court therefore accepted the applicability of article 8 but went on to hold that there had been no breach. The reasoning of the judgment is in line with the English law and is inconsistent with Mr Blake's submissions. A homosexual couple living together does not constitute a family. As regards the right to marry (article 12), the court has affirmed the heterosexual character of marriage and has refused both under article 12 and article 8 to treat same sex couples, even where one is a transsexual, as the same as heterosexual couples: *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163.

In *Grant v South-West Trains* (Case C-249/96) [1998] ICR 449, the European Court of Justice was concerned with an allegation that concessionary fares granted to heterosexual couples, married or unmarried, was unlawfully discriminatory against homosexual couples. The allegation was rejected because the relationships were not equivalent. The Strasbourg jurisprudence was referred to as well as previous decisions of the European Court of Justice. The court held, at p 478, para 35:

> "It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex."

Here again the citation does not assist the plaintiff. Indeed it underlines that the developments for which he contends involve developments of policy and fall far outside the proper ambit of statutory construction.

I would dismiss the appeal and uphold the judgments of the majority in the Court of Appeal.

Appeal allowed.

Solicitors: John Ford; Belvederes.

CTB