Happy new year to all who read, comment on or write for Nearly Legal!

This is usually a moment to take stock of the past year and look forward to the next, but I’m feeling far too lazy to do it properly. Luckily, the DCLG have made the task easier by shouting again that they propose to crack down on subletting. In what is rapidly becoming an annual tradition, Grant Shapps has announced plans to consult on proposals to make sub-letting a criminal offence. Rather oddly, Mr Shapps says:

For too long this country has turned a blind eye on the multi-billion pound problem of housing tenancy fraud and abuse.

which I take to be an admission that last year’s ‘crackdown’, action team and all, was utterly ineffective.

As to the proposals - the devil will be in the detail.

Mr Shapps has coupled the sublet issue with proposals to remove security of tenure and levy a ‘market rent’ on social housing tenants earning over £100,000 per year, hitting an estimated 6,000 tenants nationally. This seems rather over the top for legislative action, but would establish the principle of restriction on tenure by income level. This may well go further, as introducing legislation with the main aim of removing Bob Crowe’s security of tenure seems a little excessive.

What with this, the coming into force of the Localism Act, with new tenure provisions, and one presumes a response to the consultation on an ASB mandatory ground for possession and closing the bus pass loophole, it is going to be a busy year. There is plenty to look forward to in case law, as well.

The blog has had a successful year, with more than 300,000 hits in 2011. Over 1250 people subscribe to updates by RSS and email (over 1000 by email), and, worryingly, over 1700 follow the @nearlylegal twitter feed. I say worryingly, as @nearlylegal has a tendency to go off piste.

The we joined the Guardian Legal Network and our pieces appeared on the Guardian Law and Guardian housing pages. What was probably the most remarkable part of the year for me was the astonishing response through the blog in terms of people signing the public letter on the mis-representation of the law on squatting. It was a genuine surprise (and somewhat humbling) to see the level of response.

At the end of 2011, another four excellent people joined the NL team, so that there are now 10 of us. Newly refreshed, we aim to keep going to our usual standard (a pleasingly non-committal and unenforceable phrase) in 2012.

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Proportionality, Art. 8 and Monk

Mon, 02 Jan 2012 18:52:27 +0000

SJM
Chesterfield BC v Bailey is a highly instructive case heard at first instance by Recorder Tilbury in the Derby County Court. We thank Philip Barber of Zenith Chambers for providing us with a transcript of the judgment. The Defence was run by Chesterfield Law Centre. [Now on Bailii [2011] EW Misc 18 (CC)]

The case deals with the issue of termination of joint tenancies via a notice to quit under the rule in Hammersmith v Monk and the proportionality/lawfulness of possession proceedings within Article 8 ECHR.

JB had been the secure tenant of her 3 bedroom council property since 2002 and her sole tenancy became a joint tenancy after she married her husband, RB. The parties separated in 2005, leaving JB and her two children in occupation of the property. Several years later, RB received a communication from the council regarding rent arrears for the property he was no longer occupying. Following discussion with the council and reassurances that he would not thereafter be liable for rent arrears, RB served a notice to quit to end the tenancy, which was meant to end on 4th October 2010. The council commenced possession proceedings against JB and the case came before the judge on 12th October 2011.

The initial point to be made is that the judge's comments on the proportionality of the eviction are only obiter, as the possession proceedings were dismissed for want of a lawful notice to quit: the tenancy agreement required 4 weeks but only 3 weeks and 6 1/2 days were provided. Nevertheless, the judge gave lengthy reasons why eviction, notwithstanding the notice issue, would have been disproportionate.

Firstly, in advancing a Gateway B defence, JB referred to a section of the council's policy, which permitted a further discretionary tenancy to previous tenants who had a 15 year tenancy record. JB argued that this time limit was irrational and did not provide any flexibility for those who were otherwise good and deserving tenants. The judge did not accept that the policy was irrational but agreed that a policy allowing tenants to have their tenancies restored was relevant to proportionality. The judge concluded:

In looking at whether it was necessary in a democratic society to apply for possession and whether it was a proportionate means of achieving a legitimate aim, I have to accept that the council was in a strict sense legally entitled to do so, and that they were not motivated by bad faith and were simply pursuing the goal of satisfying the needs of those on their housing list. I am not satisfied however that their decision to seek possession was however either necessary in a democratic society or proportionate in the circumstances of this case. This defendant had lived in this property since 2002, had lived in a previous council property since 1996, and had moved from that property mainly at the behest of the council. Had she not moved and remained in her previous property she would be secure under the 15 year rule. She has spent money on this property and any move involves further expenditure of money. In a case such as where her husband had given the present notice in circumstances where she could do nothing about it (and did not even have notice of it until either it had taken effect or possibly very shortly before) I do not find it reasonable for the council without more to rely on that notice. Where a tenant is without blame it seems to me that the council should look and see whether otherwise they might be entitled to obtain possession. If they have grounds within the statutory regime then it is quite right that they should do so, and any challenge to their rights on article 8 grounds in my view will be met by their rights following the notice to quit, as well as the statutory grounds entitling them to possession. Where there are no statutory grounds available to them (as here), and where there is no fault on the part of the defendant, and the defendant had previously had and enjoyed security of tenure without complaint, an order for possession would in my view breach the defendant’s article 8 rights.

Comment: the above paragraph is particularly interesting as it demonstrates the interface between the council's right to take possession for the proper management of its housing stock (as established in Pinnock, Powell etc) and policy documents giving a stake in the management of that stock to people in the Defendant's position. One suspects that had it not been for the 15 year rule, the Claimant's arguments would have been more potent and decisive. Although the proportionality aspect of the decision is obiter,
it underlines the importance of using policy documents to one's advantage when proportionality/Gateway B arguments need to be raised.

Finally, it should be added that the judge declined to find that the *Hammersmith v Monk* rule was not compliant with Art. 8. That will have to wait for another case.

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**Substantial Dispute**

*Wed, 11 Jan 2012 00:21:50 +0000*

*David Smith*

**Benesco Charity Ltd v Kanj & Anor [2011] EWHC 3415 (Ch)**

*CPR55.8* has been the subject of a surprising amount of appellate interest recently. For those of you not nodding sagely at this point CPR55.8 deals with the Courts obligations at a summary possession hearing. Put simply the Court has two choices at such a hearing, set out in CPR55.8(1). They can either decide the claim by making a possession order or give case management directions. CPR55.8(2) states that "where the claim is genuinely disputed on grounds which appear to be substantial" those directions must either include an allocation to track or enable that allocation to occur.

In this case Benesco granted a lease to Speedway Tyres Ltd for ten years. K was key in the incorporation of the company and his wife was a director but K himself had no official status. Speedway was placed into liquidation along with an associated company called Autocare Ltd. The liquidator disclaimed the lease in June 2011. On 7 September K applied for a vesting order on the basis that he had a personal sub-tenancy. This application has yet to be determined. K then appeared to change his position to state that he was the assignee of a sublease held by Autocare in the basis of an assignment which was made on 20 September 2011.

Benesco then issued proceedings against K and persons unknown as trespassers on 9 September. K defended this on the basis that Speedway had granted him or alternatively Autocare a sub-tenancy in October 2004. This was not actually something he could assert for Autocare until he had obtained the assignment on 20 September. There was also the issue that Benesco had granted a tenancy at will to ECRC Ltd (of which K was a director) in June 2011. K asserted that this tenancy was not binding due to misrepresentation on the part of Benesco but this was not something that the appeal court was prepared to give a view on.

In short, the Court at first instance was unimpressed by the witness statements produced by K and dismissed them out of hand, granting possession to Benesco. It was this decision that was appealed.

The High Court held that where witness statements supported by statements of truth are produced which allege reasons why possession should not be granted then these:

- should be not rejected at a summary stage unless the evidence is incredible. A person is entitled where there are matters raised in the witness statement unless that high threshold is reached to take the matter to trial.

While K's case was weak and the High Court made clear that it doubted the veracity of their story it was equally clear that K should not have had his case summarily dismissed. The appeal was therefore allowed and a trial date was set.
Occupy LSX update

Thu, 19 Jan 2012 13:45:24 +0000

NL

As you may well have seen in the news, the Corporation of London was granted a possession order and injunction against the tents and camp of Occupy LSX in the churchyard area outside St Paul's Cathedral by the High Court on Wednesday 18 January. The judgment is on the Judiciary website here.

We'll have a note on the judgment shortly, but the main finding was that, given the Corporation's right to possession, the interference with the protestors' Article 10 and 11 rights was justified and proportionate in view of the need to protect the rights and freedoms of others, including public passers-by, St Paul's Cathedral, church-goers and businesses in the area.

The freedoms and rights of others, the interest of public health and public safety and the prevention of disorder and crime, and the need to protect the environment of this part of the City of London all demand the remedy which the court's orders will bring.

Permission to appeal was refused. The Corporation offered a 3 day stay of enforcement for an application for permission to the Court of Appeal. Occupy asked for 7 days. The High Court stayed enforcement for 7 working days, to 4 pm on 27 January, for an application to appeal to be made.

Meanwhile, we wait for the Court of Appeal on the UBS v Bank of Ideas appeal, which will also raise the intriguing issue of Art 10 and Art 11 rights biting as a defence to possession of private property, as opposed to the public highway in City of London -v- Samede.

Full of Sound and Fury...

Thu, 19 Jan 2012 21:41:04 +0000

NL

Signifying nothing*

(*And yes, I am aware that the preceding line is 'A tale told by an idiot'.)

The much trumpeted Wandsworth riot related eviction has stalled even before possession proceedings were issued. According to a press release from Liberty, following a meeting with the tenant's legal representatives (the tenant is represented by Liberty), LB Wandsworth agreed not to bring proceedings.

If you recall (and here is our very first take on the matter, written on the day of the press release and subsequent service of Notice Seeking Possession by Wandsworth), the son of the tenant was charged with riot related offences. The son has now been sentenced for burglary. The tenant has an 8 year old daughter and was generally regarded as a community asset for voluntary work with youth groups and domestic violence victims.
Wandsworth had stated their intention to rely on their amended tenancy agreement which had as a condition that no-one in the household should do anything naughty or upsetting in the whole borough - thus considerably wider than Ground 2 Housing Act 1985. (The full text of Wandsworth's clause is in the previous post). While clearly it is a good thing for the tenant that proceedings have been dropped, it would have been interesting, to say the least, to see this tested in Court, against an Article 8 defence amongst other things.

We should not forget that this whole sorry episode started with a Wandsworth press release trumpeting that they were the first to pursue a riot related eviction. Now, they are no doubt hoping that dropping the case will pass quietly and without a splash. Meanwhile, the tenant's life has been laid open to press and public by Wandsworth in pursuit of what looks like a grandstanding political gesture.

One wonders whether things might not be entirely over. Certainly Wandsworth's conduct would invite scrutiny.

And is there a question mark over riot related possession steps taken by LB Southwark?

After sending out warning letters of intent last summer to quite a few tenants whose household members were 'suspected' to have been involved in the riots, Southwark did serve some five Notice Seeking Possessions this January on the basis of riot related convictions being a breach of tenancy agreement. It is not clear if the tenant was the person convicted, or a member of the household. But, rather bizarrely, Southwark stated that no further proceedings would be taken against the five, instead any 'further breaches could result in eviction'.

Now while it is not, perhaps, uncommon for Local Authorities to use NSPs as a warning shot in effect - e.g. in arrears cases - it is very odd to find NSPs being publicly and 'officially' used in this way. An NSP is, after all, a formal statement of the landlord's intention to bring proceedings, not a conditional agreement. I do find myself idly wondering whether the decision to use an NSP in this way may be open to a public law challenge. If anyone is bringing such a challenge, we'd be very interested to hear from you.

When is a warrant executed?

Sat, 21 Jan 2012 19:28:22 +0000

NL

Royal Bank of Scotland v Bray Halifax County Court 25 November 2011

At what point in the course of an eviction and securing of a property is the warrant considered to be executed, so that no application for a stay can be made? This is a County Court case, but the Court's decision is clear and supported.

Mrs Bray's home was mortgaged to RBS. RBS had obtained a possession order and had obtained, then withdrawn 5 previous warrants. RBS got a further warrant. Before the eviction date Mrs B wrote to RBS offering to clear the arrears at lunchtime on 18 November 2011 as she had sold her car and the funds would have cleared by 18 Nov. She heard nothing in response and went to work on 18 November. She was then called by a neighbour to say they had seen someone in her garden. She went home to find the court bailiff, locksmith and dog handler there. They had gained access though the rear door.

The bailiff told Mrs B to make an emergency application. She rushed to the Court and made an application. The Court officer referred the application to the bailiff's clerk and the Judge, but the Judge
was incorrectly told that the warrant had already been executed and the application was not heard. Mrs B was referred to the CAB, which made an emergency application to set aside the warrant on the ground of oppression, but Mrs B also sought to rely on her original application from that morning, arguing that it had been made before the warrant had been executed, as the bailiff had not at that time given quiet possession to the Claimant.

At the hearing, the bailiff confirmed that he had received a telephone call from the court about Mrs B’s application while he was still at the property and before it had been fully secured and both locks refitted.

The District Judge found that the warrant had not been executed at the time that Mrs B had issued her application. The warrant was suspended on terms of payment of the arrears in full and of mortgage instalments thereafter.

My view is that this has to be right. The warrant be in the course of being executed, but it is not fully executed until the bailiff has finished and the Claimant has quiet possession. (Woodfall, The Law of Landlord and Tenant, supports this view).

Hat tip to the January 2012 Legal Action Housing updates for the case report and to Calderdale CAB for letting us know about the case in the first place.

Proportionality and stay of eviction

Sun, 22 Jan 2012 13:50:29 +0000

NL

One of the questions posed as a result of Hounslow LBC v Powell [2011] UKSC 8 [our report here] is what happens if a proportionality argument is raised after a possession order has been made, but before eviction.

Powell found that s.89 Housing Act 1980, which limits the time for a stay of possession order to a maximum of 6 weeks, was compatible with Article 8. So, once a possession order has been made, does the court have any discretion to revisit or extend a period of stay beyond 6 weeks?

Ngesa v Crawley BC [2011] EWCA Civ 1291 [Not on Bailii yet] addresses this issue, though perhaps not in a very satisfactory manner. It was a Court of Appeal permission hearing in front of Rimer LJ. I believe that the appellant was not represented and, as we’ll see, the facts are hardly attractive, but nonetheless, the Court’s view is clear.

Ms N was an unsuccessful asylum-seeker. She had applied to Crawley as homeless under a false name and provided a non-secure tenancy as temporary accommodation. A notice to quit was served after she fell into rent arrears. Crawley sought possession. No defence was filed and no article 8 point raised. Crawley were granted a possession order stayed for 28 days. After the 28 days, Crawley obtained a warrant.

Ms N sought permission to appeal out of time. She argued that the Circuit Judge on first appeal ought to have applied article 8 of his own motion and to have adjourned to get a fuller picture of the facts.
Permission to appeal was refused. Rimer LJ held that in the absence of any defence, the first DDJ had no alternative but to grant possession. The granting of a possession order circumscribed the Court's subsequent powers by operation of s.89 HA 1980. As the Supreme Court in Powell had found s.89 to be compatible with article 8, there was no basis for a challenge to the operation of s.89.

**Comment** As we noted at the time, the decision on s.89 in Powell was a major restriction on the discretion of the Court suggested in Pinnock, and indeed seemed to go against Pinnock in that regard. The effect, at least as set out in this case, is that a proportionality defence has to be raised in the possession proceedings before an order is made. While it may be possible in some circumstances to seek a set aside of a possession order (under CPR 39.3 or indeed CPR 3.1), that will not always be so. If the strictly obiter statements in Powell stand, that will be the end of the matter, no matter what the Court's view might be on the proportionality of an eviction once the circumstances have been raised in a stay application.

Hat-tip to January's Legal Action 'Recent Developments in Housing Law' for news of this case.

"I could be a lawyer with stratagems and ruses"*

Sun, 29 Jan 2012 20:00:44 +0000

NL

Wasted costs orders are scary things. There is the censure by the Court, of course, but worst of all, the solicitors then have to pay and, no matter how much or how little, that rips shreds out of the very essence of their being.

Threats to pursue wasted costs tend to be waved around rather too often by some solicitors, perhaps overly convinced of their own rightness. Usually what is at issue is actually a valid point of dispute. Personally, I think these threats tend to backfire, at least if the recipient is reasonably sure that an application would fail. Nothing shrieks of a lack of strength in a position so much as a big blustery threat.

However, there are times when a wasted costs order is certainly merited and where the solicitors have been really very naughty indeed. One such case has landed on the NL virtual desk and, although not strictly housing related - being a business lease - it is an opportunity to remind ourselves of the criteria for wasted costs orders.

**Odihambo v Gooch** Birmingham County Court, 24 October 2011 [Not available on Baili. We've got a transcript]

Mrs O had a commercial lease of a property, trading as a restaurant. The lease was excluded from protection (and renewal rights) under the Landlord and Tenant Act 1954 and Mrs O had signed a statutory declaration stating that she was not entitled to claim compensation for loss of the premises - this was agreed to be the case by Ms O's previous solicitors in discussions about remaining in the property. It was a 3 year lease and expired in October 2009.

Mrs O stayed on, paying rent as before. She was a tenant at will, as accepted by her previous solicitors. Discussions on new terms took place but failed. In November 2010 a notice to quit was served, taking effect in March 2011. By March 2011, IEI Solicitors were acting for Mrs O. Come the date in March, Mrs O did not leave. After further letters, the landlord, Mrs G, made a peaceable re-entry to the property on 5 April 2011.

On 6 April, Mrs O, through IEI Solicitors, issued a Part 8 Claim and an application for an injunction for
re-entry. The claim simply said that the landlord "without complying with the Landlord and Tenant Act 1954" and without rent being owed, had entered the property and changed the locks. An accompanying claim for costs had an affidavit from Mrs O saying that she was 'amazed to discover' that the landlord had entered without a court order, repeating that the landlord had 'failed to follow the due process of law under the Landlord and Tenant Act 1954'.

When the application and claim came before a CJ on 8 April 2011, Counsel for Mrs O only advanced one argument, that the acceptance of rent between the service of NTQ and the date it expired constituted acceptance of a new tenancy at will by the landlord. This was, as noted in this judgment, a 'hopeless' argument, with no chance of success. The hearing was adjourned, by consent, to 9 May 2011 in front of HHJ David Cooke, supposedly on this point alone. Mrs O re-entered under the terms of this agreement.

The claim and application was abandoned on 6 May (a Friday) and the hearing proceeded on costs alone. At the hearing Counsel for Mrs O indicated that he had informed IEI after the previous hearing that the argument was hopeless. Costs of £8882.40 were ordered against the Claimant. HHJ Cooke made an order that IEI should show cause why a wasted costs order should not be made.

The relevant part of the CPR is Rule 48.7. Para 53.4 of the Practice Direction to Rule 48 states:

It is appropriate for the court to make a wasted costs order against a legal representative, only if – (1) the legal representative has acted improperly, unreasonably or negligently; (2) his conduct has caused a party to incur unnecessary costs, and (3) it is just in all the circumstances to order him to compensate that party for the whole or part of those costs.

The notes to the PD in the White Book raise Saif Ali v Sydney Mitchell & Co [1980] AC 198 to the effect that "improper" covers conduct which would result in debarment, striking off, suspension or other serious professional penalty. "Unreasonable" describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct was the result of excessive zeal and not improper motive. "Negligence" is to be taken in the non-technical sense of a failure to act with the competence reasonably expected of ordinary members of the profession.

It is also necessary that there should have been a breach of the lawyer's duty to the court. There must be more than mere negligence.

Following Persaud v Persaud [2003] EWCA Civ 394, the question of hopelessness is to be considered on the basis of whether no reasonably competent legal representative would have continued with the action. A case which is not hopeless but is quite proper to argue will not be an appropriate basis for a wasted costs order if the case is discontinued.

The Court set about applying these principles to the present case.

IEI sent a letter to the Court for the wasted costs hearing, arguing that their client had instructed them to bring proceedings for re-entry because "the manner of her eviction was not palatable for her business" (I adore this line, and I propose a sustained campaign to bring in the 'palatability' defence alongside proportionality).

IEI then said that following the hearing of 8 April, they had been telephoned by Counsel saying that the client had been asked to re-enter and to send the rent to them to pay on to the Defendant. Counsel said that a skeleton argument had been directed and he would deal with it. They did not get the Order from the Court. They were then surprised to be contacted on 18 April, presumably by the Defendant, seeking a skeleton and agreed statement of facts. They were then contacted by Counsel on 4 May to say that there were no prospects. They stated that they then immediately contacted the other side.

In short, they tried to put the blame on the client and on Counsel.
This didn't get them very far. On the evidence it appeared likely that IEI had known that Mrs O's lease was excluded from the 1954 Act either before issuing the injunction application, or in any event by 7 April.

It was therefore a 'grave concern' that the Part 8 claim and injunction application were in the form that was issued. There was a suggestion of a rent dispute and a suggestion that the 1954 Act was engaged, but no mention of the notice to quit, 3 months notice and tenancy at will. When the matter came before the court on the initial injunction hearing, there was a duty of full and frank disclosure to the Court of all relevant matters and the application and affidavit fell far short of this. Mrs O had professed herself to be 'amazed' to find the landlord had re-entered, when she was fully aware that she had been required to vacate on 25 March. There was a serious degree of misrepresentation by omission which amounted to an abuse of process. Either IEI knew before the claim was issued or they knew before it was heard on 8 April. The fact that Counsel had managed to obtain an adjournment on different and extremely flimsy grounds didn't alter that.

IEI then appeared to give the matter no further consideration until they received Counsel's note on 4 May and took no steps to inform themselves of what had taken place after Counsel's initial call. The ground put forward by Counsel was so flimsy that no competent solicitor or barrister could have properly maintained it.

In view of the urgency of the proceedings brought, it was simply not acceptable that the Claimant's solicitors appeared not to have taken any substantive steps to prepare for the later hearing or to chase up counsel.

And then, even after being told there was no case on 4 May, IEI did not contact the Defendant's solicitors until 6 May, after the Defendant had had to brief Counsel for the Monday 9 May hearing. What is more, IEI had offered to discontinue on the basis of no order as to costs, which was of course going to be wholly unacceptable to the Defendant. There was no excuse for the delay or for making a proposal that they must have known would be unacceptable and would mean the hearing going ahead.

The claim was therefore initiated in circumstances that made it an abuse of process and the solicitors acted improperly and unreasonably in doing so. The solicitors then effectively abandoned the claim to Counsel and were negligent in doing so, not even giving the most basic consideration to the merits. The solicitors had caused loss to the Defendants in terms of the whole costs of defending the proceedings. Indeed, had proper consideration been given to the case in the first place by the solicitors, they would have advised Mrs O not to pursue an action, despite their instruction that it was 'not palatable' to her to be evicted. If they were still instructed to bring the claim, then the full facts should have been presented to the Court at first instance.

As it was extremely unlikely that Mrs O was going to pay the Defendant's costs it was just that the solicitors should be ordered to do so on a joint and several basis with the Claimant.

In the transcript that we have seen, there follows a fragment of a thoroughly entertaining discussion between the CJ and Counsel for the Defendant. Having had £8,800 costs of the April and May hearings awarded, the Defendant sought costs of £12,528 for subsequent costs up to this hearing. Whether they got them or were assessed down, we shall probably never know, alas.

The CJ notes that Mrs O's claim bore all the hallmarks of being brought with a view to pursuing a negotiating position, where there was no justification in law. That seems likely.

The lesson to be drawn, should it need drawing, is that one should never make a threat - let alone bring proceedings - that one cannot to some degree make good on. That applies to threatening wasted costs applications, as noted at the start, but also and with rather more force to threats to bring proceedings or within proceedings. Above all, one shouldn't be be so catastrophically daft as to attempt to make good on an empty and groundless threat!
Successful gateway (b) defence!

Tue, 14 Feb 2012 16:18:00 +0000

Dave

London Borough of Southwark v Hyacienth 22.12.2011 is that incredibly rare, beautiful thing: a successful gateway (b) defence to a mandatory possession claim in relation to an introductory tenancy. At least, I think it is: unfortunately, it's not clear whether it is a successful proportionality defence, and the circuit judge (who shall remain nameless as a result) also confuses gateway (a) and (b). [The relationship between proportionality and gateway (b) seems to me to be an interesting question and one which I've had a bit of a battle with an anonymous academic reviewer about, but that's another story]. But, so what; and thanks to David Thomas, Ms Hyacienth's solicitor, for forwarding on this frail electronic text and clearly did a wonderful job for her, very much against the odds as will appear.

In essence, what happened was that Ms Hyacienth, a single mother with two young children, took an introductory tenancy of a Southwark property in June 2008. Housing benefit clawed back an overpayment, which gave rise to rent arrears. She also had a load of other debts with the bailiffs knocking at her door, taking furniture. Southwark have a policy for early intervention, assessment of vulnerability, provision of advice and benefits/debts/budgeting. They also have a policy that agreements for rent arrears should only be made during the first six months of an IT, and there should be a six month arrear free period before the 12 month duration of the IT expires. Arrears not surprisingly arose quite early on and Southwark did make efforts to contact Ms Hyacienth but to no avail. Then in December, there was contact and this was, as the HHJ put it, "the pivotal moment". She made promises as to payment of the arrears, the HB clawback was identified as a problem, and she was having real problems managing her finances and making promises. She's told (inaccurately, by my calculation) in early December that as the tenancy was more than six months in, Southwark wouldn't make an agreement; then, later that month, they do make an agreement for the arrears to be cleared by 04 January; but she calls back the same day to say that she won't be able to do so, to be told that she must do so. After that period there was nothing.

Southwark then run through the numbers to end the tenancy - they served notice on 06 March; a review is carried out which confirms the decision to proceed; the claim is issued; and on 25 September, the District Judge makes a possession order at a hearing at which Ms Hyacienth attends unrepresented. She does not raise an Article 8 defence - proportionality - or gateway (b) defence at this hearing (not surprisingly). She then circuitously arrived at Mr Thomas' door.

From these unpromising facts, Mr Thomas and her counsel, Alice Hilken, constructed the successful gateway (b)/proportionality defence. Quite how they did so successfully, I'm still not sure. They also managed to get the possession claim dismissed leaving Ms Hyacienth a secure tenant.

Well, I do kind of know how they did so. Basically, it is absolutely crystal clear that Southwark did not follow their policies for vulnerable persons, such as early intervention and advice etc. As the HHJ put it, by the time of the review, Ms Hyacienth was faced with an "uncompromising approach" by the bureaucracy - "no agreement because you are 6 months into your tenancy and you must pay all the arrears. This was in no sense tailored to her situation, it was not helping her in a constructive way and ... she was not directed to agencies that might assist her". The reviewers nor anyone in the council had considered their policies and procedures. So, all of this was really bad practice and procedurally irregular - and the HHJ clearly has Barber v Croydon LBC [2010] EWCA Civ 51 in mind.
Southwark did not help themselves either. They failed to file the McLellan witness statement explaining how they operated the review process with the original claim, which the HHJ seems to have regarded as a requirement, not just good practice, as it enables the occupier to make a decision as to whether to raise a public law defence.

But none of this was raised before the DJ at the possession hearing, and so the basis for the appeal is unclear, certainly if it is based on proportionality. The clear guidance given by the SC in Pinnock and Powell is that it is for the occupier to raise the defence. The HHJ says that the absence of the McLellan witness statement meant that the Judge felt bound to make a possession order although enquiry was made as to the review process. But it all seems a little late to make these arguments on appeal. This point was clearly made to the HHJ (as was the dicta in Powell about the purpose of the introductory tenancy regime, requiring a high standard of behaviour, and all that guff) and who does not really comment on it. Don't get me wrong - it's fantastic to see this kind of success - but my instinct would have been to apply to set the original judgment aside as opposed to appeal it. That instinct wouldn't have yielded the same outcome for Ms Hyacienth though (- note to self: be bold, be brave!).

Then, there is the actual outcome itself: claim dismissed. The HHJ uses Eastlands Homes v Whyte [2010] EWHC 695 (QB), at [65], as the basis for this outcome. There, HHJ Holman applies his position developed from his judgment in Pinnock (at first instance) that the possession claim must be dismissed in the face of a successful public law defence (citing also Barber and Pinnock in the CA). This seems to me to be a rather touchy issue and underdeveloped (no doubt principally because there are so few successful cases), but a successful public law procedural irregularity claim would lead to a quashing order requiring "the decision" (the review, the decision to issue the claim, or the decision to proceed with the claim to hearing/appeal?) to be made again (having said that, though, the HHJ, with a final flourish, declares Southwark's decision also to be Wednesbury unreasonable for not following its own guidance, which suggests that the claim dismissed remedy is proper). That was Southwark's submission here and I'm afraid I've got some (limited) empathy with it. The type of tenancy seems important when remedy is being considered - if, as in Barber, the tenancy is non-secure, one can see why "claim dismissed" is appropriate because the public authority has to go and make the decision again; but, where the tenancy is introductory, that outcome has rather different effects as the authority can't make that decision again as the tenancy is likely to be secure by that time. The HHJ, however, viewed it "as a matter of practicality" and "there is no going back or ascertaining what would have happened if appropriate help and guidance had been given earlier. Nor what the review panel would have decided if they had conducted a more thorough review". Hmm.

Glad To See Y'Back Again?

Sun, 19 Feb 2012 12:05:16 +0000

chief

Gladysheva v Russia (App. No. 7097/10)

Courtesy of the always excellent ECHR blog, comes an interesting Strasbourg decision, particularly in relation to the question of just satisfaction. It has, regrettably, taken me ages to write this up. Any students who have had to write essays about it in the meantime clearly have sadistic tutors.

The facts of the case bear some similarity with Tuleshov v Russia, but there are a few differences and what is quite interesting about this case is what the ECtHR does about just satisfaction.
The basic facts are that Ms Gladysheva was a bona fide purchaser of a flat in Moscow. The previous owner had bought the flat from someone referred to as Ms Ye, who had, in turn, acquired the title to the flat from the City of Moscow through a privatisation scheme (which appears to be not a million miles away from right to buy).

Unfortunately for Ms Gladysheva, there appear to have been some shady goings on, err, going on when Ms Ye acquired the flat, which all started to be investigated after Ms Gladysheva had bought it. In July 2009 a court in Russia found that the privatisation had been fraudulent. Applying domestic law the court ordered the return of the flat to the City and Ms Gladysheva’s eviction. She was not entitled to compensation or the offer of alternative accommodation.

Although the Deputy Prosecutor General and the Moscow City Ombudsman have both intervened in support of Ms Gladysheva, that decision stood. At the time that her case came to Strasbourg she had not yet been evicted, but considered that eviction was imminent.

She brought the case to Strasbourg in reliance on A1P1 (which provides for protection of property) and Article 8 (which provides for protection of a home).

The ECtHR dealt first with A1P1. Russia argued that it did not apply as Ms Gladysheva’s dispute was really with the person who sold her the flat. The ECtHR said that this argument was “misguided”. It was the Housing Department that had brought the case to recover the flat, so the dispute was clearly between the applicant and a municipal body. It cannot be said that it was a purely private dispute between the City and Ms Gladysheva as the alleged frauds that had taken the flat out of the City’s ownership involved residential registration, social tenancies and privatisation.

When considering the merits of the A1P1 claim, the ECtHR held that the interference with Ms Gladysheva’s rights was not proportionate. Much of the blame had to be attached to the failure of the authorities to prevent the fraudulent privatisation of the flat. In addition, Ms Gladysheva was being “stripped of ownership without compensation, and … [had] no prospect of receiving replacement housing from the State.” The court went on to note that “mistakes or errors of the State authorities should serve to the benefit of the persons affected, especially where no other conflicting private interest is at stake. In other words, the risk of any mistake made by the State authority must be borne by the State and the errors must not be remedied at the expense of the individual concerned … It therefore concludes that dispossessing her of her flat placed an excessive individual burden on her, and that the public interest was not sufficient justification for doing so.”

Therefore A1P1 had been breached. For pretty much the same reasons there had also been a breach of Art 8. In the court’s analysis of Art 8 it is interesting that some significance appears to be attached to the fact that “no goodwill had been shown by the Moscow Housing Department in that it would not provide her with permanent, or even temporary, accommodation when she had to move out. The Government’s suggestion that the applicant move in with her parents aside, the authorities made it clear that they would not contribute to a solution of her housing need.”

Where this case does get interesting is what happened next. Ms Gladysheva claimed an amount of money for non-pecuniary damage and also an amount to allow her to purchase another flat. Russia resisted both of these and argued alternatively for a lower award in respect of the loss of the flat. However, the ECtHR did something a bit different. At [106] the court said that

having due regard to its findings in the instant case, and in particular having noted the absence of a competing third-party interest or other obstacle to the restitution of the applicant’s ownership, the Court considers that the most appropriate form of redress would be to restore the applicant’s title to the flat and to reverse the order for her eviction. Thus, the applicant would be put as far as possible in a situation equivalent to the one in which she would have been had there not been a breach of Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.
In other words, she gets to keep the flat. While not a new development in relation to A1P1 (Bulgaria has been on the receiving end of a couple of such decisions), it is interesting to see this being applied to residential property.

Rumour has it...

Wed, 29 Feb 2012 16:25:33 +0000

J

Keep your eyes out for Khela (by his LPA receiver) v Dainter, Birmingham County Court, 29.2.12, which HHJ McKenna has just transfered into the Court of Appeal.

It's an appeal against a s.21 possession order made under the accelerated procedure in which Ms Dainter argues that she should have been allowed to raise an art.8 defence. The DJ held that there was no need to consider personal circumstances / proportionality but granted permission to appeal. HHJ McKenna, noting that the interaction between art.8 and the private sector had been left open in Pinnock, has sent the case to the CA for them to have a go with.

More details as and when we get them.

Monk, ECHR and Article 8

Tue, 13 Mar 2012 22:13:45 +0000

SJM

Dixon v UK has now reached a conclusion in the ECHR with an Order made on 21/2/12 removing the case from the lists under Art 37 (1)(c) of the Convention.

This Order is the Court's response to a unilateral declaration made by the UK government on 8/11/11 accepting that Mr Dixon had not had the benefit of a proportionality exercise in line with the principles set out in McCann, Pinnock and Powell and that the High Court's obiter findings on proportionality were insufficient to guarantee Mr Dixon's Article 8 rights. The UK therefore offered £3000 by way of just satisfaction, costs and expenses.

Despite Mr Dixon's argument that had Art 8 been applied to his case in a substantive sense, no possession order would have been made, the Court found the offer of compensation to be in line with its findings in previous cases dealing with Article 8 and proportionality and it declared continuation of the application to be unjustified.

To my knowledge, there are no other applications pending in the ECHR on the issue of the compatibility
One question (of the many) arising from the watershed that is represented in English and Welsh law by *Pinnock* is just how far it extends. We hope to have a Court of Appeal decision on private landlords and the application of proportionality soonish. But there is also a question on the relationship between this new jurisdiction and that of bankruptcy sale proceedings. Prior to *Pinnock*, there was a discussion in some of the cases about the overlap between section 335A, Insolvency Act 1986, and Article 8 (the starting point for this discussion is *Barca v Mears* [2004] EWHC 2170 (Ch), but that case is rather hopeless; more recent discussion has occurred in *Foyle v Turner* [2007] BPIR 43 and *Turner v Avis* [2008] BPIR 1143).

Section 335A(3) provides that, where the trustee makes an application for an order for sale in respect of property held by the bankrupt under a trust of land, and does so after the first year of the bankruptcy, "... the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations". It is designed to retain the kind of fervour for bankruptcy trustees which was exemplified by the extremely unfortunate judgment of Nourse LJ in *Re Citro* [1991] Ch 142 (homelessness, moving, changing schools are not exception but "the melancholy consequences of debt and improvidence with which every civilised society has been familiar").

The question comes down to whether the exceptional circumstances test works with the proportionality test. There was full argument on this issue in *Ford v Alexander* [2012] EWHC 266 (Ch), which includes discussion of the horizontal application of Article 8 to such cases. Although Peter Smith J refused permission to appeal, which means it's non-binding, there are some interesting observations. The Fords bankruptcy involved debts of around £262,500. Their main asset was a studio flat worth around £40-55k. The Fords resisted the trustee's inevitable application for an order for sale with evidence of moderate depression as a result of their position, their non-priority need status for homelessness, and "They would also have difficult finding private rental accommodation due to their need to house their fish and terrapins..." I have to say that this was hardly the most compelling evidence, but their counsel argued that section 335A needed to be read in concert with Article 8, post-*Pinnock*. The district judge who heard the case disagreed that Article 8 required her to operate a different exercise from the wording of s 335A but also, as an alternative, held that it would not be disproportionate to order a sale on the facts. And there was another problem: the Fords were seeking to resist the order not just for a limited period but indefinitely (or, as SJM and I now know, "permanently"). Both the District Judge and Peter Smith J found it inconceivable on the facts before them to find that it was proportionate permanently to deprive the creditors of any prospect of ever having any realisation out of the bankruptcy. That was on the facts of this case and Peter Smith J concludes his analysis with the observation that "There may be a circumstances where it is proportionate permanently to deprive a Trustee but that is not the position in the present case" (at [39]).
He then discussed whether Article 8 had any relevant at all. He recited paras [4] and [50] from *Pinnock* and there is a lengthy citation from *Zehentner v Austria* (noting that it was referred to in *Pinnock* "not on the point under consideration"), and taking the view that the circumstances of that case "were extremely unusual". Further, s 335A(2) and (d) "... provide a necessary balance as between the rights of creditors and the respect for privacy and the home of the debtor. That balance serves the legitimate aim of protecting the rights and freedoms of others. I am therefore of the opinion that the requirements of section 335 A satisfy the test of being necessary in a democratic society and are thus proportionate ... This was the conclusion in the pre *Pinnock* bankruptcy cases and I see no basis for coming to a different conclusion". I have to say that I am in almost entire disagreement with that comment.

What was not discussed was the role of "exceptionality" in *Pinnock* and its crossover with "exceptional circumstances". One might be able to have quite an interesting play there.

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**The cost of criminalising trespass**

*Mon, 19 Mar 2012 09:41:27 +0000*

*NL*

The Government's proposal to criminalise trespass to residential property, contained in LASPO at clause 136, is due to be considered at report stage in the House of Lords tomorrow (Tuesday 20 March). The Government's estimate of additional costs arising from the proposal is £25 million over 5 years.

SQUASH have obtained a report on the likely costs of the proposal, highlighting the shortcomings of the MoJ's costings. The research takes into account knock on costs to other Departments and to Local Authorities. It outlines a range of scenarios that may result from the criminalisation and estimates the likely costs at between £316 million and £790 million.

The Guardian has further details here.

Given that LASPO is intended to be a costs savings bill, cutting some £350 million from civil legal aid, it seems somewhat reckless to tack on a largely unnecessary measure, (which although promoted as protecting homeowners will do nothing of the sort), on the basis of limited and faulty costings. If the SQUASH figures are anything like accurate, the cost savings of LASPO are, at the least, wiped out.

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**Proportionality, Section 21 and starter tenancies**

*Sun, 22 Apr 2012 15:07:23 +0000*

*NL*

Another RSL 'starter tenancy' and s.21 case, albeit one that marginally pre-dated *West Kent HA v Haycraft*, is *The Riverside Group Limited - v – Sharon Thomas* [2012] EWHC 169 (QB) 2 March 2012 (Manchester District Registry) [Not on Bailii. We've seen a transcript].
This will be a quick note, as the general principle has been established that proportionality defences are available for Housing Association 'starter tenancies', being assured shorthold tenancies, where possession is sought via section 21 notice. In addition, Ms Thomas was in person, and failed to appear, after her solicitors came off the record for lack of co-operation, so the extent of argument was limited.

Ms T was Riverside's starter tenant, on an assured shorthold tenancy from 6 April 2009. By June 2009, Riverside were aware of complaints of ASB and a notice requiring possession was served in July 2009. Ms T was offered a 'right of appeal' and a hearing took place in September 2009 before a panel of Riverside representatives. The 'appeal' was refused and a claim for possession issued. A defence and counterclaim was filed. After adjourned hearings, the claim was stayed pending the decision in *Pinnock*.

In the meantime, following continued allegations of ASB, Riverside had sought and obtained a 2 year ASBI. On allegations of breaches, committal was sought and this was listed at the same time as the re-listed possession hearing. The whole matter was then bumped to the High Court when Ms T's revised Defence and Counterclaim pleaded that Section 21 possession procedure was incompatible with the ECHR.

The issues as presented in the amended Defence and Claim were that domestic legislation permits the imposition of a suspended or postponed possession order on terms in a starter tenancy possession claim and, alternatively a declaration of incompatibility as against section 21. There was also a proportionality defence, following *Pinnock* and *Powell*. In addition, Ms T contended that fresh allegations of ASB, following the 'appeal hearing' should bring a right to a fresh internal appeal.

Riverside conceded that it was a public body. It further conceded that its 'starter tenancy' scheme was analogous to (and based upon) the introductory tenancy scheme, so that *Pinnock* and *Powell* applied precisely.

The High Court (Mr Justice Ryder) decided that the issues to be determined were:

(a) Where possession proceedings are issued and there are then allegations of further anti-social behaviour is the Defendant entitled to a further internal appeal?

(b) Ought the court to consider the possession claim summarily?

(c) Does the court have power - in principle - to suspend or postpone possession on terms and, if so, ought it to do so?

(d) Ought there to be a declaration of incompatibility in relation to section 21?

On (a), the Court held that there was no such entitlement. A process that required further internal reviews to run, presumably alongside litigated proceedings, for each fresh allegation would be cumbersome and unnecessary. It would plainly fly in the face of:

the whole rationale behind the accelerated possession procedure which does allow personal circumstances (and where necessary facts) pre and post the issue of proceedings to be considered, albeit within the scope of the decisions in *Pinnock* and *Powell*

On (b), the Court considered *Pinnock* and *Powell*, taking the view that in the case of an introductory tenancy (and by analogy, a starter tenancy) the Court should consider a proportionality defence

only "in very highly exceptional circumstances" if the Article 8 issues have crossed the "high threshold of being seriously arguable". (See *Powell* at paragraphs 92 and 33).

As the Court should only consider the defence in 'very highly exceptional circumstances' it followed that this stage would only be reached in a small proportion of cases [See my comments below]
In the absence of 'very highly exceptional circumstances' the Court should make a summary possession order.

Where a proportionality defence was raised, the Court's powers extended to reconsidering for itself the facts found by the landlord, or that had arisen since the commencement of proceedings. However:

it is not a requirement in the introductory tenancy scheme nor is it a requirement of the starter tenancy scheme for facts to be proved in order to justify a decision to terminate a tenancy. Rather the right question under these schemes is whether in the context of allegations and counter-allegation it is reasonable for the landlord to take a decision to proceed with termination of the tenancy (Powell at paragraph 93).

In any event, in this case, facts had been admitted by the Defendant in the injunction proceedings.

The Claimant submits that in the instant case the Defendant is arguing for a full consideration of proportionality from a remarkably weak position - for example having already been made the subject of a two year injunction based on admissions of anti-social behaviour and in a position where she faces two outstanding committal applications in respect of breaches of the injunction and there have been ongoing allegations of anti-social behaviour from neighbours, all of which are evidenced before the court and which continue up to September 2011. I agree.

While the Defendant had raised mental health and alcohol abuse vulnerabilities in an earlier hearing, no further evidence had been raised in relation to these and these were no sufficient evidence to say the 'seriously arguable' threshold had been crossed in any event.

On the Claimant's argument that the 'public policy' reasoning for introductory tenancies acknowledged in Powell extended to starter tenancies and the s.21 procedure, the Court found:

The court accepts that the Claimants reliance on "public policy reasons" taken from the judgment of the Supreme Court in Powell should be received with caution. This decision was made following consideration of evidence provided by the Secretary of State for Communities and Local Government in relation to the introductory scheme. This is a specific statutory scheme introduced by Parliament. Evidence was provided to explain the public policy reasons for introducing those provisions. There is no such evidence concerning the starter tenancy scheme because Parliament has not (yet) introduced such a statutory scheme. This is a scheme introduced by individual landlords and has no statutory force save for the underpinning provision of section 21. When section 21 was introduced it was arguably not based on the same public policy reasons that the introductory tenancy scheme was introduced. However both schemes provide for temporary security of tenure and in my judgment despite this caution and in the absence of full argument, it appears to be right to read across public policy reasons in the manner contended for by the Claimant.
Summary possession order granted.

On (c) - a power in principle to suspend possession or impose terms - there was no other power save that in s.89 Housing Act 1980, 14 days or 6 weeks in cases of exceptional hardship.

On (d) - the declaration of incompatibility:

44. The Secretary of State, through the Treasury Solicitor, considers that this issue has been answered in Pinnock and Powell. I agree. No issue of incompatibility arises with regard to section 21. So far as section 89 is concerned its meaning and effect is plain and no incompatibility arises here either.

45. In any event a declaration would add nothing, and would change nothing, as between the parties to this litigation. It does not provide grounds for granting any form of relief against the Claimant (section 4(6) of the 1998 Act).

Immediate possession order made and the matter set down for the hearing of the first committal application.

Comment

This was, by any measure, a very weak case for the Defendant. Admitted and ongoing ASB, solicitors coming off the record and a lack of detailed argument together make this a case that was doomed to fail.

However, there are two areas of concern in the way the Court approached the matter.

The first is that, while admitting an absence of argument on the point, the Court was prepared to extend the 'public policy' justification for limited security of tenure from introductory tenancies to 'starter' tenancies, apparently simply on the basis that the Claimant asserted its starter tenancy regime was modelled on the introductory tenancy scheme. This may need to be argued in detail in future.

The second is the use of 'very highly exceptional' as a threshold. This is, as we've argued before, not an accurate response to the use of the term in Pinnock, and the sole reference in Powell (at 92), referred to in this judgment, makes clear that exceptionality is a question of outcome, not a threshold test:

In paras 51 to 53 this Court in Pinnock commented on the proposition that it will only be "in very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument. I believe that this proposition is an accurate statement of fact in relation to introductory tenancies. This is because the judge should summarily dismiss any attempt to raise a proportionality argument unless the defendant can show that he has substantial grounds for advancing this. Two factors make it extremely unlikely that the defendant will be in a position to do this. The first is the relatively low threshold that the authority has to cross to justify terminating the introductory tenancy. The second is the significant procedural safeguards provided to the tenant that I have described in para 90 above.

The issue is solely the seriously arguable threshold. There is no 'exceptionality' test. It is disappointing to see the High Court apparently adopting it.

In any event, the 'exceptional' outcome is in relation to all introductory possession claims, not those in which a proportionality defence is raised. It would be theoretically possible for all proportionality defences to successfully raise seriously arguable defences and for the outcomes to still be exceptional.
The tenant is dead, long live the tenant

Fri, 11 May 2012 11:31:35 +0000

Francis Davey

Our attention was drawn to a decision in the Medway County Court, presumably because it considered a proportionality defence. I'm not sure there's much to see there — one of the team said that he was not "remotely excited about it".

But it caught my eye. To be fair, one cannot always tell from a short judgment of this kind exactly what happened, but it gives the impression that landlord and tenant law was, at best, misunderstood. So it seemed like a golden opportunity to set the record straight.

The defendant's father and mother had lived in the property under an assured tenancy. Sadly, the father died. The mother succeeded under s.17 of the Housing Act 1988. Later on her son, the defendant, came to live with her and look after her. The mother died. The landlord eventually decided that the defendant would not be allowed to carry on living in the property and served a notice to quit which duly expired. They claimed possession on the basis that the son was a trespasser.

But why? Assured tenancies are not magic. They have some magical properties given to them by the Housing Act 1988 but underneath they are still perfectly normal tenancies which means they are an estate in land capable of being inherited.

This means that when the defendant's mother died, her tenancy would pass under her will or intestacy. If the mother had not been a successor, the magic of s17 might have come in to play, but she was so it did not. From the facts of the case it seems overwhelmingly likely that the son was her heir. He would then inherit the tenancy and become the tenant.

As an aside there are some subtleties here which I am not about to delve in to, such as the nature of a heir's rights under an intestacy and the role of the Public Trustee. Readers will be familiar with the and all the usual rules about giving notice after a tenant has died.

It seems likely that the defendant was a tenant of the property and, since he lived there, almost certainly an assured tenant. You cannot end an assured tenancy by giving notice to quit. It may be that the district judge inquired into this possibility and the matter was dealt with but not mentioned in the judgment, but it really ought to have been.

The right way to evict an heir in these circumstances is of course to use Ground 7 of Schedule 2.

Housing and Human Rights Round-Up

Mon, 14 May 2012 20:37:32 +0000

SJM

Two interesting cases have been delivered by the ECHR in the last few weeks: Mago and others v Bosnia-Herzegovina and Yordanova and others v Bulgaria.

Mago
The applicants in Mago held tenancies for life of flats within Bosnia-Herzegovina (with the exception of Mrs Mago, whose husband was the tenant) and they were compelled for varying reasons to leave their homes following the outbreak of the war in Bosnia-Herzegovina in 1992. Security of these flats could be lost in a limited range of circumstances, including where the flat was left unoccupied for a continuous six month period or more. Once the tenants left, their properties were treated as abandoned by the authorities.

After the end of the war, the applicants made claims for restitution of their former homes. The Statute under which they made these claims contained an exception for those who served in foreign armed forces after 19/5/92. The majority of the applicants were members of the Yugoslav People's Army and their claims and appeals were dismissed because they fell foul of this exception. The applicants petitioned the ECHR alleging breaches of Art 1 Protocol 1, Article 8 and Article 14.

The Court held that there had been no violation in three of the complaints as the applicants in question had been provided with alternative flats in Serbia and Montenegro. Although the deprivation of property rights might in normal circumstances lead to a finding of a violation, the exceptional circumstances of the case and the fact that the loss of the accommodation was the result of war and the dissolution of the former Federal Republic of Yugoslavia meant that the Respondent was under no obligation to make reparations under Art 1 Protocol 1 (para 104).

In Mrs Mago's case, the Court held that the exception had been incorrectly applied as she was entitled on her divorce from Mr Mago to inherit the rights to the flat. Mrs Mago was not involved with any foreign forces and the Court accordingly held there had been a breach of Art 1 Protocol 1. The two remaining applicants (Radovic and Krstevski) had been members of the VJ forces and the Court accepted the argument that membership of certain armed groups depended largely on one's ethnic origin. The Court held that the measures depriving the applicants of the right to restitution had the effect of treating individuals differently on ethnicity grounds and there could be no justification for deprivation in these circumstances. The Court found a violation of Art 1 of Protocol 1.

The overall award ranged from EUR 58000 to 90000.

Yordanova

This claim was brought by members of the Bulgarian Roma community, who inhabited vacant land in a district of Sofia from the 1960s onwards and constructed tenements (without the permission of the authorities) for between 200 and 300 people. The State sold the land occupied by the community to a private investor in 2006 and the Courts ordered the community's expulsion on the grounds that they had no proprietary interest in the land, despite the time they had already lived there with the State's acquiescence.

Nevertheless, the eviction was delayed pending a decision whether they should be rehoused and the applicants in the meantime petitioned the ECHR on the grounds of breaches of Art 1 Protocol 1, Articles 3, 8 and 14.

In deciding under Art 8 whether the authorities were pursuing a legitimate aim, the Court rejected the applicants' argument that the State was motivated by a racist agenda and it accepted that the buildings were unlawfully built, that they were structurally unsafe and sub-standard and that there were inadequate sanitary facilities.

The relevant question for the Court was whether expulsion was necessary in a democratic society. The Court noted that alternative methods of dealing with the risks to health and safety had not been properly explored (for example legitimisation of the community's occupation of the land, improving sanitation and providing adequate re-housing). The Respondent was also criticised for describing the risk of homelessness as "irrelevant" when the principle of proportionality required due consideration to be given to the consequences of removal (para.126).
Furthermore, the Court recognised (para. 129) that "Such social groups, regardless of the ethnic origin of their members, may need assistance in order to be able effectively to enjoy the same rights as the majority population.....In the context of Article 8, in cases such as the present one, the applicants’ specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake."

This factor provides an important qualification to the principle that there is no duty under Article 8 to be provided with a home and that "an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases".

Accordingly, the Court held there to be a violation of Article 8 and it declared that either the 2005 order be repealed or it be suspended pending implementation of Convention-compliant measures (the Court having recognised that Art 8 gave no right to occupy land unlawfully in perpetuity). No damages were awarded.

Footnote

The ECHR has recently posed questions to the parties in the controversial night-time care case of McDonald v UK, namely:

1. Did the withdrawal of the night-time care service interfere with the applicant’s right to respect for her private life under Article 8 of the Convention? If so, has there been a violation of Article 8 of the Convention (a) from 17 October 2008 to 4 November 2009; and (b) from 4 November 2009 onwards?

2. Was the respondent under a positive obligation under Article 8 of the Convention to provide the applicant with a service which enabled her to live with dignity? If so, in withdrawing the night-time care service was it in breach of this obligation?

We'll stay alert for any developments in this one.

Barking and Dagenham LBC v Bakare; too little too late

Mon, 14 May 2012 11:35:54 +0000

FTM

Just a brief note on this. As yet no transcript. This is another example of a fairly robust antisocial behaviour decision being upheld on appeal and it reinforces the well established principle that an appellant who is essentially attacking the discretion of the Judge below will find no sympathy in the Court
The background was that a long standing secure tenant had lived in her flat with her three children. Her youngest son aged 19 had been involved in some offending including use and possession of cannabis and had some connection with firearms and ammunition found near the premises. B&D sought possession for both rent arrears and antisocial behaviour. On the first consideration, the court granted an ASBO against the younger son and adjourned the possession claim. Then when the matter came back on, the younger son had been involved in further offending and had breached the ASBO. However, just before the returned hearing, the Tenant had arranged for him to reside elsewhere and while she conceded that the grounds for possession were made out, she asserted that her son would continue to live elsewhere thereby ceasing the nuisance and sought a suspended order. The Judge appears to have had none of this, finding that the Tenant's actions were too little too late and that he had no confidence that she could do anything to control her son's escalating conduct. He duly made an outright possession order. She appealed on the basis that the Judge had failed to properly consider either the measures she had put in place to deal with the problems and her own personal circumstances.

The appeal was dismissed. There had been no error of law and the appeal was an attack on the exercise of discretion by the Judge. The Court of Appeal commented that while the judgment did not expressly state that the Judge had taken account of the measures put in place by the Tenant, it was clear from the judgment overall that he had a very clear grasp of the case and it was material that he had adjourned the first hearing having impressed upon the Tenant how serious he found the antisocial behaviour to be. There were no grounds to interfere with the judgment.

This is a good example of the ever shortening judicial fuse on antisocial behaviour and may signal that advisers need to be giving much starker warnings much earlier to clients in this position.

ASB and Possession

Sun, 16 Dec 2012 23:25:43 +0000

SJM

_Birmingham CC v Ashton_ is a case which illustrates the difficulty that judges face when they are invited to make possession orders on the grounds of nuisance and anti-social behaviour against tenants with mental health problems.

The Council relied on four incidents of ASB between 2004 and 2010, three of which involved Mr Ashton's next-door neighbour, Ms Benton, and which included threats with a kitchen knife and the brandishing of a samurai sword outside the premises. Mr Ashton was subsequently detained under the Mental Health Act. He was also convicted in the Crown Court on 11/10/10 of affray and of possession of an offensive weapon in connection with the samurai sword incident and as part of a Community Order, he was ordered to stay out of the property for a three year period, to remain under supervision at approved addresses for three years and to undergo mental health treatment.

A statement on behalf of Ms Benton from January 2011 asserted that her family continued to suffer trauma as a result of the incidents involving Mr Ashton and they spent a significant amount of time out of the property.

The case came before HHJ Owen QC on 20/12/11 and the judge was provided with psychiatric evidence from a consultant, Dr Van Woerkom, who considered that Mr Ashton's bi-polar disorder was stable, the
risk of re-offending was low (20-30%) and that the prognosis for Mr Ashton was good, assuming that he refrained from drug and alcohol use.

The judge also accepted the evidence from Mr Ashton (with hesitation owing to the lack of corroborative evidence) that he had abstained from drug usage since his discharge from hospital in October 2010, that he had co-operated with his Drug and Alcohol Team and other support services and that he harboured no ill-feeling towards Ms Benton and her family.

The judge found that it was reasonable to make a possession order but that such an order be suspended. The Council appealed, asserting that the judge had given insufficient weight to the factors under s.85A(2) of the Housing Act 1985, which read:

The court must consider, in particular-

(a) the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought;

(b) any continuing effect the nuisance or annoyance is likely to have on such persons;

(c) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated

In particular, it was claimed that the judge had attached insufficient weight to the impact of Mr Ashton's conduct on Ms Benton and other residents in the neighbourhood if it were repeated.

The Court of Appeal found that the judge had approached the evidence from the wrong angle. The evidence that Mr Ashton would not re-offend was conditional on abstention from drug and alcohol usage and there was no evidence that Mr Ashton had been successfully treated for his drug problem. Furthermore, there was no medical indication of the likelihood of him remaining abstinent, particularly given his absence from the property at which the offending occurred. Accordingly, no cogent evidence had been presented by the tenant (following Sandwell MBC v Hensley [2007] EWCA Civ 1425) that the offending behaviour would not recur and the judge, in suspending the Order, had not looked at the prospects for the future or the likely effect on other residents of repetition.

The Appeal was allowed but the Court decided that the question of suspension ought to be considered by a different judge, particularly given the lapse of time and the fact that Mr Ashton had successfully applied to the Crown Court to vary the Order to enable his return to the property.

Comment: It is possible to detect in this judgement an echo of the recent point made by Neuberger LJ in Corby BC v Scott that a judge "should not let understandable sympathy for a particular tenant have the effect of lowering the threshold". That point seems to be relevant to the factors under s.85A(2) of the Housing Act 1985 as it is to Article 8 proportionality. The Court of Appeal expressed sympathy for the judge's task and it strikes me that these cases are highly fact sensitive. For instance, had this been a case of a mentally ill tenant merely banging on walls and ceilings, it is debatable whether the Court would have been required to look too far beyond the tenant's assurances that such behaviour would not recur. In any event, it is clear that the Court was hesitant to decide the case against the Defendant in view of his personal circumstances and that he ought to be given the opportunity, at least, to provide more comprehensive medical evidence to support his case for suspending the Order.
When is Article 8 available at the enforcement stage of the eviction process?

Wed, 01 May 2013 14:37:50 +0000

S

In R (JL) v SSD [2013] EWCA Civ 449, the Court of Appeal "broke new ground"* by considering how Article 8 applied to the stage at which possession orders are enforced.

Facts

JL rented accommodation owned by the Ministry of Defence and had done so since 1989. It lacked security of tenure. She lived at the accommodation with her two adult daughters and her grandson. One of her daughters suffered from mental health problems and JL was physically disabled and required the use of a wheelchair.

The Ministry of Defence had provided this accommodation to her despite the fact that it had no duty to do so. This was because she had separated from her husband in 1989 after he had been discharged from the army.

In the mid 1990s the Ministry of Defence told JL that she would have to leave her home and attempts were made to find her alternative accommodation. This failed and in 2007 a claim for possession was brought. JL defended this claim on the basis that her eviction would infringe her Article 8 rights and / or the decision to seek possession was irrational.

In 2009, Collins J ordered that JL give the Ministry of Defence possession of the property within six weeks. He refused to hear the Article 8 defence (because he was then bound by Doherty).

Leeds City Council subsequently decided it owed JL a duty under Part 7 and it was agreed between the parties that she could remain in her home until suitable accommodation was sought. Unfortunately, this took longer than the Ministry of Defence was willing to tolerate and, on 9 March 2011, a warrant was applied for. JL sought permission to judicially review the decision to apply for a warrant on the ground that her eviction would infringe her Article 8 rights. Permission was granted and the judicial review was finally heard in July 2012.

The Ministry of Defence sought to argue that Pinnock prohibited JL from raising an Article 8 defence to defeat the enforcement of a possession order. Ingrid Simler QC, sitting as a deputy, rejected that argument, but found that the eviction did not infringe Article 8 because it was proportionate (see our note here).

JL appealed on two grounds:

First, the Minister's decision to enforce the possession order was Wednesbury unreasonable because he was not provided with a full or accurate presentation of the material facts with which to be able to make a properly informed judgment.

Second, the eviction would be a disproportionate interference with JL's Article 8 rights.

Public law

While the judge at first instance had been wrong to hold that the public law challenge had been "overtaken" by the Article 8 defence, the first ground failed because it could not be said that, in the
context of the decision that had to be made, the Minister was not fully apprised of the material facts. The
Minister was under no obligation to house JL, had obtained a possession order vindicating its right to
possession of the property and was aware of JL's, and her family's, disabilities and of the fact such
disabilities had not changed since the possession hearing. The only material factor of relevance, which
had changed since the possession claim, was the fact that JL had failed to obtain alternative
accommodation and the Minister was aware of this fact and had taken it into account.

None the less the Court of Appeal reiterated that Article 8 and public law defences were alternatives and
both defences required consideration.

**Article 8**

The Ministry of Defence sought to argue, as they did below, that an occupier could not raise an Article 8
defence at the warrant stage. This was again, unsurprisingly, rejected. However, that did not mean that an
occupier would always be able to raise an Article 8 defence at the warrant stage because:

1. An occupant's Article 8 rights will be respected by a proportionality review at the possession hearing.
2. An occupier will only be able to raise an Article 8 defence at the warrant stage if he was prevented
   from doing so at the possession hearing or there has been a fundamental change in the occupier's personal
   circumstances since the possession claim and such personal circumstances are relevant to the
   proportionality of the eviction.
3. As an occupier is obliged to request a proportionality review, a failure to do so at the possession hearing
   will be taken as the occupier waiving their right to a proportionality review. In such circumstances, absent
   a fundamental change in circumstances, an occupier will not be permitted to raise an Article 8 challenge
   at the warrant stage.

In the circumstances, as JL had been prevented from having a proportionality review at the possession
hearing, she was entitled to raise it at the warrant stage.

None the less, the judge below was entitled to find that her eviction would not be disproportionate. She
had correctly assessed the Ministry of Defence's legitimate aims as being very powerful and had correctly
weighed these against the personal circumstances of JL, in particular the fact that as suitable
accommodation had not yet been found by Leeds there was the prospect of JL having to move twice.
Finally, she was right to hold that the threshold to be met was as high as at an ordinary possession
hearing.

Finally, the Court of Appeal took the opportunity to remind everyone, if it needed to, that it is only "in an
exceptional case that circumstances will justify the refusal by a court to make a possession order on the
grounds of an Article 8 defence."

**Comment**

I don't think this is a terribly surprising decision.

First, the Minister was always going to fail in his argument that Article 8 did not apply at the warrant
stage. In *Zehentner v Austria* (2011) 52 E.H.R.R. 22 the ECHR said that where the measure (of
dispossessing a person of their home) includes proceedings involving more than one stage, it is the
proceedings as a whole which must be considered in order to see if Article 8 has been complied with.
Therefore if an occupier has been prevented from raising an Article 8 defence at a possession hearing she
must be able to raise it at the enforcement stage or else there will be an interference.

For the same reason, however, if an occupier has already raised an Article 8 defence in the substantive
claim and failed, unless something has happened since, then there is no reason why he should be able to
raise it again. The proceedings must be looked at together. Clearly, however, if there has been a change in
the occupier's circumstances, which are relevant to the proportionality of his eviction, then he must be
able to raise them at any stage prior to his eviction.

What is slightly more controversial - but in my view right - is the point that a warrant cannot be
challenged under Article 8 if a defence was not, but could have, been raised in the possession claim
(which will now, further to Pinnock, be every possession claim).

That must be right because it is for the occupier to raise an Article 8 defence; Article 8 does not require
the court to assess the proportionality of an eviction unless the point is raised by the occupier. Moreover,
if we revisit the oft quoted line from McCann, there is only a breach of Article 8 where an occupier is
unable to have the proportionality of his eviction determined by an independent tribunal.

Accordingly, where an occupier is able, when looking at the eviction process as a whole, to ask for a
review of the proportionality of his eviction, but has failed to do so, then there can not be a breach of
Article 8.

The only time this point has been before Strasbourg has been in the case of Bjedov v Croatia (our note
here). That was, however, a slightly odd case in that Strasbourg found that Article 8 had been infringed
because procedurally, at the enforcement stage in Croatia, the body responsible for enforcing the order
was incapable of considering an Article 8 defence and the occupier had not been given the opportunity to
raise one when the possession order was made. I very much doubt Strasbourg would make the same
finding in respect of the UK.

This still does leave the question of how, procedurally, an occupier can raise an Article 8 challenge at the
warrant stage. As we all know s.89, Housing Act 1980, cannot be read in any other way (see Powell at
[62]), but is, in the context of possession hearings, compatible with Article 8 (Powell, at [64]).

If s.89, can't be read down, then the county court is going to be unable to consider an Article 8 defence at
the warrant stage (six weeks will already have expired or if there is time left unlikely to be long enough).
It would appear therefore that -as JL did - the only recourse will be to judicially review the landlord
bringing the claim. Which is all very well if they are a local authority or housing association that meets
the criteria in Weaver but what if they are a private landlord or housing association that does not meet the
criteria in Weaver? Time to revisit that declaration I think.

* which is not entirely fair on the deputy judge below who considered the question and, as appears from
the decision of the Court of Appeal, got it right.

The Unbeatable Litigant in Person*

Sat, 26 May 2012 11:53:38 +0000

David Smith

Birmingham City Council v Richard Lloyd (2012) CA Civ 23 May 2012 (On Lawtel but not on BAILLI)

A short note on this hearing as it is a situation which is likely to become far more common.

Birmingham Claimant had lost a claim for possession against L. They appealed. At the hearing of their
appeal L attended without representation. He asked that the appeal be adjourned as his Public Funding had
been withdrawn on the grounds that he had means. He was asking the LSC to reconsider that decision and
they had asserted to him in a telephone call that they would reconsider their decision. The Council disputed the adjournment on the basis that if their appeal was successful the adjournment would keep them out of the property for an unreasonable period.

The Court of Appeal acknowledged that the reconsideration of the LSC was speculative and that they might in fact decide not to continue funding and so L may well appear before the court again without representation. However, there was no reason to disbelieve the content of the telephone call reported. Any prejudice to the Council would be slight due to an adjournment and the Council might well seek to rely on the decision made in the appeal as a case authority in future matters. This authority would be immeasurably better if L was represented and the arguments were fully canvassed before the Court so the delay could be seen as a benefit to the Council.

However, the Court was not prepared to allow a long delay. It adjourned the matter to July and made clear to L that the hearing of the appeal would proceed at the next attendance irrespective of whether he was represented.

Matter adjourned, costs reserved.

*All headlines by the Chief

**Housing and Human Rights Round-up Part II**

*Mon, 04 Jun 2012 20:15:48 +0000*

*SJM*

Three more housing-related cases have been decided recently by the ECHR:

**Bjedov v Croatia (29/5/12)**

Mrs Bjedov was granted a joint tenancy of a 'specially protected' flat in Zadar, Croatia in 1975 and she became the sole tenant after the death of her husband in 1994. Since 1991, Mrs B had been living with her husband in another property and she moved to Switzerland after her husband's death, returning to Croatia in 1998. Mrs B was unable to return to her flat as it had been occupied by trespassers from 1991 onwards.

Mrs B was eventually able to move back in July 2001 and she then applied to purchase the flat from the Municipal Authorities. The Authorities counterclaimed for her eviction from the flat and the Municipal Court dismissed the claim and allowed the counterclaim on 28/4/06. The Court held that her absence from the flat for over 6 months was unjustified and that the absence of any legal proceedings against the trespassers demonstrated a lack of an intention to return. Mrs B's appeal was unsuccessful but she argued before the Court (at the enforcement stage) that her eviction would be both inhumane and degrading as she could not afford to live anywhere else, she was frail, elderly (she was in her seventies), in poor health and death would result from the eviction (supportive medical evidence was provided).

Nevertheless, the Municipal Court decided on 11/5/11 to proceed with enforcement but the warrant had yet to be executed when the ECHR heard the case. Mrs B argued before this Court that Croatia had breached her rights under Art 8.

The Government argued before the ECHR that notwithstanding Mrs B's claims of infirmity, she had never approached the local welfare centre, which was prepared to arrange a nursing home for Mrs B if she were evicted from her flat. Mrs B pointed out in response that the costs of a nursing home would be prohibitive,
both for her and for her children, who would be expected to support her.

The ECHR concluded (at para.68) that the Municipal Court in the course of the enforcement proceedings had ordered her eviction without determining whether her eviction was proportionate or necessary in a democratic society, particularly when there was a real possibility of irreparable harm to Mrs B's health. The Court also found that the offer of nursing care was speculative rather than real.

The enforcement process was an inadequate mechanism for the adversarial examination of complex legal issues and the Court held that Mrs B's Article 8 rights had been breached.

The ECHR also made this interesting comment (para 70):

"Another element of importance is the following. In circumstances where the national authorities, in their decisions ordering and upholding the applicant’s eviction, have not given any explanation or put forward any arguments demonstrating that the applicant’s eviction was necessary, the State’s legitimate interest in being able to control its property comes second to the applicant’s right to respect for her home. Moreover, where the State has not shown the necessity of the applicant’s eviction in order to protect its own property rights, the Court places a strong emphasis on the fact that no interests of other private parties are likewise at stake."

Damages of EUR 2000 and costs were awarded.

Comment: Bjedov is potentially a very useful case in the context of applications to suspend warrants when new evidence is presented to a Court that raises fresh Article 8 issues. It is difficult to tell from this judgement whether Mrs B argued in 2006 that it would be disproportionate to evict and whether the Court at that stage considered, for instance, the overall length of the tenancy. However, it would appear to be insufficient on the strength of this judgement for a Court to ignore new evidence at the warrant stage and to state, for example, that the main proportionality issues had been dealt with in the course of the possession claim.

Jarnea and others v Romania (31/5/12)

The applicants were owners of properties which had been let to tenants under agreements concluded with the State. The applicants complained that they were unable to receive the rent that was due to them and they commenced proceedings in the local courts for the tenants' eviction. The courts refused to allow the evictions as they considered themselves bound by legislation which provided for a 5-year extension to the tenants' agreements. The applicants petitioned the ECHR for compensation for breach of their rights under Art 1 Protocol 1.

The ECHR rejected the government's argument that because the extension of the agreements was in the tenants' interests, it was therefore in the public interest for the applicants to be deprived of their possessions. It found there to be a breach of Art 1 Protocol 1 and awarded EUR 5000 compensation to each applicant.

Costache v Romania (27/3/12)

Mr C petitioned the ECHR for breach of his rights under Articles 3 and 8 of the Convention by reason of the State's failure to remedy his inadequate housing situation and to allow him to remain in living conditions which were, on Mr C's case, inhuman.

Mr C struggled to find his own accommodation following the death of his father in 2001 and he moved into a deserted stable with his partner (in either 2003 or 2005). Mr C suffered from hepatitis and brain damage resulting from a stroke and visits conducted by Social Services inspectors to the stable confirmed that it lacked sanitation and functioning utilities and that it was unsuitable for habitation. The couple were
placed on the waiting list for rehousing and they were eventually relocated to suitable accommodation at the end of 2007.

The Court noted that there was no right under Article 8 to be provided with a home (Chapman v UK) except in the limited circumstances where an applicant's serious personal circumstances created a positive obligation on the State to act. Notwithstanding the applicant's serious health problems, the Court found that the State had not authorised or arranged for Mr C to occupy the stable by way of social housing. It merely allowed him to live there until his housing situation was resolved. Mr C was eventually prioritised for a tenancy in 2007 and the Court concluded that the State had acted within the correct margin of appreciation for the distribution of its housing resources.

The application was found to be inadmissible.

**Disability and possession**

*Tue, 12 Jun 2012 06:28:27 +0000*

*Dave*

This is a short note of [O'Connell v Viridian Housing](http://example.com) [2012] EWHC 1389 (QB) - it's short because it goes nowhere really and the facts were not exactly great. Ms O'Connell is partially sighted and suffers from depression. She had occupied supported housing managed by Viridian since 1998. Her Mum died in 2005, and she inherited another property. In May 2008, a possession order had been made against her under Ground 8 for non-payment of rent, and it was found her mental and physical impairments, which were disabilities, were not related to her rent arrears. That order was, however, set aside by consent to enable Ms O'Connell to decide what she was going to do with the other property. She didn't do anything and rent arrears continued. Viridian then sought possession again under Grounds 8, 10 and 11. At a hearing, Ms O'Connell was represented by the duty solicitor but there were no papers; the judge adjourned the hearing until 5pm on the same day, when the duty solicitor said that there public law/Article 8 issues which, not unreasonably, led to the duty solicitor seeking an adjournment. The consent order was still unavailable.

The judge made an order for possession on ground 8, as there were no exceptional circumstances to justify an adjournment and Viridian had extended considerable latitude for a long period of time. The judge was aware of the Article 8 jurisprudence and the (in my view) baleful decision in [North British HA v Matthews](http://example.com) [2004] EWCA Civ 173. The disability arguments had been dealt with at the previous hearing. Before Tugendhat J, it was argued that the judge was wrong not to adjourn the proceedings as Ms O'Connell had not been in a position to obtain legal representation which would have enabled her to file a defence; there were other irregularities to do with the consent order. A draft defence was provided which pleaded the Equality Act (ss 15, 19 & 20), and various elements of Article 8 (including the interesting
defence about the different protections given to secure and assured tenants). The problem was that Ms O'Connell had been offered the opportunity to prepare a witness statement/s for this appeal but she did not explain why she was unable to advance her case at the hearing. There was also no material to show that the judge was wrong or had made a procedural error. The appeal was, therefore, dismissed.

Cohabitant succession

Tue, 12 Jun 2012 07:48:11 +0000

Dave

All there is at the moment is a Lawtel note of Amicus Horizon v Mabott and Brand and no neutral citation. It concerns whether Mr Brand was living with Ms Mabott as her husband for the purposes of succession to Ms Mabott's tenancy: s 17(4), Housing Act 1988. They had lived together in the property for 10 years. They obviously had a loving relationship - according to the Lawtel note, they "gave those who knew them the impression that their relationship was important and lasting" - and Mr Brand expressed his devotion to Ms Mabott's daughter. But they had claimed benefits separately and it had been found that Ms Mabott "had always been keen to preserve her independence because of past experiences". The judge had found that they were not living together as husband and wife, and the Court of Appeal refused to overturn that decision on the basis that the judge had been aware of the correct test so that Mr Brand had not discharged the burden of demonstrating to the outside world that they had displayed a lifetime commitment. I guess this shows the importance yet again of the significance of the county court judge's decision and the difficulty of overturning it, but I'd like to take a peek at the CA judgment if there is one (hint hint Rebecca Cattermole and Angela Jack, who were counsel for the parties).

Judicial review of a closed minded appeal

Tue, 19 Jun 2012 23:06:19 +0000

NL

Sharing, R (on the application of) v Preston County Court [2012] EWHC 515 (Admin) [Updated 20 June 2012 to make clear this was a permission to appeal decision, not an appeal hearing]

This is by any measure an unusual case. It is a judicial review of the conduct of an application for permission to appeal to a circuit judge in an unlawful eviction and harassment claim. What is more, it is a successful claim for judicial review (sorry to spoil the tension).

Ms Sharing was a tenant of a Mr Tomlinson. She had brought a claim for unlawful eviction, breach of quiet enjoyment and harassment. He counterclaimed for rent owing. At first instance trial, the main issue was the Claimant's allegation that:

On 15 December 2009, the claimant having fitted bolts to the door, the defendant attempted to gain entry using his own key and, finding that the way was barred, barged through and broke the bolts off the door. Following upon that, the police attended and, according to the claimant, the police suggested that she would have to leave the flat as she was not able to pay
Mr T denied this and his evidence was supported by a Ms Morley, a tenant of another of the flats, to the effect that he had not forced his way in and that Ms S had left of her own accord. A police officer, WPC Dempster had submitted a witness statement and her notebook was in the trial bundle, but she was not at the trial. Mr T told the Court that a witness summons had been served 'by his wife' he thought, but WPC Dempster had not attended.

The judge then asked when it had been served and Mr Tomlinson said he did not know, but he had got a message that morning to say she was unavailable. The judge then said that if he had issued a witness summons and could prove that it had been served, that would be reasonable grounds for an adjournment. Mr Tomlinson then said that he understood that she was caught up in an inquiry, or she is on leave. The judge then pointed out that if there was a witness summons which she had received but had not attended then that would potentially be a contempt of court, at which point Mr Tomlinson said that he left it to his lawyer and did not know the ins and out. Mr Tomlinson then said that he was happy to go ahead with the statement.

At the trial, the District Judge rejected the of Ms S. He did not accept either the Claimant's or Defendant's accounts where unsupported by other evidence, but found against Ms S on the issue of payment of a deposit, undermining her credibility. The Judge also accepted Ms M's evidence as being true.

The witness statement of Tracy Morley was to the effect that the defendant had asked her to accompany him to the claimant's flat because he wanted to speak to her about the tenancy. She was present when Mr Tomlinson knocked on the claimant's door, there was no answer but there was shouting from the inside. After a couple of knocks, the claimant and her boyfriend flung open the door and screamed abuse at the defendant and herself. She also claimed in her evidence, in her witness statement, that on previous occasions the claimant had indicated that she had intended to leave the flat and make a claim against the defendant for illegal eviction, that it was easy and she had done it before.

The hearsay evidence in WPC Dempster's statement was to the effect that she had not told the Claimant to leave the flat and there were others present who had also told her she didn't have to leave the flat.

Ms S' claim was dismissed and Mr T's counterclaim allowed.

It then came to light that WPC Dempster had not been served with a witness summons and was unaware of the hearing. Ms S sought permission to appeal to a Circuit Judge on grounds of new evidence, including a further statement by WPC Dempsey:

It included evidence in paragraph 3, to which I have already referred, that WPC Dempster had not been witness summonsed but had been available to attend court if so required on the date of the hearing before the district judge. In addition, in paragraph 5, she refers to the notes which were in the notebook which was before the district judge as part of the bundle. She says that those notes were made by her during an interview she had with the defendant, in the presence of a female who at the time she believed to be the defendant's partner, because of the way that she related to one another. They did not appear to her to act like a landlord and his tenant, but she now understands that the female was in all likelihood the tenant of one of the other flats at the premises, namely Tracy Morley.

At paragraph 6, she says that the defendant admitted to her that he had let himself into the claimant's flat that evening using his own key, claiming that he had a right to do so because of rent that was overdue and owing to him. He had admitted that he had broken a chain fastening which he said was poorly affixed, and claimed that it was his door that had got
damaged. WPC Dempster goes on in her witness statement to say that she remembered seeing a bolt on the door of the claimant's flat which clearly had been forced, but it was very small and would have been more suited to securing a rabbit hutch rather than a main door to a flat. They were fixed with very small, short screws which had been forced away from the door and the door frame. Quite probably, the door could have been opened and the bolt forced away from the door and door frame without the person opening the door even knowing that had happened.

Despite this evidence, permission to appeal was refused.

The Judge on the permission application, HHJ Appleton, took the firm view from the start that:

"The judge is patently saying, 'I have seen this lady in the witness box and I do not believe her'. There we are. This is not a case where permission to appeal should be given."

On the fresh evidence, he said:

"It is suggested that the second statement of PC Dempster, which was taken long after the events in question and after, indeed, the trial, makes a crucial difference. In my judgment, it does not. I have read the transcript of the proceedings carefully and it is plain to me, and it would be plain to any appeal court looking at this matter independently, that what happened is the claimant's case was destroyed, A, because of her own dishonesty in relation to what she did with the deposit that she obtained from her grandparents and that was exposed quite clearly as being dishonest conduct and, secondly, the evidence of Tracy Morley was important in completely devastating the claimant's case.

This despite the clear implications that the second witness statement of WPC Dempsey had for the credibility of both Mr Tomlinson, and, seemingly crucially, Ms Morley.

Permission to appeal was refused and Ms S sought judicial review.

The criteria for judicial review of a hearing and a Judge's decision are set out in The Queen on the application of Strickson v Preston County Court & Ors [2007] EWCA Civ 1132, to the effect that the Administrative Court must be "vigilant to see that only truly exceptional cases -- where there has indeed been a frustration or corruption of the judicial process -- are allowed to proceed to judicial review".

Ms S argued:

i) Mr T had plainly told a lie in the first trial about the whereabouts and availability of the WPC. The second statement of the WPC made this plain and should therefore have been admissible as new evidence on that basis alone.

This was not accepted. Although not expressly addressed by the Circuit Judge, the district Judge has clearly formed an adverse view on the honesty of both Ms S and Mr T, unless supported by other evidence, so it was hard to see that a further lie by Mr T would affect the decision over much.

ii) The Circuit Judge had 'stepped over the line' to the extent that the judicial process was frustrated or corrupted, because of the way in which he conducted the hearing. The Judge did not permit Counsel for the Claimant to develop her main point, the significance of the new statement of the WPC:

The learned judge repeatedly said that the case had been won or lost because the district judge had not believed the claimant, essentially because of the lies she must have told in relation to the deposit and also because of the fact that Ms Morley's evidence was believed by way of contrast.
It is said that the learned judge has, effectively, revealed to the claimant -- and to any fair-minded or interested party -- that he had already, finally, made up his mind about the case and that it was not going to go any further, and that the aggressive way in which he interrupted the claimant's counsel repeatedly and failed to permit her to develop the point that she wished to make evidences, or gave rise to, an apparent bias on his part.

The high point of that, although it is by no means the only place where he says this, is that when Miss Cawsey for the claimant explicitly asked that the fresh evidence of WPC Dempster be brought into court he said: "I am not interested in fresh evidence, fresh evidence is very rarely admitted...and, frankly, you are grasping at straws in this regard. You have already lost the case on the basis of the judge's views about credibility."

A little further on, having said that he had read everything in the appeal bundle, he said this: "It does not make a crucial difference, you lost because the judge did not believe your claimant."

However, the point that counsel for the Claimant was trying to raise was that the WPC now raised issues of credibility about not just Mr Tomlinson's account but that of Ms Morley, whose evidence the District Judge had accepted as reliable.

Therefore Ms S argued that the way the Circuit Judge had dealt with the issue of new evidence was in itself sufficient to quash the decision "on the basis that it evidenced a total failure to enquire or adjudicate upon a matter which it was his unequivocal duty to address".

This was rejected. The circuit Judge did address the issue of fresh evidence, the further evidence of the WPC and the importance to the case. "He did articulate why it was that he was ruling against that fresh evidence because of, firstly, her own dishonesty in relation to deposit and, secondly, the evidence of Tracy Morley whose evidence was devastating of the claimant's case."

iii) Ms S argued that the way in which the Circuit Judge conducted the hearing:

the way in which he made plain as plain could be to the claimant and to any impartial bystander that he was not minded to have regard to fresh evidence because of his very firm and fixed view that she had lost the case because the district judge found her to be a liar and that she had lost the case because the district judge believed Ms Morley -- that this was a judge who was not minded to give anything like a fair consideration to the claimant's application.

The Admin Court 'with very great hesitation and regret' agreed with this argument:

I have been forced, by reading the transcript of the hearing, to conclude that His Honour Judge Appleton did act in such a way that a fair-minded and independent bystander would conclude that he had finally and firmly made up his mind from the outset of the application that he was going to refuse it, that he was going to refuse to admit the fresh evidence of WPC Dempster, and that his repeated interruptions of the claimant's counsel and the way in which he focused on the way in which the district judge had decided the case, was the clearest possible evidence of that apparent bias.

The Circuit Judge's decision to dismiss the appeal was quashed and the matter remitted to the County Court for rehearing in front of another Circuit Judge (HHJ Appleton had retired anyway).

On costs, the position wasn't clear. Whether costs could be sought against the County Court was left to written submissions, if advised, as no order would have left Ms S exposed to a statutory charge for the legal aid costs should her appeal be successful.
The threshold for JR'ing a Court's decision is high and credit to Counsel James Stark and Ms S' representatives for pushing ahead with this claim. It is interesting (and potentially useful to others) that the point of success in this claim was the Circuit Judge's handling of the hearing, the interruption and refusal to allow Ms S's counsel to develop her point from the outset. The 'fair minded and independent bystander' test used here should clearly be in the mind of any representatives who feel that they have been effectively rejected without serious hearing on appeal - it was not the CJ's handling of the new evidence or, at least in part, the arguments for it that was found to be sufficient to amount to 'a frustration or corruption of the judicial process.

**Double plus ungood**

*Wed, 20 Jun 2012 20:35:38 +0000*

*NL*

The lovely, smiling Grant Shapps, Housing Minister, who clearly in no way whatsoever wants to distract attention from the recent kerfuffle over his alleged misleading of Parliament through dodgy use of statistics (hereafter Shapptistics), has announced the Government's support for a private member's Bill.

The purpose of this Bill? Why, it is to criminalise sub-letting of social housing!

Mr Harrington's Bill would:

- create a new criminal offence of subletting; and allow for proceeds of subletting to be reimbursed to the social landlord in whose stock the fraud was committed

Nobody here would disagree that sub-letting of social housing is a significant problem, and one that needs to be addressed by action by the social landlords. But we can but wonder at the actual point of Mr Harrington's Bill.


And the Audit Commission notes Councils successfully pursuing the sub-letters for the proceeds of the sub-let as unjust enrichment - case study 1 [link is to PDF]

The DCLG press release frankly seems a bit confused. It starts off by saying:

- if caught these cheats face little more than losing their tenancy.

Which is, we must sadly point out, not actually true, but then quotes Grant Shapps as saying:

"I am delighted that Richard Harrington's Bill will make this fraud a criminal offence so that the perpetrators don't just lose their tenancy but feel the full force of the law. And by introducing this effective deterrent against subletting, we can free up thousands of homes for those who genuinely need them.

Grant, dear boy, if it is a fraud it is already a criminal offence (which indeed it actually already is) so doesn't need to be made a criminal offence (again).
Grant Shapps has shown a distinct keenness to make civil offences into criminal ones (trespass to residential buildings) and to make civil proceedings into an arm of retribution for crime (evicting 'rioters' wherever the offence happened), but this is a first even for him, to support a bill to make a criminal offence into a criminal offence.

One can only presume he wants unlawful sub-letting to be really, really criminal, twice as criminal as just being criminal. And who amongst us would argue that this is not a sensible use of Ministerial, departmental and legislative time?

Trespassers and Article 8

Fri, 20 Jul 2012 06:25:10 +0000

J

Seek and ye shall find. Thanks to Lindsay Johnson of Doughty Street Chambers we now have a transcript of the decision in Malik v (1) Persons Unknown, (2) Reynolds (3) Matthews (0UB00913, Central London County Court, HHJ Walden-Smith).

Mr Malik was the freehold owner of a plot of land near Heathrow Airport and had been since around April 2003. He had purchased it with a view to redevelopment but had failed to get planning permission for offices and had been advised by local residents not to bother seeking permission for flats, given the uncertainty over the third runway at Heathrow. In the end, he used the land for storing cars as part of his taxi business. At times it was rented to a third party and even used for some fly tipping, leading to enforcement action by the local authority.

The defendants had been occupying the land since March 1, 2010. They had entered without permission and were, therefore, trespassers. They were part of the "Grow Heathrow" collective, campaigning against the expansion of Heathrow. By all accounts, they seem to enjoy a lot of local support from residents and even the local MP.

Around 4 1/2 months after they entered the land, the claimant issued possession proceedings. The defendants advanced a number of defences.

First, there was a suggestion that the proceedings had not been properly served in that, in particular, they had not been posted through a letter box but had been given to one person unknown and affixed to structures on the site. It's not clear how hard this point was actually pushed. There was clearly some evidence and cross-examination about whether a particular wooden box amounted to a letter box but, in any event, HHJ Walden-Smith held that it is not mandatory to serve proceedings via a letter box (CPR 55.6 merely makes clear that this should be done "if practicable") and the letter box identified by the defendants was not obviously a letter box, such that it was not unreasonable not to use it. In any event, the defendants clearly had received the papers and any failings had caused no prejudice.

Secondly, it was said that the claim should not have been issued against "persons unknown" as the claimant knew the name of at least one defendant. Despite criticising some of the evidence for the claimant, the Judge was satisfied that, on balance, the claimant had not known the name or names of the unknown persons. Even if that was wrong, the failure was not such as to justify dismissal of the proceedings.

Thirdly, it was said that the occupiers had an implied license to occupy, which had arisen as a result
of, *inter alia*, discussions and/or negotiations between the parties. If that were right, then the claim must fail as the license had not been terminated. There was a dispute of fact as to when the claimant became aware of the occupation and what the claimant had said. In short, the defendants contended that there had been discussions about how long the occupiers wanted to stay, whilst the claimant contended that no such discussions had taken place and that the occupiers had made clear they intended to force him to expand valuable time and money to get them out. After reviewing the respective cases, the Judge found that there was no license but, at best, a tentative exploration as to whether it would be possible to reach an agreement. Negotiations, of course, do not in themselves create a licence.

Fourthly, and arising out of the same facts as the third issue, the defendants contended that there was an implied licence through acquiescence as the claimant had not issued proceedings for over four months, despite knowing of the occupation. The Judge rejected this, characterising it as an estoppel argument. There had been no representation by the claimant and, as such, it could not have been relied upon by the defendants. No issue of detriment arose. To the contrary, they had the benefit of living – rent free – on the land for two years.

Fifthly, and most importantly, we come to the Article 8 defence. As readers will know, the combined effect of *Pinnock* and *Powell* is that any person facing eviction at the suit of a public authority is entitled to argue that the eviction would be disproportionate under Art.8. What is far less clear is how this applies to the private sector. The argument is, of course, that the court is itself a public authority (s.6, Human Rights Act 1998) and has to give effect to convention rights, even in disputes between private parties. There is already one case on this point in the Court of Appeal (*Dainter*, our note here) and it's clearly one of the biggest issues in housing law today.

The Judge held (rightly) that even though the defendants were trespassers, that did not prevent them from raising an Art.8 defence. On the facts, for at least some defendants, the land was their home. It was noted that the Supreme Court in *Pinnock* had left the issue open. [I interpose for a moment. There are, however, some very helpful statements in earlier cases (none of which are mentioned in the Judgment, see, *e.g.* Lambeth LBC v Kay [2006] UKHL 10; [2006] 2 A.C. 465; [2006] H.L.R. 22, per Lord Nichols [61] and Lord Hope [64]. See further, Harrow London Borough Council v Qazi [2003] UKHL 43; [2004] 1 A.C. 983; [2003] 3 W.L.R. 792; [2003] H.L.R. 75, per Lord Bingham [22] and Birmingham CC v Doherty [2008] UKHL 57, [2009] 1 A.C. 367, [2008] H.L.R. 45, in the written submissions for Birmingham (noted at 391F-G, 392E-F and per Lord Hope at 401E. In the light of these, and various ECtHR cases, I cannot for the life of me see how anyone can say Art.8 does not apply in the private sector]

Back to the judgment - even though *Pinnock* had left the issue open, the Judge accepted that the court was a public authority and the real issue was whether the eviction was a proportionate means of achieving a legitimate aim. It was also material that the claimant had rights under A1P1 to the peaceful enjoyment of his possessions. It would need something highly exceptional where those rights of a landowner could be interfered with by persons claiming Art.8 rights. It was difficult to imagine how a case involving a private landowner and a trespasser could ever have a disproportionate eviction. Even accepting that the defendants were considered an asset by the local community (as it seems they were) and accepting the social utility of their occupation and protest, a possession order still had to be made. They had entered the land without permission and could not now remain against the wishes of the owner.

Although not covered in the judgment, Lindsay tells us that both sides were granted permission to appeal. I'm going to go out on a limb here, but this case should not be pushed to an appeal. Whilst the landlord didn't accept that Art.8 applied at all, that is clearly wrong and I cannot for the life of me see how the Court of Appeal would say otherwise. Landlords do not, I imagine, want a Court of Appeal case to say that Art.8 applies, otherwise s.21, Housing Act 1988, Ground 8, Sch.2, 1988 Act and other mandatory grounds all become a lot less attractive. If you're a landlord, you want this case to die a quiet death in the county court.
But, if you're a tenant, you don't want this case to go any further either. As I say, I'm confident the Court of Appeal would accept (grudgingly) that Art.8 applies in the private sector. But the facts of this case are terrible and the Court of Appeal will take the same line as in Pinnock etc, about the need for some sort of exceptional factors before the eviction is disproportionate. It is inconceivable that squatters will win an Art.8 defence. I cannot find a single E CtHR case that helps. So, we'll end up with a grudging acceptance that the defence can exist, but the barrier set too high to be of any use.

In addition, this case is clearly going to be presented as a "clash of rights" case - A8 (for the occupier) v A1P1 (for the owner). The right case to push is one involving a lawful occupier, since then the occupier has both A8 rights AND A1P1 rights (i.e. their assured shorthold tenancy is itself a property right worthy of respect) to be set against the A1P1 rights of the landlord (as reversioner). That is a much better case to present on appeal because it means you can't do what HHJ Walden-Smith did in this case and just play the freehold ownership as a trump card.

Ultimately, of course, HHJ Walden-Smith is probably right in her decision. I say this based on a short note of the recent Court of Appeal decision in Birmingham CC v Lloyd July 4, 2012 (extempore, based on a note from Jonathan Manning and Sam Madge-Wyld of Arden Chambers, who appeared for Birmingham; see also this bit of background). [Update - Chief has, with his dark arts, found the transcript.]

In Lloyd, Mr Lloyd was a secure tenant of Birmingham. His brother was also a secure tenant. His brother sadly died and Mr Lloyd moved into his flat. Birmingham explained that they could not let him stay in his brothers flat and that he should move back to his own property. Instead, he gave notice to quit on his flat and stayed at his brothers flat. The Recorder dismissed the possession claim on the basis that Mr Lloyd would suffer personal hardship if evicted and had recently started to run a business after receiving a loan from a state funded scheme.

The Court of Appeal overturned that decision and granted a possession order. A trespasser (such as Mr Lloyd) would face almost insurmountable problems in trying to resist eviction based on Art.8. It would require the most exceptional circumstances before such a defence could succeed. Even the minority in Kay had been unable to envisage a trespasser ever having more than a short time to leave. E CtHR jurisprudence made clear that the state was not required to tolerate unlawful occupation Hoire v UK, Yordanova v Bulgaria) and this was another example of a case that should have been filtered out as not being seriously arguable.

In the light of Lloyd (not mentioned by HHJ Walden-Smith), surely the Court of Appeal will uphold the decision that HHJ Walden-Smith made.

JL and the Second Bite of the Cherry

Mon, 27 Aug 2012 19:31:14 +0000

SJM

Our previous report on the possession claim in Defence Estates v JL and another [2009] EWHC 1049 (Admin) can be found here. There now follows a judicial review of the decision to enforce the possession order made in that claim: JL v SS for Defence [2012] EWHC 2216 (Admin) [not yet on Bailii], heard by Justice Simler QC on 30/7/2012.
After the making of the possession order in JL1, the Claimant was accepted for the full homelessness duty by Leeds City Council and she was placed in the highest band on the Council's allocation scheme. JL's household comprised an adult daughter with mental health problems and a grandchild with Crohn's disease. JL herself was wheelchair-bound, which meant that the search for suitable alternative accommodation was never going to be straightforward. The Minister refrained from enforcing the Order pending enquiries into alternative accommodation until a letter was sent to JL's solicitors on 8/11/10 warning them that the eviction would proceed unless up-to-date evidence was provided to persuade the minister otherwise.

There was no response and the warrant was issued on 9/3/11. The JR claim was issued on 24/3/11, permission was granted and 4 weeks before the hearing, Leeds CC undertook to arrange temporary accommodation for the family, except that they could not guarantee that cooking, bathing and washing facilities would be accessible to JL.

There were 3 grounds for the Court to consider: 1. the Defendant failed to have regard to considerations of mandatory relevance (i.e. absence of suitable alternative accommodation/no consideration of effects of eviction on household) 2. absence of Art 8/proportionality review at enforcement stage 3. the decision to evict was unreasonable

In rejecting Ground 1, The judge referred to the absence of a response to the letter of 8/11/10 and to a ministerial submission of 8/2/11, where the household's circumstances were considered when the decision was made to evict.

As far as Ground 2 was concerned, the judge rejected the Defendant's contention that the Claimant was not entitled to a proportionality review at the enforcement stage. The judge held that this would involve too literal a reading of Pinnock, Powell and Zehentner. The judge held [at para 61]:

"a proportionality review can be considered at the enforcement stage in an appropriate case, but not in every case. Where the question of proportionality has been raised and addressed at the possession stage, or where it could have been raised and addressed, it will be difficult for the tenant successfully to invoke it absent a marked change in circumstances or some other exceptional reason justifying its consideration. In the vast majority of cases where enforcement takes place (without any need for the service of a notice that a warrant has been applied for or issued) within days or weeks of the possession order, it is unlikely that such a justification will be capable of being established."

In this case, there had been a substantial lapse of time between the making of the possession order on 5/5/09 and the warrant of 9/3/11 and the Judge decided that JL was entitled, even within judicial review proceedings, to a proportionality review (NB this approach would be consistent with ECHR jurisprudence, as set out in Bjedov v Croatia-see our report here).

The Judge concluded that it would not be disproportionate or unreasonable to evict: the responsibility of avoiding the hardship that eviction would cause to the family had been assumed by Leeds City Council. Although there was no guarantee of suitable accommodation upon eviction, JL had been given the highest priority for re-housing to permanent accommodation, which meant that her stay in temporary accommodation ought to be short-lived. Furthermore, JL had no right to occupy her present property indefinitely and there was no evidence that eviction would have a greater impact now than several months down the line.

Footnote: It is worth noting that the judge commented (at para. 73) that the property at the time of the possession order had actually been surplus to MOD requirements. This is interesting because the original claim proceeded on the assumption that the property would be required at short notice (see paras 52 and 57 of Collins J's judgement). However, there was no argument of Article 8 necessity at the enforcement stage as the MOD provided witness evidence that the property would either be allocated to another service family or it would be sold on.
Article 8 and Possession

Sun, 23 Sep 2012 22:31:30 +0000

SJM

The ECtHR's recent decision in *Buckland v UK* [updated link to amended judgment 5 October 2012] demonstrates again how wonderfully delphic the subject of housing and Article 8 rights has become.

In one sense, the outcome was fairly predictable because the case was determined by the UK Courts before the Supreme Court in *Manchester CC v Pinnock* established the principles of proportionality in possession claims.

The facts are fairly straightforward: Ms B and her family entered into a licence agreement with the Gypsy Council on 29/3/04 to occupy a plot on a caravan site in Port Talbot, Wales. Following allegations of nuisance and anti-social behaviour, the Council issued possession proceedings. The Judge, bound by *Kay v Lambeth*, found that the Council's decision to seek possession was not unreasonable and he made a possession order. However, he found that the allegations were at the lower end of the scale and he postponed enforcement of the Order (under s.4 of the Caravan Sites Act 1968) until 24/11/06. Ms B appealed to the Court of Appeal, who decided on 12/12/07 that the Court's power to postpone under s.4 imported the requisite judicial scrutiny to claims brought under the Act and that the Act was within the margin of appreciation permitted to States under Article 8 ECHR. The Appeal was dismissed and Ms B left the site in May 2008.

Ms B complained to the ECtHR that she had been unable effectively to challenge the making of the possession order and that her eviction was disproportionate. The Court found that the judicial review grounds applied by the Court were insufficient to ensure the necessary Article 8 protection and that the power to grant 12 month suspensions of the order under s.4 provided inadequate procedural guarantees. Accordingly, Ms B was deprived of her home without the opportunity of having the proportionality of her eviction determined by an independent tribunal. Ms B's complaint under Article 8 was therefore upheld and 4000 EUR non-pecuniary damages were awarded.

Comment: this case is particularly interesting because of the Separate Opinion of Judge De Gaetano. He scrutinises the classic formula: "Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end" and observes that the final part of the test might lead one (incorrectly) to conclude that the making of an Order terminating those rights disappears from the picture as far as Article 8 is concerned. This is not the basis on which the Court decided *Buckland* and it leads the Judge in turn to make these remarks:

In my view while it is perfectly reasonable to require that an eviction or repossession notice issued by the Government or by a local authority – both of which are normally under a public law obligation to provide accommodation for people within their jurisdiction – or possibly even by a private entity in receipt of public funds, should be capable of being challenged on the grounds of proportionality, when the landlord is a private individual the tenant’s right should in principle be limited to challenging whether the occupation – tenancy, lease, encroachment concession, et cetera – has in fact come to an end according to law. In this...
latter case the proportionality of the eviction or repossession in light of the relevant principles under Article 8 should not come into the equation.

The first point here is that the judge appears to take it for granted that Article 8 applies to claims brought by private landlords. However, once the possession order is made in favour of a private landlord, the applicant would appear to be prevented from raising Article 8 issues at the enforcement stage.

Secondly, the judge refers to private entities in receipt of public funds. This contains an echo of the point made by the CA in Weaver about housing associations (para.84). While it is likely to be somewhat of a stretch to fix private landlords in receipt of housing benefit with Article 8 obligations equivalent to those of public authorities in the context of the paragraph, the door is certainly open, for instance, to challenge possession proceedings brought against homeless tenants who have taken up a private tenancy in discharge of the homelessness duty.

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**Haigh, Squatting is Now Illegal**

*Thu, 27 Sep 2012 13:54:12 +0000*

*David Smith*

The Evening Standard is reporting the sentencing of the first person under the new anti-squatting provisions in the LASPO Act.

Alex Haigh received 12 weeks in prison. Unfortunately Mr Haigh appeared to be unaware that squatting was now an offence and admitted to Police that he was a squatter.

I am not going to repeat the various comments we have made about this legislation and its implementation. The most recent post on the topic is [here](#).

I am also not going to comment on the Standard article except to highlight this phrase from the article:

> The law was brought in amid a squatting crisis in London as organised eastern European gangs and other squatters targeted family homes.

Really? Crisis? Clearly the severity of a crisis has been downgraded recently.

I am now going to have some lunch or, for Evening Standard reporters, alleviate my food crisis.

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**More on ECtHR, Article 8 and the Private Sector**

*Sat, 06 Oct 2012 22:37:44 +0000*

*SJM*
Hot on the heels of *Buckland v UK* follows a further decision of the ECtHR: *Pelipenko v Russia*, which is likely to add further weight to the Article 8/private sector debate.

The case is distinctive for the State's shocking mishandling of the litigation between the Applicants and their landlord. Possession proceedings were initially brought against Ms P and her son by 'The Golden Beach Resort' in 2001. The Town Court dismissed the claim on 21/11/01 and ordered the Resort to make arrangements for the purchase of a flat for the family.

In 2004 Ms P applied to enforce the judgement of 21/11/01 and on 5/11/04, the Town Court ordered that unless the Resort purchased a 2 bed flat for the family by 1/1/05, they would be required to pay the sum of 1,168,800 roubles in lieu.

Ms P applied again for enforcement of the 21/11/01 judgement in 2006 but it subsequently emerged that the bailiffs office mislaid the writ of execution in 2008 and the Resort became insolvent on 11/3/09.

The property had in 2006 been the subject of a number of transfers and sales until it ended up in the ownership of Ms A in July 2006. Ms A started possession proceedings against Ms P in July 2009 and the Court, holding that the premises had never been declared fit for habitation, made a possession order on 25/1/10. The bailiffs turned up unannounced at the premises on 11/8/10 and evicted the family the same day. Despite moving back in in September 2010 following an inquiry initiated by the Prosecutor's Office, the bailiffs returned to re-execute the warrant on 25/11/10.

The Supreme Court quashed the judgements and ordered the family's reinstatement on 7/6/11. The Court also held the judgement of 21/11/01 to be enforceable against Ms A. However, Ms A had already made the property substantially uninhabitable and it was not possible for the family to return to their former home. An application was then made to the ECtHR for breaches of Art 6 and Art 8 ECHR.

The Article 6 complaint presented the Court with no difficulty. The bailiffs office did nothing to enforce the 2001 judgement for a seven year period between April 2002 and March 2009, when the company was still solvent. They failed to take adequate and effective measures to ensure compliance with an enforceable judicial decision.

Even though the Supreme Court had overturned the possession order of 25/1/10, the Court observed that this decision was of no practical benefit to the Applicants as Ms A had already made the property uninhabitable. The Court found that the Russian Courts had failed to secure for the Applicants the rights guaranteed by the Convention and it held that there had been a violation of Article 8.

The Court reserved the question of compensation upon written submissions from the parties.

Comment: it might be too early to treat this case as laying down clear principles as far as Article 8 and the private sector is concerned. The focus in *Pelipenko* was on the State's dereliction of duty and the failure of the Court system to uphold domestic law for the benefit of the Applicants, hence the breach of the Convention Rights. The Court stresses (at para.65) that there was no reason to depart from the Supreme Court's interpretation and application of domestic law. However, the Government did make this point in its submissions (para. 43):

> Having extensively relied on the Court’s case-law, the Government further submitted that the judgment had been issued against a private company for whose debts the State could not be held liable. They stressed that the State’s responsibility did not go any further than to assist the applicants in the enforcement of the judgment, through bailiffs or by way of bankruptcy proceedings. The Government reiterated that this was not an obligation of result but of means, with the means of enforcement available to the present applicants having been adequate and effective. The State should only bear responsibility for very serious omissions committed by its officials which had negated the point of enforcing the judgment.
The Government might have hoped that the Court would declare the complaint inadmissible because of Ms P's right to enforce against the liquidated company and/or Ms A. Nevertheless, the Court held the State accountable for the Applicants' eviction, irrespective of whether the landlord was private or public. It will be interesting to see how the damages award is assessed.

Proportionality - between claim and hearing

Sun, 21 Oct 2012 20:26:38 +0000

NL

Well, well. A successful proportionality defence on an introductory tenancy and one upheld on appeal. There is also some helpful confirmation about what can be considered in assessing proportionality.

*Southend-on-Sea Borough Council v Armour* (2012) QBD 18/10/2012 (Not on Bailii. Note on Lawtel and on Garden Court's site here)

Mr A was the introductory tenant of Southend, living in a flat with his 14 year old daughter. The tenancy started in January 2011. Over the next 3 months there were three complaints that Mr A had been verbally abusive to a neighbour, a member of staff of the property managing agents and some electrical contractors. It was also alleged that he had switched on electricity while contractors were working resulting in one suffering a shock. Southend decided to seek eviction, a decision upheld on review.

Between issue of the claim and the possession hearing, some eleven months elapsed, with a couple of adjournments.

In the meantime, Mr A had been diagnosed with Asperger's Syndrome and Severe Depression, and he lacked capacity to defend the claim. The case proceeded with a litigation friend.

There had been no further incidents between March 2011 and the hearing of the claim in March 2012. There was also evidence from Mr A's probation officer and a youth worker as to his recent good behaviour and medical evidence on the potential effect of eviction on Mr A's physical and mental health.

The Court at first instance, Recorder Davies, found that while Southend had been justified in bringing the claim, and that at the date of claim it would have been lawful and proportionate, Mr A's subsequent good behaviour and the absence of any further incidents were relevant factors in assessing proportionality at the date of trial. On that basis, it was not proportionate to make a possession order. A copy of the first instance judgment is here.

[The judgment also raises the interesting question of whether such a thing as the 'popular housing press' actually exists - see the post-judgment discussion on permission to appeal.]

Southend appealed. Their argument on appeal was that: 1. Mr A's compliance with the tenancy agreement issue of the claim was not a relevant consideration for an assessment of proportionality. 2. If the good behaviour was a factor, it was insufficient on the facts to give rise to an Article 8 defence. 3. The Recorder should have approached her decision on the same basis as it would have been considered at the initial hearing, as Mr A should not gain an advantage from the delay caused by the adjournments.

Mr Justice Cranston dismissed the appeal.

The overriding principle was that consideration by the Court depended on the facts of each case. (Corby
BC v Scott [2012] EWCA Civ 276, [2012] H.L.R. 23). It was clear that subsequent behaviour, even good behaviour, could be a relevant consideration for proportionality. (Manchester City Council v Pinnock [2011] UKSC 6, [2011] 2 A.C. 104 and Hounslow LBC v Powell [2011] UKSC 8, [2011] 2 A.C. 186). The proportionality review by the court had to be on the basis of the material available at the time of the hearing. The Recorder had approached the issue of proportionality correctly and there was no error in her decision, which was a 'model judgment' in how such cases should be dealt with.

So, useful confirmation that the proportionality review by the court is to be based on all materials up to the date of that hearing, including post issue materials and events (or lack of them).

We always took it that the principle is that the decision to seek eviction is an ongoing one, that should be under review in changing circumstances in order to consider whether it remains proportionate. This is an affirmation of that by the High Court.

It is also a useful case on the significance of post notice conduct in Introductory tenancy possession cases.

Withdrawn, dismissed or discontinued - the extent of consent


NL

A case perhaps best filed under the 'Ooops' category, which only took a trip to the Court of Appeal to sort out

Spicer & Anor v Tuli & Anor [2012] EWCA Civ 845

Spicer and Shinners were Law of Property Act 1925 receivers, appointed under a charge in respect of a London flat. The charge had been granted by BRM Investments Ltd to Clydesdale Bank plc. When the receivers instructed solicitors to sell the property, it was discovered that Ms Tuli and her two daughters were in occupation.

The solicitors for the receivers issued a possession claim against trespassers, CPR 55.1. Ms Tuli defended claiming to have been a tenant since 2003, under two successive tenancy agreements. A trial was set for 25 September 2008. However, Ms T did not provide the tenancy agreements to the receivers’ solicitors until 24 September 2008, although Ms T was represented.

In a series of telephone calls and exchange of a draft order with Ms T’s solicitor, solicitors for the receivers stated that they believed the tenancy agreements were not genuine, but that the receivers would need time to investigate and would therefore agree to the proceedings being ‘withdrawn’ on no order as to costs and the trial the next day vacated. The clear intention was to potentially bring fresh proceedings depending on investigation of the tenancy agreements. The first draft order, as per the discussions, stated that ‘proceedings be withdrawn’.

[This is a particular annoyance of mine. I often get opponents, particularly Local Authorities, insisting on orders stating proceedings are 'withdrawn'. They are simply wrong...]

As the Court of Appeal notes, there is no such thing as 'withdrawning' proceedings:
Under the CPR an action cannot be withdrawn. It may either be discontinued under CPR Part 38 or it may be dismissed. If an action is discontinued rather than dismissed, it is clear that a second action may be brought even if it arises out of the same facts as the discontinued action, although the permission of the court would be needed under CPR Part 38.7 if the action is discontinued after the defendant has served a defence.

In any event, the consent order actually filed on 25 September 2008, approved by both parties' solicitors, provided that the claim 'be dismissed'. Lewison LJ in this appeal judgment took the view that "The underlying agreement, however, was that the proceedings would be withdrawn so as to give the receivers time to investigate the position, and on the basis that Mr Sharpe [receivers' solicitor] had stated his belief that the tenancy agreements were not genuine."

In November 2009, the receivers began fresh possession proceedings:

In their Particulars of Claim, they alleged (1) they had a right to possession of the property; (2) Ms Tuli remained in occupation without their consent or licence; (3) she had never been the tenant of the receivers, the bank or the mortgagors, nor had she held a sub-tenancy; (4) in the event that Ms Tuli were to be found to be a tenant, the tenancies do not bind the bank, because they were fraudulent and created after the charge had been entered into, or because the existence of the tenancies was fraudulently concealed from the bank; (5) the tenancies should have been granted by deed but were not, with the consequence that they created equitable interests only which the bank's legal interest overrode; (6) alternatively, the tenancy agreements were not intended to have any effect in law.

The claim sought possession, use and occupation charges at £1500 per week and costs. Ms T applied to strike out this claim, on two grounds. Firstly that as the previous possession claim had been dismissed, the second claim was barred under a cause of action estoppel. Secondly, alternatively, the fresh claim was an abuse of process.

At first instance, the DJ decided that there was no abuse of process, as did the Circuit Judge on appeal. While the matters raised in the second action could have been raised in the first, the tenancy agreements suggested fraud. It was in the public interest to investigate fraud. Moreover, the receivers had made it clear that the 'withdrawal' of proceedings would not end their investigations. This outweighed Ms T's private interest in a peaceful family life in the property.

On second appeal to the Court of Appeal noted that *Johnson v Gore Wood & Co* [2002] 2 AC 1 held that the question in such situations was what assumptions the parties proceeded under when settling the previous proceedings, looking in particular at the negotiations. Whether as 'issue estoppel' (Lord Bingham) or as abuse of process (Lords Goff and Millett), the precise legal nomenclature mattered little, the issue was the conduct of the parties in ending the first proceedings.

In this case, it was clear that the receivers had said that they would pursue a further claim and that was the basis on which the consent order was arrived at.

Although Lord Bingham analysed the matter as a question of estoppel by convention, neither Lord Goff nor Lord Millett were attracted by that analysis. I do not think that the precise legal analysis matters. The conduct of the parties in bringing an end to the first action is part of the broad merits-based approach to the question of abuse of process that Lord Bingham, with the agreement of the whole House, had commended. It was quite clear in the present case that the receivers said they would pursue their claim against Ms Tuli; that was the basis of the suggestion that the action be withdrawn. The accident that the draft consent order substituted "dismissed" for "withdrawn", instead of "discontinued" cannot in my judgment alter the broad merits-based approach. It would, in my judgment, be unconscionable to allow Ms Tuli to take advantage of what was plainly a technical error. If, therefore, there is no cause of action estoppel, I would hold that there is no abuse of process.
On cause of action estoppel, Ms T argued that:

(1) an order made by consent dismissing the first action operates in the same way as a judgment on the merits of the claim, and gives rise to a cause of action estoppel; (2) the cause of action relied on in the first action was the receivers' claim to possession against Ms Tuli; (3) the only question relevant to that cause of action was whether the receivers had a better right to possession than Ms Tuli; (4) the receivers asserted that their right to possession derived from the charge, while Ms Tuli asserted that her right to possession derived from the tenancy agreements; (5) thus the stage was set for a battle to determine which of the two asserted rights was the better one, and that directly raised the question whether the tenancy agreements were genuine, and if so whether the bank was bound by them; (6) once that action had been dismissed by consent, that cause of action was barred by a cause of action estoppel, and cannot be raised in a second action; (7) this is a rule of law, and is not a matter of discretion. There are only three limited exceptions to the rule: fraud, collusion, or where the construction of the order itself shows that no estoppel should arise.

But, assuming that the second cause of action was based on the same issues as the first - not decided at this point, it remains that cause of action estoppel is based on the principle "that there is a public interest in the finality of litigation, and that a person should not be unjustly harassed by a revival of proceedings that have already been disposed of. These principles must be applied to work justice and not injustice". It is open to the courts to recognise that the inflexible application of an estoppel may cause injustice, *Arnold v National Westminster Bank* [1991] 2 AC 93. A *res judicata* estoppel is where a cause of action estoppel is essentially concerned with preventing abuse of process, *Arnold v Westminster*.

The first step here is the effect of a consent order. In *Ako v Rothschild Asset Management Limited* [2002] EWCA Civ 236, the Court of Appeal said that the court may have regard to the surrounding circumstances in order to determine the extent of the consent given to the making of the order, and this on grounds wider than the procedural difference between the lower courts and tribunals. This was an alternative ratio, not obiter. As Per Dyson LJ:

> In my view, what emerges from these authorities is that there is no inflexible rule to the effect that a withdrawal or judgment by consent invariably gives rise to a cause of action or issue estoppel. If it is clear that the party withdrawing is not intending to abandon the claim or issue that is being withdrawn, then he or she will not be barred from raising the point in subsequent proceedings unless it would be an abuse of process to permit that to occur.

*Zurich Insurance Co Plc v Haywood* [2011] EWCA Civ 641 did not conflict with the approach of Dyson LJ. In addition Article 6 would support such an approach, where proceedings were dismissed without a hearing, the question is whether this was a friendly settlement such as would waive article 6 rights. Where a waiver of art 6 rights is alleged, a thorough analysis is needed to determine whether this was indeed a friendly settlement, including the surrounding circumstances.

In this case there was no friendly settlement, indeed the reverse. There was no intention to abandon the claim and this was made clear at the time to Ms T through her solicitors.

This case was indistinguishable from *Ako*, and it would be unjust not to allow the receivers to proceed with their second claim. There was no cause of action estoppel and no abuse of process.

**Comment** Apart from the welcome (to me) aside on 'withdrawal' of a claim being non-existent, this is a curious case. The initial error in the consent order stating 'dismissed' rather than 'discontinued' led to a 3 year trek to the Court of Appeal, but the judgment does open the interesting prospect of being able to revisit the context of consent orders in some circumstances, where related proceedings are involved.
The Article 8 Toys Go Back in the Box

Fri, 09 Nov 2012 08:39:53 +0000

David Smith

Thurrock Borough Council v West [2012] EWCA Civ 1435

The Court of Appeal has handed down judgement in a case that will probably come to characterise the operation of Article 8 in the daily life of the County Courts.

Facts W's grandparents (or great grandparents, there was some doubt) were tenants of T. W had joined them in the property and he was later joined there by his son and his partner. After the death of the grandfather the tenancy then vested solely with the Grandmother. After her death in December 2010 W sought to succeed to the tenancy. This second succession was barred by s37, Housing Act 1985. Accordingly, a notice to quit was served and T began proceedings for possession.

First Instance W defended the proceedings entirely on the grounds of Article 8. The relevant parts of the defence read as follows:

"7. The First Defendant will maintain that under Article 8 of the European Convention on Human Rights he is entitled to the right of respect for his home and that there shall be no interference by a public authority with the exercise of this right except in accordance with the law and as is necessary in a democratic society in the interests of the economic well being of the country, ie, that any Court Order must be proportionate. 8. In all the circumstances of the case the First Defendant, having occupied and paid rent for his home for nearly four years since April 2008 and with his partner Samantha Downward [sic] and son Harley West for over since [sic] years since 28th October 2009, it is not proportionate that he and his family should be evicted from their home."

This is worth quoting as it also formed the primary argument before the Court of Appeal. The case was allocated to the multi-track and at trial the DJ dismissed T's claim. There was heavy reliance by the DJ on Pinnock. In particular the DJ set out his stall with the following words:

19. However, on balance and exercising the test for proportionality, it seems to me that to evict this small family and this young child from this property to re-house them in another property which is one bedroom smaller, against all the background of the connection would be disproportionate. 20. Lord Neuberger clearly highlighted that people who might suffer physical and mental difficulties might well fall into a special category. It seems to me that families with young children fall into a similar situation and although they are not expressly included in that paragraph, it seems to me that it is another factor which in this case is of particular weight here. For these reasons, I find that the Article 8 defence succeeds."

T appealed.

Appeal The Court of Appeal set out a series of 8 principles to be applied to Article 8 defences drawing on the various authorities. I suspect this fairly clearly laid out tick-list will end up becoming the de facto standard in the County Courts. In summary the principles are:

1. It is a defence to a local authority claim for possession that it would be disproportionate in all the circumstances and therefore a breach of the Article 8 right to respect for the home;
2. The test to be applied is whether possession is a proportionate means of achieving a legitimate aim;
3. The threshold for establishing that a local authority is acting disproportionately is high and circumstances will have to be truly exceptional;
4. The threshold is high because there is a public policy interest in local authorities managing their own stock effectively. They will normally be better equipped to make management decisions than the Courts;

5. Where the local authority has a clear legal right to possession and there is no strong evidence that the authority is not acting in accordance with its duties then these fact alone are a strong factor in support of the local authority position without the need for further explanation;

6. Any Article 8 defence must be pleaded and set out in sufficient detail to show that it meets the threshold. It is not enough to simply cry "Article 8" without a detailed summation of the reasons why it should apply;

7. The Court must consider any Article 8 defence on a summary basis at the earliest opportunity and consider whether it reaches the threshold. If it does not it must be struck out or dismissed;

8. Where an Article 8 defence has been established it will rarely be sufficient to allow someone who has no legal right to remain in a property absent Article 8 to do so.

In this case there was no legal right to remain in the property and the threshold was considered not to have been met. The Court did not agree that W and his family fell into the special category outlined by Lord Neuberger in *Pinnock* and cited by the DJ. There was no suggestion that the Council would no, in fact, rehouse W elsewhere.

Appeal allowed.

Notably, the Court of Appeal went further stating that the Article 8 defence should never have been allocated to the multi-track and should have been dismissed summarily.

**Conclusion** This decision will be a bit of a cold water bath for many housing lawyers. The clear statement of principles and the strong conclusion that this case should have been summarily dismissed will probably be picked up in the County Courts rapidly. I suspect that this will reduce the number of Article 8 defences in the County Court quite drastically. The Court of Appeal has put Article 8 firmly back in its box and nailed down the lid.

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**Consultations, bills and mysterious advisors**

*Thu, 13 Dec 2012 22:56:20 +0000*

*NL*

A bit of a miscellany, with Government skulduggery and posturing galore.

First up, Grayling's MoJ has announced a consultation into revising the rules on Judicial Review. Broadly, he is against it. Responses are due by 24 January 2013, so a busy holiday for the rest of us. Given the dubious inferences drawn from inadequate statistics, people really should respond. Our view from when the first announcement was made is [here](#).

Next, the Home Office [draft Anti-Social Behaviour bill is out](#) (officially tomorrow 14/12/2012). The end of ASBOs and ASBIs, closure orders etc. but also the new mandatory ground of possession for breach of an ASB injunction, noise abatement order or other ASB conviction. And, lest we forget, a discretionary ground for possession of a secure or assured tenancy where a tenant, member of household or visitor commits a riot related offence. We'll be coming back to this one in detail, but our initial view of the possession proposals was [here](#) and [here](#).
And then there is the curious case of the advisor who wasn't (or was he?). Andy Gale 'CLG Policy Advisor' was the author of a briefing paper to Council officers that appeared to advocate unlawful gatekeeping, reducing the homeless preference in part 6 to effectively nil, and acknowledged out of borough offers were going to happen (not the official CLG line or guidance). We revealed the briefing document here. The Guardian picked up on the detail of the briefing paper here, and then all hell broke loose.

The CLG aggressively denied to the Guardian that Andy Gale had anything to do with them (though I noted at the time the strange precision of the wording used "Andy Gale is not employed by the department and [...] it has no contractual arrangements with him"). Andy Gale vanished from a January 2013 conference where he was billed as CLG policy advisor. An erratum slip was issued at a November conference to say Andy Gale was not a CLG policy advisor.

Meanwhile, I was hearing odd tales, including one from several different directions that Andy Gale had been 'frogmarched' out of CLG HQ one afternoon about a week after the Guardian article. There were also whispers about him working at LB Newham as 'a CLG advisor'. Bits and pieces were coming together to make it clear that the CLG's denial was not necessarily as clear cut as it seemed.

Now the Guardian has gone public with the whole story, straight out of the Thick of It. Do read the full article. It might even make you feel rather sorry for Mr Gale. But some highlights are the CLG suggesting that Andy Gale had been effectively making up his 'policy advisor' title since 2008:

He [Gale] has advised the Government in the past, but he is not employed or seconded by DCLG, and it's not true that this advice reflects our views. This alleged advice was not paid for, or commissioned by, or given to DCLG.

and

He has been told he should not present himself as a government advisor, and he accepted that.

Meanwhile Andy Gale was using a CLG email address...

Then there is the Newham arrangement, CLG insisted that Gale was "an advisor to Newham BC [borough council]." But the diligent digging by the Guardian's Patrick Butler resulted in an exchange of emails between CLG and Newham in which CLG offered to pay Newham to 'host' Andy Gale:

I believe Andy has spoken to you about Newham hosting Andy Gale to continue to provide support to local authorities to tackle homelessness. I would be most grateful if Newham are able to help in this respect. The objective is for Andy to continue to provide support for two day a week to local authorities. DCLG would provide additional grant funding to Newham this financial year of £72,000.

So, it is quite true that CLG did not have a direct contractual relationship with Andy Gale, or employ him. Instead, CLG asked a local authority to 'host' Gale to provide 'support to local authorities' for two days a week. For this Newham would get £72,000, "$52k to pay Gale, £10,000 for his travel and hotels cost, and £10,000 for Newham's administrative costs.". This is hardly 'nothing to do with us'. (My sympathy for Mr Gale for being left to twist in the wind and being portrayed as a fantasist by CLG was somewhat ameliorated by £52K per year plus expenses for a two day a week job. Though he did throw in 10 days free advice to Newham.)

Then there is the matter of the Housing Minister's answer to a parliamentary question. Karen Buck MP, who had engaged with both my post and the Guardian's on twitter, laid a written question after seeing the general surprise at the CLG's denial of having anything to do with Andy Gale, but with some further information from somewhere.
Ms Karen Buck: To ask the Secretary of State for Communities and Local Government, which local authorities have received grants from his Department to employ Andy Gale Consultants in each of the last three financial years. To ask the Secretary of State for Communities and Local Government, on how many occasions his Department has recommended Andy Gale Consultants to local authorities in each of the last three financial years.

Mark Prisk's response from today (13/12/2012) follows a similar line to the CLG's replies to the Guardian.

Mr Mark Prisk: Andy Gale is not employed by the Department, is not contracted to the Department and, for the avoidance of doubt, does not speak for the Department. He was formerly employed by the Department in 2007. From 2008 onwards, I understand he has acted as a homelessness consultant to a number of local authorities. Under this and the last Administration, the Department has provided grant funding to a number of local authorities to support the provision of advice on preventing homelessness to complement the funding we provide to the voluntary sector. I understand that Mr Gale was commissioned by the London Borough of Croydon from 2008 to 2011 and currently by the London Borough of Newham as one of those providers of preventing homelessness advice. Whilst officials have had contact on how such departmental funding has been spent, Ministers in this Administration have had no involvement with local authorities on commissioning such services.

This is, shall we say, a little disingenuous in view of the documents around the set up of the Newham position. Whether Mr Prisk's reply is actually misleading is something on which people can draw their own conclusions. Got to love that "Ministers [...] have had no involvement with local authorities on commissioning such services". I do doubt it was Mr Prisk himself emailing Newham with a £72K proposal if they'd 'host' Gale. Mr Prisk's response is also, of course, not an answer to Karen Buck's question...

What is clear, as the Guardian concludes, is that every effort is being made to make sure the blame for the housing, homelessness and benefits catastrophe that is now accelerating remains laden on local councils rather being pointed at ministers and the ministries. Out of borough homeless accommodation - it is all the council's fault. The minister has, after all, told them not to do it.

I think someone has got a little confused

Wed, 19 Dec 2012 00:45:30 +0000

NL

According to this article, the Residential Landlords Association are up in arms about the European Court of Human Rights being about to rule on article 8 defences in a case affecting private land owners. Richard Jones, the RLA policy director (and a solicitor who some might think should really know better) is quoted as saying:

"If Europe decides that respect for the home provisions within the Human Rights Convention apply to private landlords this will lead to a mass exodus of landlords, causing untold misery for those in desperate need of a place to live."

There are a few problems with that statement, but perhaps the most immediate one is that the case the RLA appear to be on about is not actually in front of the ECtHR at all. It is, in fact, in front of the entirely
UK based Court of Appeal, Malik v Persons Unknown, (the Heathrow trespass case - our earlier report) in Mid January 2013. Somehow this appears in the article as the 'ECHR's court of appeal'...

This isn't the first time the RLA has wholly inaccurately got its knickers in a twist about Art 8 cases. One might have thought they would have learnt to check before fulminating about 'Europe deciding'.

Oh, was that a wolf?

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**Request for information**

*Wed, 19 Dec 2012 23:29:19 +0000*

**NL**

[Updated 20/12/12. See below]

There is a rather odd case note on Lawtel on a High Court appeal of a dismissed defence to possession following an apparently failed succession...

*Evans v Brent London Borough Council QB (Ramsey J) 18/12/2012 [note of extempore judgment on Lawtel]*

From the note it appears that Ms Evans was the joint secure tenant of Brent with her father. She then moved out to take up an AST with her children in 2010, on a 12 month term, apparently to give space to her father, who was ill. In 2011 she moved back in. Soon after, her father died.

In 2012, Brent brought possession proceedings, on the basis that Ms E could not succeed her father under s.87 Housing Act 1985, as she had not been residing in the property as her principal home for the 12 months prior to her father's death.

Ms E apparently defended challenging factual issues about the position on succession, apparently that she had lived with her father in the 12 months prior to his death. She also raised a public law defence that Brent's policy on discretionary succession was unduly fettering its discretion by excluding those who would otherwise succeed under s.87, and an article 8 defence that the eviction was not proportionate.

At first instance - at what we have to presume was a first hearing - the Judge held that neither the public law or article 8 defences were seriously arguable. The Judge also found that Ms E had not resided with her father in the 12 months prior to his death and so had no s.87 rights to succeed.

Ms E appealed. The High Court held that there was no seriously arguable Article 8 defence. Further, the local authority's decision under its policy on succession was set out in a letter that gave the relevant matters it had to consider and gave reasons for its refusal. There was no case that the Authority had not exercised its discretion because it was fettered by its own policy or that it had failed to take matters into account when exercising its discretion.

However, while the Authority had advanced strong documentary evidence that MS E had no intention of living with her father, the case raised issues of fact that needed to be determined. Ms E also had strong evidence. The Judge below should have considered the terms of E's defence. It was not appropriate to deal with the case by way of summary judgment or CPR 55.8 where there were matters that required further investigation by the court.
Appeal allowed.

**Comment** While this appears to be a decision that there was a factual case on the s.87 point that was not suited for disposal by summary hearing, it is rather difficult to be sure if this is right. It isn't clear whether it was actually a first or summary hearing on the original possession claim, for example.

The history is also not clear. Did the tenancy remain a joint tenancy after MS E had moved out, for example? I long to know more principally because the facts and cases reported in the note don't actually make much sense.

So, would anyone care to enlighten us, given that this was an extempore judgment and nothing more will be forthcoming via that route? (Looks pointedly at Victoria Osler and Gillian Redford, Counsel and solicitor for Ms E respectively).

[Update: Thanks to Counsel for Brent, we have more details. And Lawtel really did confuse things.

This was not a joint tenancy, Ms Evan's father was the sole secure tenant. Ms E and her children were listed occupiers. On 1 December 2010, she took up an AST with a 12 month term arranged through Brent's rent deposit scheme. In November 2011, a month before the end of the AST, MS E returned to the property. The AST ended on 15 December 2011 and her father died on 16 December 2012.

Ms E's defences were as in the Lawtel note outlined above, save that Ms E's argument on succession was that although physically at the AST, she had always intended to return and that her absence was merely temporary, to give her father some respite.

The appeal was allowed on the basis that Ms E's case that she had such an intention needs to be heard and determined on the evidence, despite evidence by Brent of Ms E asking to be housed elsewhere because of relationship breakdown.

The appeal argument was based on *Camden LBC v Goldenberg* [1996] 28 HLR 272, which found that, at least in some circumstances, an occupier who had been living elsewhere for part of the 12 month period for s.87 could still be said to be 'residing' at the relevant property.

Appeal allowed and case remitted to the County Court for hearing.

So, in one way, a very straight forward case, in which the appeal was allowed on the basis that there was evidence that needed hearing so the defence should not have been summarily dismissed at an initial hearing. ON the other hand, it shows the possibilities for confusion where a public law and/or article 8 defence faces possible dismissal at a summary hearing (*Powell* etc) and there is also a 'conventional' defence that should be addressed under CPR 55(8) at first hearing. The distinction between 'not seriously arguable' (*Powell*) and 'disputed on grounds which appear to be substantial' (CPR55(8)(2)) needs to be considered.]

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**Article 8 success in the County Court**

*Thu, 17 Jan 2013 22:12:19 +0000*

*NL*

This was a failed succession case where an article 8 proportionality defence was, at least in part successful. Our thanks to Legal Action 'Recent Developments in Housing Law' January 2013 for bringing...
Mr Cooper senior was a secure tenant of Bromley LBC. Following a large scale transfer of Bromley's stock to Affinity, Mr Cooper senior became an assured tenant. There was statutory right for succession by anyone other than a spouse. However, the tenancy agreement provided for a contractual succession for any family member residing with the tenant in the 12 months prior to the tenant's death. The clause stated:

all claims to succeed to the tenancy must be made... in writing within six months of the death of the tenant.

Mr Cooper senior died in March 2009. His son, Colin, who had lived with him for 37 years, remained in the property.

Colin Cooper did not make a written application to succeed within 6 months of Mr Cooper senior's death. However, Affinity were aware during that 6 month period that Colin Cooper wanted to succeed. Affinity did not ask him to provide a written application, but, after the 6 months, served a notice to quit and began possession proceedings. Colin Cooper was sectioned under the Mental Health Act 1983 in October 2009.

On resumption and hearing of the possession claim, District Judge Brett dismissed the claim.

Firstly, Affinity had waived its right to insist upon written notice.

Secondly, the Claimant was held to be a public authority. And then

...apart from a technical omission (failure to serve written notice) [he] would have had an incontrovertible right to a tenancy... and because of this it would be disproportionate to deny him the right to continue to reside in a home where he has been for 37 years.

There was therefore a disproportionate breach of Article 8 in the claim.

Comment

This is an interesting 'failed successor' case. One wonders if it might have gone otherwise if Affinity hadn't been aware of Colin Collins desire to succeed, to the extend that they could be found to have waived the right to written notice.

But the other question is what is Colin Collins' tenancy status now? If there wasn't that finding of the waiving of written notice, which presumably means that he had succeeded to the assured tenancy under contract, but just the Article 8 decision, then the notice to quit would have been valid in law. While eviction would be disproportionate, on what basis or status would he continue to occupy the property?

Although not applicable in Mr Collins case - through that finding of waiver - are we re-inventing the tolerated trespasser?

Premises 'reasonably required'
A rare Rent Act 1977 possession case, with possession sought as 'reasonably required' under Case 9 Of Schedule 15 of the 1977 Act via section 98(1).

*Miles v Law* [2012] EWCA Civ 1756 [Transcript on Lexis. Not on Bailii yet]

This was a permission to appeal hearing, with Mr Law the appellant from a District Judge's first instance decision to grant Mr & Mrs Miles a possession order. Mr L had been the Rent Act tenant of the property for some 30 years. Mr & Mrs Miles sought possession to provide accommodation for their adult son and daughter. Section 98 (1) provides:

Subject to this Part of this Act, a court shall not make an order for possession of a dwelling-house which is for the time being let on a protected tenancy or subject to a statutory tenancy unless the court considers it reasonable to make such an order and either—(a) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order in question takes effect, or (b) the circumstances are as specified in any of the Cases in Part I of Schedule 15 to this Act.

Case 9 - a discretionary ground - states:

Where the dwelling-house is reasonably required by the landlord for occupation as a residence for— (a) himself, or (b) any son or daughter of his over 18 years of age, or (c) his father or mother, or (d) if the dwelling-house is let on or subject to a regulated tenancy, the father or mother of his wife or husband, and the landlord did not become landlord by purchasing the dwelling-house or any interest therein after— (i) 7th November 1956, in the case of a [tenancy which was then a controlled tenancy]; (ii) 8th March 1973, in the case of a tenancy which became a regulated tenancy by virtue of section 14 of the Counter-Inflation Act 1973; (iii) 24th May 1974, in the case of a regulated furnished tenancy; or (iv) 23rd March 1965, in the case of any other tenancy.

The circumstances were that Mr & Mrs M stated that they wanted the property for their adult children, son and daughter, who had what was accepted to be a total income of £26,000 pa between them. The evidence was that the son was effectively homeless and the daughter was not earning a substantial income. Mr & Mrs M were approaching retirement and were found to be not wealthy. Mr L had lived in the property for 30 years, had lost his employment in 2002. He worked two days a week and was on means tested benefits. The Court below heard evidence that there were premises that 'with diligence' would be available to Mr L to rent:

There was one property available on 25 March according to the website of Gumtree Property, an organisation which makes properties available in these circumstances. There were (1) emails and letters between estate agents and the respondents confirming that they would consider Mr Law for a property currently on the books notwithstanding that he would need housing benefit to pay his rent, and (2) the existence of Outreach Housing and four websites solely dealing with applicants on housing benefit.

On carrying out a balancing exercise, including relative hardship, the court below had decided it was reasonable to make a possession order. Mr L sought permission to appeal. Mr L argued firstly that the judge below had failed to apply the test in *Kennealy v Dunne* [1977] 1 QBD 837 properly.

The court is required to be satisfied that the premises are reasonably required, but on the authority of *Kennealy v Dunne* that reasonable requirement must be something more than a desire but less than a necessity. Mr Topal [for Mr L] points out that Mrs Miles conceded during her examination that it was her desire that her children should live together in the premises. She did not put it as high as a requirement.
This should have been 'the framework' within which the District Judge considered whether the requirement that it was a requirement had been satisfied.

The Court of Appeal disagreed. It was for the Judge to satisfy herself whether it was a reasonable requirement, on all the evidence. The Judge was not bound by a statement either way by the landlord. If the landlord had said the premises were reasonably required, the Court would still have had to form its own view.

On comparative hardship, "The court has to weigh up the comparative hardship to the tenant and to the landlord and be satisfied that there would be greater hardship to the landlord in refusing possession". Mr Largued that the decision the District Judge had reached was perverse when the disparity of available rented properties of this nature was considered.

The evidence on his submission was that the children would find it relatively easy to find premises to rent, and that the appellant would find it difficult. And that, in fairness, is not a point in relation to the appellant's children that the District Judge goes into. But the reason, in my judgment, why the District Judge did not go into that is that the District Judge was persuaded that what the landlord wanted was that their children should have security. Indeed they wanted to subsidise the rent to a small extent for the benefit of their children, given their limited income. So the question of hardship fell to be assessed on the District Judge's approach to the matter by reference to comparing the inability to give security in the accommodation so that the children could have some security, and indeed could live together, as they wished, as opposed to the availability of premises for rent to the appellant.

As a comparative judgment it was not undermined by the Judge's failure to consider whether the children would find it relatively easy to obtain rented property.

Mr L next argued that in using the expression 'wasting asset' about Mr & Mrs M's lease, the Judge had taken into consideration the value to them of the property without a sitting Rent Act tenant. But this should not have been considered as it was always the case that there would be a relative windfall to the landlord in obtaining vacant possession in terms of the value of the property. In any event Mr & Mrs M could have raised funds to extend the lease well beyond and possible occupation by Mr L.

The court of appeal said:

I accept that, but in my judgment by using the expression "wasting asset" the District Judge is not referring to that benefit. I would accept that there would be a good argument for saying that that sort of benefit, the windfall benefit that Mr Topal speaks of, would be irrelevant. But, in the case of a wasting asset, it seems to me that what the District Judge was really taking into account was the fact that having a tenant in possession for many years made any investment in buying, or extending, the lease more risky and less attractive, and that that was a relevant factor.

Lastly, Mr L argued that the court should not have found that an alternative property was 'with diligence' available to Mr L, as the expert evidence had been against Mr & Mrs M's position.

The Court of Appeal was not prepared to overturn the Judge's decision on this point.

The District Judge drew from that material that, notwithstanding that the expert evidence had not been in favour of the respondent's position, there was sufficient evidence for the court to be satisfied that the defendants would be able to obtain alternative accommodation.

10. That, again, was a finding of fact for the District Judge. The District Judge heard witnesses as well as looking at documentary evidence, and has seen and heard and learnt things in the course of this case which simply did not appear in the judgment. In those
circumstances, giving the advantages enjoyed by the District Judge, an appellate court really is in a very difficult position and is most unlikely to interfere. It would take a much stronger case than this for the court even to consider it.

Despite the quality of the argument presented, permission to appeal refused.

Don't tell (and didn't ask)

**Sat, 26 Jan 2013 01:06:33 +0000**

**NL**

Introductory tenancies require a notice under s.128 Housing Act 1996 to be served before possession proceedings. That notice

shall inform the tenant of his right to request a review of the landlord’s decision to seek an order for possession and of the time within which such a request must be made. [s.128(6)]

But in what form should that information be given? Does that affect the validity of the s.128 notice?

Some, but tantalisingly not all, of the issues are considered in a High Court appeal in

Wolverhampton City Council v Helen Shuttleworth. High Court Birmingham District Registry 27 November 2012 [not reported elsewhere. We have a transcript of judgment]

Ms S had an introductory tenancy from Wolverhampton. This was extended for 6 months following complaints of anti social behaviour. There were further complaints and the Council decided to serve notice then bring possession proceedings. A notice, supposedly under s.128, was served on 23 June 2011. Ms S did not request a review - she said that she had not read the letter carefully and did not realise she could request a review - and possession proceedings were brought.

At first instance, the defence was that the s.128 notice was defective in that it sought to prescribe the way in which Ms S could request a review. The Judge struck out the possession claim on that basis, but granted permission to appeal.

The issue was that there can be no prescribed form or manner of requesting a review, as per Sullivan J (as he then) in _R (on the application of Chalfat) v London Borough of Tower Hamlets_ [2006] EWHC 313 (Admin) at [16]. He said that it was clear that the request could be in any form

since the notice will be issued by the landlord who will have access to legal advice, whereas the request for review will be made by the tenant who may well not have access to such advice. Thus, whilst it is helpful for the notice to be accompanied by a form for requesting a review, the tenant is not required to complete the form or to make the request in any particular procedural manner.

The defence and appeal centred on the phrasing of two passage in the documents sent to Ms S by Wolverhampton.

The letter that served as a s.128 notice in this case stated, in supposed satisfaction of s.128(6)
You have the right to request a review of the landlord’s decision to seek an order for possession. Any request must be made within 14 days of service of this Notice. To make a request for a review you should complete the enclosed form and return it to your local housing office.

The enclosed form, headed 'request for review', stated:

Delete as Appropriate (1) I *do/do not request a review of the Council’s decision to serve me with a notice of proceedings for possession of my introductory tenancy. (2) I *do/do not request an oral hearing which I and/or my representatives would attend in person.

[Signature Space]

You must return this form to your local housing office within 14 days of service of the Notice of Proceedings for Possession.

The argument for Ms S was that the wording of the notice and the enclosed form together:

sought to limit her right to seek a review of the decision of the [Council] by requiring her to inform the [Council] of her intention to seek a review in writing through the completion of the request form rather than allowing her to use any form of communication she wished, including allowing her to initiate it orally, as is her right

This limitation, argued Ms S, via Counsel Martin Hodgson, meant that the notice did not properly inform Ms S of her right to request a review as required by s.128(6), and therefore the possession claim must fail. At first instance, the Judge had accepted this argument, holding that the effect of the notice, with the enclose form "was to inform Ms Shuttleworth that the only way in which she could request a review was by completing and submitting the form." and that this rendered the notice defective.

On appeal, by the Council, Ms S maintained the Judge below was right. The Council raised 3 issues: 1. the construction issue - did the wording of the notice (and form together) prescribe the means by which Ms S could request a review; 2. That the Council did have a power to stipulate how the tenant must request a review; and 3. Even if Ms S was right on the construction and lack of powers issues, this did not mean that the notice did not comply with s.128(6) requirements.

On 1. the construction issue, the High Court noted the difference in wording between 'must' on the enclosed form and 'should' in the notice/letter:

In my opinion, the difference in language must mean that something different was intended. “Must” in the context of when the request for a review might be made tracked the language of section 128(6), and could only have meant that the time limit of 14 days was mandatory and had to be complied with. How the request for a review might be made was altogether different. As I have said, the 1996 Act did not specify how the request might be made. So how is one to give effect to the fact that the word “should” is used and not “must” in the context of how the request for a review might be made when the Act did not stipulate how such a request had to be made? The answer, I think, has to be to treat the reference to the completion and submission of the form in order to request a review as a recommendation only. Tenants were being recommended (indeed, they were even being encouraged) to use the form, but there was nothing in the notice which said that they had to.

While the Judge below had considered that the notice and the form in conjunction meant that such a construction couldn't hold - as the form said 'you must return the form in 14 days' not 'you must request an appeal in 14 days' - the High Court took the view that that form should be considered a subsequent document:
However, by the time the tenant uses this form, the tenant will have decided whether to request a review or not, and importantly to use the form to request a review. In these circumstances, the instruction relates to when the form had to be submitted by rather than how the request for a review should be made.

While the wording of the notice could certainly have been improved by saying 'may' rather than 'should', at the same time the wording should have said 'must' rather than 'should' if compulsory use of the form was intended.

There was an issue raised below over what Ms S thought the passage meant. This would not be appropriate as an aid to construction. However, if the Judge below was referring to the Council's tenants in general, which seemed more likely, it would be right to conclude that they did not know that they had the right to request a review in any way they chose.

Therefore, if all that the judge was saying was that introductory tenants who received the notice would not have wondered whether they had to use the form to request a review or whether they could request a review in some other way, I agree with him. They would just have assumed that completing and submitting the form was the way to request a review, and the question of whether that was the only way to request a review, or whether they could request a review in some other way, was not something which would have come up on their radar. They would just have accepted that that was how it was to be done. But that does not mean that the Council was stipulating that it had to be done in that way.

The Council's internal training documents for staff stipulated that:

On receipt of a request for a review, the reviewing officer must date-stamp and initial the form on the same day and pass [it] to the relevant estate manager.

However, while this meant that the Council was expecting the form to be used, it did not amount to saying this was the only way a review request could be made.

So, on the construction issue, the High Court found that the Council's notice did not stipulate the only way of making a review request.

This in itself was sufficient to determine the appeal. However the court went on to consider issue 2 - whether the Council had the power to stipulate the form in which the review request was made.

There was no prescribed way in which the review request should be made in the 1996 Act nor the Introductory Tenants (Review) Regulations 1997 (SI No. 72 of 1997). The Regulations provide that the "precise way in which a landlord chooses to conduct such review is for each landlord to determine." The Council argued that by extension, where there was no prescribed means for requesting a review, it was for the Council to determine. Ms S argued by analogy to the case law on request for housing assistance under Part VII (homeless applications). Neither analogy was found to be convincing.

The High Court found

I see no reason why the Council cannot stipulate the way in which a request for a review has to be made. The critical point is that if a request for a review is made in a way other than the way the Council has stipulated, there can be no question of that disentitling the tenant from having the decision reviewed, provided, of course, that the request was made within 14 days of the service of the notice. So long as the tenant’s failure to comply with what the Council has stipulated has no adverse legal consequences for the tenant, the Council can stipulate how the request for a review should be made.

And on the crucial issue 3. - would a notice which demanded that the tenant request a review in a
particular way be a defective notice as not fulfilling the requirements of s.128(6) - the Court found this was not an easy issue, but not one that it had to decide upon, given the finding on construction of the notice.

Appeal allowed and possession order within 28 days made.

Comment

There are two interesting issues here, which may well turn up again.

The first is the finding that a Council may stipulate the way in which a review request is made, so long as it doesn't exclude review requests made otherwise. I suspect that another Court may be more persuaded by the analogy with Housing Act 1998 Part VII application case law (e.g. R v Chiltern District Council ex parte Roberts (1991) 23 HLR 387 and R (on the application of Aweys) v Birmingham City Council [2007] HLR 27) to the effect that no method of application should be stipulated.

The second issue, tantalisingly unresolved, is whether a notice which required a review request to be made in a certain way would be defective for the purposes of s.128(6) and therefore render it defective for the purposes of a possession claim. If the notice provides the information required by s.128(6) - the right to request a review of the Council’s decision to seek an order for possession, and the time within which such a review must be made - would an additional requirement on the form of review request render it non-compliant?

I suspect that sooner or later, we will find out...

Without lawful authority? The houseboats strike again

Fri, 15 Feb 2013 12:27:23 +0000

Francis Davey

People live in boats. In some cities, such as Cambridge and London, living in a houseboat may be an affordable way somewhere where house prices would otherwise make that impossible. On so slender thread as that we at nearly legal have reported a number of houseboat cases, even though the points in issue might seem to have more of a nautical than housing flavour.

Moore v British Waterways Board [2013] EWCA Civ 73 certainly falls into that category, but it may raise a much more fundamental issue: what does "without lawful authority" mean?

Mr Moore "had care of" a number of houseboats, all occupied as homes, that were permanently moored on the banks of a tidal part of the Grand Union Canal. He lived in one, the Gilgie. The British Waterways Board (BWB), now the "Canal & River Trust", wanted to stop him doing so.

BWB's plan was to use section 8 of the British Waterways Act 1983 (a local act, 1983 c.ii, available as a PDF from the statute law database). This permitted (among other things) BWB to remove craft which were moored "without lawful authority". BWB said that Mr Moore had no lawful authority.

Both parties agreed that Mr Moore could exercise the rights of the riparian owner (i.e. the person who owned the river bank). The actual ownership of this stretch of river is complex. For a detailed discussion
Mr Moore's straightforward claim was therefore that, as riparian owner, he had a right to moor his boat by the river bank. That right was firmly rejected by the Court of Appeal in a thorough analysis of the law by Lewison LJ. Although there was a public right of navigation over the Canal at that point, Mr Moore did not rely on that as giving him a right to moor. Not only was that point rejected in Moore v British Waterways Board [2010] EWCA Civ 42 (a rather odd appeal) but as he explained to us in a comment on Port of London Authority v Ashmore [2010] EWCA Civ 30 (an even odder appeal about a houseboat) he never contended for such a right.

This is where the appeal becomes very interesting. Lord Justice Mummery thought that in deciding whether the boat was moored "without lawful authority" the first instance judge should have asked whether Mr Moore was committing an actionable wrong in doing so, not whether he could point to a positive right. He cited Sir Robert Megarry V.-C in Metropolitan Police Commissioner [1979] 1 Ch 344 at 357C:

   England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.

Mummery LJ reasoned as follows:

   Although the common law does not recognise a positive riparian right to moor alongside the bank permanently, the absence of that right does not necessarily connote the commission of a wrong and the presence of an unlawful mooring. If what the claimant was doing was not a legal wrong, he was entitled to do it. If he was entitled to do it, he was not doing it "without lawful authority" within s.8, because the law allows him to do what it did not prohibit at common law or by statute.

This is a highly significant decision. If it is followed it will have far-reaching consequences, the phrase "without lawful authority" being used in thousands of statutes. Although the obscure subject matter may mean little notice is taken of it.

I do wonder whether it is right. If the answer to "does X have lawful authority" is "yes" then one is surely entitled to ask "what lawful authority does X have?". The answer "X does not need lawful authority because England is a free country" does not seem, to me, to be a proper answer. Not needing lawful authority is surely distinct from having lawful authority. But if X cannot be said to have lawful authority, surely X is "without lawful authority"?

I confess that time constraints have prevented me from searching the case law to see if there are other decisions on this point. I would be interested what NL readers might have to offer.

Another impressive feature of the Court of Appeal's decision is its strong defence of oral advocacy. I cannot put it better than Mummery LJ:

   Doubts are sometimes expressed about how often oral advocacy affects the actual outcome of appeals. Judicial experience affirms the value of oral hearings of appeals. Sometimes there are dazzling, even terrifying, displays of advocacy, but more often the hearing is a down-to-earth exercise in pro-active judicial engagement with the case: talking through unfamiliar, confusing or difficult factual and legal aspects; disentangling what matters from what does not matter; bringing order and understanding to the discussion of what matters by judicial thinking aloud to test legal propositions and to double-check facts; and ensuring as far as possible that, in conjunction with the pre-reading of the papers, the court has a good grasp of what the parties are getting at.
Quite so. Oral hearings can be essential. One of the first appeals I conducted as an advocate had been rejected twice on the papers (a curious feature of the particular forum was that one could remake paper applications indefinitely) but at the oral hearing the judge could not see anything in my opponent's arguments. What seemed unlikely on paper was treated as being obviously so in the oral hearing.

For this reason it really is important, especially with litigants in person, to allow oral advocacy and in particular to permit the court to extract from the litigant what exactly is their case.

Room without review: Thoughts on tackling the bedroom tax

Sun, 10 Feb 2013 22:58:51 +0000

NL

With the beginning of the bedroom tax looming up for April and upwards of 700,000 households affected, I've been thinking about the position when the inevitable rent arrears possessions start to appear - probably by about October - and also whether the statute itself is open to challenge.

A quick reminder - from April all working age social housing tenants (and from October 2013 some pensioners, when both members of a couple will need to be over state pension age to escape) will see a deduction of 14% of rent from their housing benefit (not 14% of housing benefit) if they are deemed to have one surplus bedroom, 25% for two. The DWP Circular on the Regulations is here. There are no 'dispensations' for bedroom entitlement beyond the basic allocation of one bedroom for:

- An adult couple
- Other adults aged 16 or over
- Two children of the same sex aged under 16
- Two children aged under 10 regardless of gender
- Any other child under sixteen
- A non-resident carer who occasionally stays the night

The DWP has suggested that Discretionary Housing Payments should be used in difficult circumstances. However, the DHP fund has had an increase of £30 million, while the 'expected saving' to housing benefit is some £500 million, suggesting that only one in sixteen affected might be helped by DHP. Further, the DHP boost is for a year and not ring-fenced.

There is no definition of a bedroom in the regulations. What constitutes a bedroom has effectively been left up to social landlords.

Rather belatedly, the main news media have caught on and it is stories of those needing an extra bedroom for reasons of disability, or where children stay between two parents (of whom only one will get the bedroom allowance), that have made headlines. (Here and here for example).

The DWP have acknowledged that only a proportion of those affected will be able to 'downsize'. In many areas, particularly in the north, social housing providers state that they have very few one bed properties, so those looking to downsize will either be frustrated, or forced into the private sector, ironically increasing the housing benefit bill. (For posts on the effect of the bedroom tax on Housing Benefit, see here and here).
So, what everyone in the sector is expecting is a significant increase in people in rent arrears, unable to
downsize but unable to make up the shortfall from subsistence benefits. It is also worth noting that the
DWP minister, Steve Webb, has repeatedly suggested that 'two or three hours' extra work, for those in
work, would be enough to cover the bedroom tax shortfall. This, idiotically, takes no account of the
deductions in HB for additional work. The actual picture is set out here - with an example of someone on
16 hours at minimum wage would need to work not two or three hours more but 32 hours, just to escape
the £14 deduction.

While landlords are giving priority transfers to those affected seeking to downsize, (and thereby
completely clogging up transfers for the foreseeable future), there simply won't be enough smaller
properties. In addition, there are many who will not consider that they are able to downsize. For a survey
of the make up of households affected, see Hilary Burkitt's research, which we'll return to.

While social landlords are struggling to see how they can cope with the situation, it seems inevitable that
there will be a significant increase in rent arrears possession cases, with arrears largely or wholly due to
the bedroom tax deductions from housing benefit. The first swathe could be expected from October 2013
onwards.

With this slow motion disaster in mind, I've been thinking about possible challenges to the bedroom tax,
whether to the regulations per se, or to the implementation of them by local authorities and social
landlords. These are sketchy thoughts, nothing more, and hopefully there will be other grounds for
challenge and/or defence brought forward.

Challenge to the regulations.

I have heard of a challenge at early stages in Scotland (also affected by the bedroom tax) based upon the
difference between the 14% deduction and the actual difference in rent between a 3 bed and a 2 bed
property. The challenge is by the tenant, apparently supported (and funded) by the landlord. I have no
further details. This is potentially interesting, as given that the DWP have acknowledged that a large
number of those affected will not be able to downsize, it would be tricky for the Government to argue that
the 14% is in effect a penalty for not moving or incentive to move. There has to be a connection to rent.
That said, the DWP's announced method for arriving at the 14% for one bedroom is claimed to be
"broadly based upon rent differentials for new lettings in a typical local authority area" (See the EIA here
at page 2). Clearly, any percentage deduction reached would have to involve some degree of averaging,
and therefore there would always be relative winners and losers. A simple challenge that the rent
differential in one set of circumstances was lower than 14% doesn't strike me as in itself a strong ground.
However, a challenge to the 14% (and 25%) as being based on inadequate research, a bad evidence base,
or unjustified assumptions might have stronger grounds. I'm very interested to hear more about this
challenge if anybody knows details.

The other challenge that springs to mind is based upon Burnip v Birmingham CC, Trengove v Walsall
MBC, and Gorry v Wiltshire C [2012] EWCA Civ 629 (Our report here). In Burnip, the private sector
housing benefit bedroom rules were found by the Court of Appeal to be discriminatory against those who
needed an extra bedroom for a carer or because their children could not share a room as a result of
disability on Article 14 grounds. As Hilary Burkitt's research has made clear (albeit from a limited
sample, though the same size as the DWP's), some 72% of affected households had a member who is
disabled or suffers from a major health concern. No specific exemptions are made in the regulations for
disability requiring an extra room, save for a provision for carers staying overnight. The finding in Mr
Gorry's case might be particularly relevant here. The key points from Burnip would be that the shortfall
was discriminatory because a) their HB was based on one room less than their objective needs, and b) -
breaking new ground - drawing on Thlimmenos v Greece (2001) 31 EHRR 15, the right is also violated
"when states without an objective and reasonable justification fail to treat differently persons whose
situations are significantly different”.

It is also worth noting Henderson J's points about DHP and disability benefits - quoting Dave in our


Burnip report

'(a) incapacity benefit and DLA are designed to meet ordinary living expenses and not intended to meet housing needs – that is HB – so, it would be wrong in principle to regard “those subsistence benefits as being notionally available to him to go towards meeting the shortfall between his housing-related benefits and the rent he had to pay” ([45]); (b) discretionary housing benefit payments were not a complete or satisfactory answer to the problem that he needed two bedrooms but was assessed on the basis of one bedroom only because they are (i) discretionary, (ii) payable from a capped fund; (iii) could not be relied on to meet the difference between one/two bedroom rates; and (c) the difficulty in finding suitable accommodation and the probable need for adaptations mean that it is likely to require a long-term commitment for which there was a need for “… a reasonable degree of assurance that he will be able to pay the rent for the foreseeable future, and that he will not be left at the mercy of short term fluctuations in the amount of his housing-related benefits”

I have heard a whisper that a Burnip style challenge is being prepared. I know nothing more. Burnip is due to be heard by the Supreme Court, which may change everything.

[11/02/13 - it has been pointed out to me that para 9 of the DWP Circular noted above suggests people in a 'Gorry' situation, with a severely disabled child unable to share a room, may have a bedroom tax exemption on an individual case basis, following the Court of Appeal decision. However, this does not address other arguably similar situations, for example an adult couple unable to share a bedroom through disability]

Challenges to implementation/defences in the County Court

The difficulty with the bedroom tax is that it renders the usual defences, or arguments, in arrears possession cases redundant. If arrears are wholly bedroom tax related, then there is no possibility of recovering benefits (though that will be outside the scope of legal aid funding from April 2013) or arguing for an adjournment or suspension on terms. There will be no realistic prospect of rent plus £X per week to arrears being viable. The general prospect is frankly that arrears will rise. For that reason, an article 8 defence will also be of little use.

Any defence must therefore be on the basis that the implementation of the bedroom tax is wrong in that case, and this will most likely take the form of a public law defence.

One option might be whether the bedroom is actually a bedroom. As noted above, the statute and regulations have left the definition of a bedroom up to social landlords. I don't know of any social landlord conducting a review of its properties.

While the bedroom tax statute is silent on what constitutes a bedroom, there is plenty of statute that could provide a definition, e.g Part X Housing Act 1985 - the statutory overcrowding provisions:

- more than 110 sq feet (10.2 sq metres approx) = 2 people
- 90 - 109 sq ft (8.4 - 10.2 sq m approx) = 1.5 people
- 70 - 89 sq ft (6.5 - 8.4 sq m approx) = 1 person
- 50 - 69 sq ft (4.6 - 6.5 sq m approx) = 0.5 people.
- Less that 50 sq ft = not suitable as sleeping accommodation

Then there are the HMO regulations, Housing Act 2004, which sets a minimum of 6.5 sq m as a bedroom where there is a communal living room (or 10 sq m where there isn't.)

Some local authorities also have their own HMO licensing standards, which set minimum bedroom sizes.

Arguably, any or all of these would be of relevance to whether what is identified in the tenancy agreement as a bedroom is lawfully so-called, and thus whether the bedroom tax should apply.
Another possible route, for adapted homes, is whether a bedroom is lawfully identified as such where it cannot practically be used as a bedroom. Some properties adapted for disabled use have former bedrooms adapted for other purposes, such that they could not be used as a bedroom at all by the tenant's household. Where the landlord has carried out the adaptations, can the landlord then rely on the description of number of bedrooms in the tenancy agreement for the purposes of the bedroom tax, or is there an effective duty to review and revise that description?

These would only be even possible defences in specific cases, where the facts were right, of course. Assuming that they would actually run. If successful, though, they should result in the bedroom tax being removed for the bedroom or bedrooms at issue, potentially retrospectively.

(Tenantive) Conclusions

These are only some initial thoughts and barely worked through. And it is likely that challenges to the bedroom tax will be a matter of nibbling at the edges, of finding specific circumstances that, in one way or another might be discriminatory in breach of Article 14, or a public law defence issue, or possibly an equality duty issue. Even a successful Art 14 discrimination challenge would only mean a limited incompatibility (and we know how long those can wait to be corrected).

Any other thoughts on potential challenge and defences are welcome.

If there are potential challenges that go to the heart of the bedroom tax, for example on the means by which the percentage reductions were arrived at, then I would be very interested to hear of them.

[Update 4 March 2013: A JR of the bedroom tax regulations has been issued on 1 March 2013. See here.]

What a tangled web...

Sun, 17 Feb 2013 23:17:10 +0000

NL

[Update 22/01/2014 - Anyone concerned with proceedings brought by Mr Ghopee under any company name should see this new post]

Since our post on Barons Finance Limited, we've heard various things about the property and landlord related activities of Barons Finance and assorted other companies under the control of Dharam Prakash Gopee. As it appears that Mr Gopee has on at least one occasion continued to pursue proceedings (including appearing in the appeal permission in the last post) for Barons Finance Limited, despite the company having been wound up and a liquidator having been appointed by the Court, we hope this post might be of use for people acting for Defendants in possession proceedings, duty scheme advisers and hopefully members of the judiciary who are unaware of the relevant court decisions and orders.

It is also a tale of the kind of things that go on when people are desperate and the people who prey on that.

As we have seen, Barons Finance Limited has been found to have been making secured loans in a form outside the Consumer Credit Act 1974 and therefore unenforceable. The loans were, at least in some instances, at a high rate of interest, such that the monthly payments were effectively the same as the interest. Barons Finance Limited has been bringing possession proceedings against defaulting borrowers. Apparently a number of these cases have been brought together in the Mercantile Court - and we are keen for more details of this.
The OFT and Consumer Credit Appeals Tribunal have determined that Barons Finance Limited was controlled by a director, Mr Dharam Prakash Gopee. Mr D P Gopee (for there is another Mr Gopee involved) apparently often appears for Barons Finance (and other companies, as we'll see) in court proceedings. Mr D P Gopee is also a director of a raft of other companies, at least some of which will feature as we go on.

In unravelling all of this, a place to start is the Consumer Credit Appeals Tribunal decision in CCA/2011/0004 and CCA/2011/0005 Appeals by Barons Bridging Finance 1 Limited and Reddy Corporation.

What this judgment makes clear is that of all of Mr Gopee's companies, only Reddy Corporation had a consumer credit licence. That licence was revoked on 19 April 2011 and the appeal process expired on 18 August 2012. The associated companies named in the judgment are Ghana Commercial Bunks Limited (now known as Ghana Commercial Finance Limited), Barons Finance Limited, Barons Bridging Finance Limited, Barons Bridging Finance Public Limited Company, Moneylink Finance Limited and Barons Bridging Finance 1 Limited. All of these companies were found to have engaged in 'unlicensed trading' - making loans, usually secured on property/homes - and at least the majority of these were defective because of the failure to comply with sections 60 and 61 of the CCA.

and then, addressing the circumstances in which the loans were made:

the clientele of entities such as the Appellants are likely to be people who are in financial difficulties or those who are otherwise unable to obtain traditional credit resources from the usual outlets such as banks. It is all the more important, therefore, that the Appellants and their associates as well as their controller in the person of Mr Gopee properly adhere to the duties and obligations required of them under the CCA.

And:

In the hearing before the Tribunal, Mr Gopee confirmed that 75% of the loans extended by BBF, BFL and Ghana Bunks as associates and agents and alleged agents of Reddy, are to individuals seeking credit in order to stave off repossessions. The Tribunal agrees that represents strong evidence that the majority of the people to whom these businesses extend credits are themselves in financial straits.

It appears, then, that there are a substantial number of companies of which Mr Gopee is a director, and which are under his control, that have made loan agreements in ways which do not comply with the requirements of the CCA - in the absence of required information, or payment schedules and terms, in breach of sections 60 and 61 of the CCA and in particular the Consumer Credit (Agreements) Regulations 1983 (CCARs).

- and/or made by an entity which was not licensed to enter such loan agreements.

Mr Gopee's argument that all these other companies were 'agents' for Reddy Corporation was not accepted by the Tribunal or indeed by the Court of Appeal in Barons Finance Limited and Reddy Corporation Limited v Amir Ul Haq [2003] EWCA Civ 595. As the Tribunal puts it:

The Tribunal therefore, is of the firm view and duly finds with regard to the various reported agency agreements which have been said to be formerly in existence and which apparently continue to be used in some form or other, that no reliance can be placed on the existence of any claimed agency agreement or arrangement.
This has apparently been going on for some considerable period of time, over 11 years. The Tribunal judgment also notes another couple of companies under Mr Gopee's control, Halifax Business Finance Limited and Halifax Repossessions Limited, but these seem to be no longer in existence. We should also note another director of some of the companies, Rajav Prakash Gopee, who is Mr Gopee's son and, according to this record, a company director from the remarkable age of 13.

A full list of current companies in which Mr Gopee senior is a director, and/or which are raised in the Tribunal judgment is below, complete with registered office addresses - which aren't always the addresses used...

So, the situation looks like this:

i) A loan made to private individuals by any of Mr Gopee's companies, save Reddy Corporation, is very likely to have been invalid and unenforceable as not made by a company licensed to undertake regulated agreements and

   none of these companies has applied for an order under section 40 of the CCA before seeking to enforce agreements entered into.

ii) A loan made by any of the companies, including Reddy Corporation, is very likely to be unenforceable as the agreement will not fulfil the requirements of the CCA as the necessary information will not have been provided, typically, no details of loan period and payment schedule, amongst other defects. Companies had sought to enforce such agreements

   which fail to comply with section 60(1) of the CCA as well as with the CCARs without the previous obtaining of an enforcement order under section 65 of the CCA.

iii) Barons Finance Limited was wound up in the Manchester District Registry on 19 September 2012 (for unpaid legal costs by opponents) and no proceedings involving Barons Finance Limited could lawfully go ahead after that date without the agreement of the liquidator. (The registered office of Barons Finance Limited is now a Manchester address which appears to be the liquidator's).

So, the list of currently (or recently) active companies:

Barons Bridging Finance 1 Limited (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD)
Barons Finance 1 Limited (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD)
Moneylink Finance Limited (Reg Office 169A PERRY VALE, LONDON, ENGLAND, SE23 2JD)
Pangold Investments Limited (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD) Note this company is described as dissolved here, and under strike off proceedings as of 9 December 2012 here, but we have heard of active proceedings in the name of Pangold. This may be Pangold Estate Limited. See below)
Pangold Estate Limited (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD)
Ghana Commercial Finance Ltd (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD)
Barons Finance 1 Limited (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD)
Ghana Commercial Bunk Limited (Yes, bunk) (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD)
Barons Bridging Finance Public Limited Company (Not a plc) (Reg Office 169 PERRY VALE, LONDON, ENGLAND, SE23 2JD)
It is also worth noting that Halifax Repossessions and Halifax Business Finance had registered offices in the Southend area, one as PO Box 5467, Southend-on-Sea, SS0 9GY, the other as Gopee Business Centre, 9 St Vincent’s Road, Westcliff-on-Sea, Essex, SS0 7BP. In various forms of 'Credit Agreement', the address of both Ghana Bunks and Barons Finance Limited has been given as 'PO Box 5467, Southend-on-Sea, SS0 9GY', though neither was registered there.

It appears that as well as 169 Perry Vale SE23 2JD (And 169A Perry Vale), the Southend addresses also get used by Mr Gopee's companies' 'credit agreement' documents, though these are not the registered addresses (e.g for Reddy Corporation and Ghana Bunks).

So there we are. A mass of different companies, some allegedly operating as agents for the one company that had a consumer credit licence, (but this was found by both the Court of Appeal and the First Tier Tribunal to be a sham), making loans to people in desperate circumstances, secured on their homes. The agreements were/are generally defective in failing to meet the requirements of the CCA, as well as being entered by companies that had no licence to do so.

From what we have been told, Mr Gopee remains active in pursuing possession and eviction proceedings, often appearing on behalf of the companies he controls, and even in seeking to stay or prevent possession proceedings by lenders who hold the first charge.

From the Tribunal decision, the Court of Appeal decision, the permission to appeal decision in the High Court in our first report, it is clear that it is at least likely that the agreements and charges that Mr Gopee's companies rely on are unenforceable. Anyone dealing with secured loan possession proceedings should be aware of this.

A bit too widely cast...

Fri, 22 Feb 2013 07:11:07 +0000

NL

You may recall the discussion that took place on this blog of Wandsworth's secure tenancy terms, introduced in 2009, that sought to introduce a list of things that the tenant, "lodgers, friends, relatives, visitors and any other person living in the property are not allowed to do whilst in the London Borough of Wandsworth", including causing a nuisance to others, causing damage to property etc. etc. A full list of the terms is at the end of this post.

Our discussion was in the content of Wandsworth seeking to use this clause against the mother of an accused rioter for a possession claim under Ground 1 -breach of tenancy conditions. Wandsworth backed away from that case, but the view of some, including me, at the time, was that the terms were effectively a personal obligation, not a term of the tenancy.

We have just heard about a County Court judgment in a case, LB Wandsworth v Maggott, in Wandsworth County Court, where exactly that was held. The following are just brief notes - more detail when we have it.

Mr M was Wandsworth secure tenant, having succeeded his mother, and had lived in the property for
some 30 years. There were no problems until 2010/11 when Mr M became subject to racist and other
abuse. Mr M thought he knew where the originators of this abuse lived, in a flat on another estate, and, for
a period of about 8 months, went to this other estate and flat, marking unpleasant graffiti on the flat door
and common parts.

Mr M was arrested, pleaded guilty and received a prison sentence. About 3 months after he was released.
Wandsworth brought possession proceedings on grounds 1 and 2. The ground 1 claim was on the basis of
clause 31 of the post 2009 tenancy agreement, which states:

"This is a list of things that you, your lodgers, friends, relatives, visitors and any other person
living in the property are not allowed to do whilst in the London Borough of Wandsworth or
the area which is local to the property: . breach the tenancy conditions . do anything which
causes or is likely to cause a nuisance to anyone living in the borough of Wandsworth and/or
the local area . do anything which interferes with the peace, comfort or convenience of other
people living in the borough of Wandsworth and/or the local area . cause damage to property
belonging to other people or council property in the borough of Wandsworth and/or the local
area . harass anyone in the borough of Wandsworth and/or the local area because of his or her
race, colour, nationality, culture, sexuality, gender, age, marital status, religion or disability .
use the property for any criminal, immoral or illegal purpose . threaten or harass or use
violence towards anyone in the borough of Wandsworth and/or the local area . threaten or
harass or use violence towards council employees, managing agents or contractors . use or
threaten violence towards anyone living in the property Any breach of the tenancy conditions
by anyone living in or visiting the property, or where there is a joint tenancy, by one of the
joint tenants, will be treated as a breach by the tenant. If you are evicted it is likely you will
be considered to have made yourself 'intentionally homeless' and consequently not be entitled
to rehousing by the council."

At the hearing of the claim, the District Judge held: (a) cl.31, insofar as it applied to the entire borough,
was not an "obligation of the tenant", applying RMR Housing v Combs [1951] 1 K.B. 486 (b) insofar as it
related to anything which was "local" to his flat then Wandsworth had failed to prove, as a matter of fact,
that his ASB was in the area (c) in any event, it too was not an obligation of the tenancy (d) if he was
wrong about that, it wasn't reasonable to make an order for possession.

The possession claim was dismissed.

Now this is just a County Court first instance decision, but the decision follows the approach that some of
us thought likely on such a broad tenancy term. It will be interesting to see if there is an appeal, because
that would lead to a precedent hearing affecting the widely drawn tenancy conditions of a number of
Councils. If upheld, the significance would be that those clauses couldn't be enforced by possession
proceedings for breach of tenancy.

The Tolerated Trespasser Rides Again!

Sun, 10 Mar 2013 14:32:00 +0000

SJM

OK, so the title of this post may be an exaggeration of what is only a passing reference to an old friend in
Fareham BC v Miller [2013] EWCA Civ 159. But it is interesting to see it used as part of the 'nuts and
bolts' of an Article 8/proportionality judgement.
Mr Miller (M) held a non-secure tenancy of a flat with Fareham BC. M was a habitual offender and a long-standing heroin addict who spent his life in and out of prison. On 13/5/10 the council served a notice to quit because of rent arrears which were cleared very soon afterwards. However, by September 2010, it became clear that the flat was being occupied by a group of individuals whom M claimed had not been given permission to live in the premises and were instructed only to check on the property and collect post while he was in custody.

These individuals would threaten other residents and cause a disturbance within the flat and a further NTQ was served on 20/4/11. A three-way meeting involving the council's housing officer, the probation officer and a representative from the Drugs Intervention team took place on 19/5/11. The council was satisfied that M should be allowed another chance as he would receive intensive support upon his release from custody on 20/5/11 and he would be required as part of his licence conditions to live alone at the property. Unfortunately, M was sent back to prison for yet another offence immediately after being released. Possession proceedings were issued on 20/7/11.

The ASB at the premises became worse throughout 2011 and 2012 with urinating from the windows, drugs paraphenalia strewn both inside and outside the flat, smashed bottles and general rowdy behaviour. Despite this, M asserted that he had no effective control over the behaviour of these other individuals and he reported that he was making progress with his drug and alcohol addiction during his imprisonment.

The trial judge on 3/8/12 found that the service of the NTQ was a proper and proportionate exercise of the council's housing management functions, given the effect of the ASB on the residents of the block. The crux of the case was the meeting of 19/5/11. It was argued on M's behalf that the council was aware of M's proclivity as a vulnerable person for offending behaviour and that when the decision was taken to give him another chance, it would not have been any surprise to see him return to prison so quickly after release. It was therefore disproportionate to evict by effectively punishing M for his offending.

Instead of dealing with this question from the point of view of Article 8 or proportionality, the Recorder found that the council had on 19/5/11 revoked the NTQ served the previous month and that the possession proceedings ought to be dismissed as they no longer had a cause of action.

On appeal, Patten LJ found that the Recorder had erred in his analysis of the meeting of 19/5/11. It was not possible at common law to revoke the NTQ, the professionals present at the meeting could not be described as M's agents from the point of view of the grant of a new tenancy and it was clear from the council's witness evidence that the council was doing nothing more than staying its hand. Once M returned to prison, he was in breach of the condition on which proceedings were stayed. From 19/5/11 onwards, M was no more than a 'tolerated trespasser.'

The Court proceeded to consider whether there was an Article 8 defence to the possession claim. The decision to give M another chance was premised on the view that the risks of ASB could only be eliminated if M lived alone at the flat and kept to his licence conditions. This scenario failed to materialise and the property was again beset by nuisance behaviour. On a balancing exercise, the Court found that an Article 8 challenge would have no real prospects of success and a possession order was made.

Comment: it is interesting to observe in this case a focus on the decision to continue with proceedings rather than to start them, which one gets from Central Bedfordshire v Taylor para. 40 and Pinnock para.45. While on the face of it this can give Defendants' representatives further opportunities to attack the lawfulness of proceedings, it is in my experience difficult to persuade judges, if a claim is soundly based like this one was, that a later decision causes the lawfulness to unravel. I'd be very interested to hear other people's views/experiences.
Article 8, Undue Influence and much, much more...

Sun, 17 Mar 2013 18:49:24 +0000

SJM

The recent case of Birmingham CC v Beech contains a wealth of legal issues but sadly for the Defendant, none of them was decided in her favour. Mrs Beech's parents had been joint tenants of a 3 bedroom property at 31 Tilshead Close, Birmingham since 1967. Mrs B's father passed away in 1994 and her mother succeeded to the tenancy. Mrs B moved in to the property with her new partner in 2007 in order to provide care for her mother. Between 2008 and 2009, five offers of accommodation were made to Mrs B and these were refused for a variety of reasons. Mrs B's request for her name to be added to the tenancy for Tilshead Close was also refused.

In December 2009, Mrs B's mother moved into a care home and in the course of a visit from a housing officer on 19/2/2010, her mother signed a notice to quit, effective from 22/3/10. Mrs B was informed of this and she made a formal application for a secure tenancy of the property in her name. Mrs B's mother passed away on 9/6/10. Notwithstanding the sentimental attachment to the property, the manner in which they had looked after it and the couple's health problems, the application was refused, principally because the property was under-occupied. Possession proceedings were brought against Mrs B in August 2011 and after the claim was transferred from Birmingham CC to the High Court, it was heard by Keith J on 28-30/11/2012.

There were three limbs to Mrs B's defence:

Validity of NTQ

Mrs B argued firstly that her mother's signature was procured under undue influence. The judge found that at the meeting on 19/2/2010, the mother was made aware that she had to give up the property, even though her daughter was living there with her partner, because she was now residing in a care home. Although the consequences of not signing the NTQ were not spelt out, nor was it explained to the mother that she could reconsider during the 'cooling-off- period, it was clear from the council's evidence that they would have served their own NTQ on Mrs B even if her mother had decided not to sign. This would not have made any material difference to Mrs B at that time because her request for a secure tenancy was under consideration with the housing panel.

As far as the two categories of undue influence identified in RBS v Etridge (No 2) (improper pressure or coercion/abuse of position of trust and confidence) were concerned, they boiled down to the same problem for Mrs B. The fact that the council retained the option of serving its own NTQ on Mrs B in the event her mother refused to sign (which at best would have given Mrs B a few extra weeks) demonstrated that there could have been no coercion or abuse of a position of trust (even though the judge found that the mother did not place her trust and confidence in the housing officer). In other words, Mrs B's mother did nothing which no well-advised person would have done.

Public Law Challenge

This ground was also dismissed. Firstly, Mrs B contended that she was not informed that in accordance with the council's policy, a request for her name to be added to the tenancy agreement had to come from
The judge preferred the council's evidence that Mrs B was informed of this condition but that she had not acted on it. Secondly, it was alleged that not informing the mother of the consequences of not signing the NTQ made the proceedings unlawful. The judge reiterated the point that not signing the NTQ would simply have led to service of a NTQ on Mrs B. Thirdly, on the challenge to the panel decision not to grant Mrs B a new tenancy, the judge found that the degree of under-occupation and the competing demands from others on the housing list were overriding considerations.

**Articles 8 and 14 ECHR**

The judge found that there was nothing exceptional in the individual circumstances of this couple to bring their case over the seriously arguable threshold. He compared their circumstances to those of the household in *Thurrock v West*, where the ECHR challenge was likewise dismissed. To refuse to make an order for possession here would be tantamount to giving them a right to possession which they did not otherwise enjoy.

The argument that the 'second succession' rule was incompatible with Articles 8 and 14 ECHR did not get very far either. The s.87 conditions were not fulfilled because Mrs B was not residing with her mother for the 12 month period up to the time of her death and the tenancy ceased to be secure in any event when her mother moved out. The judge could not therefore consider what might have been an 'interesting argument.'

A possession order in 28 days was made against Mrs B.

Comment: despite the failure of Mrs B's defence, a number of interesting legal points arise. The mother's relationship with the housing officer might not have given rise to a relationship of trust and confidence in this case but I doubt that the same could be said of all housing officer-tenant relationships. After all, tenants do not attend possession hearings on a regular basis on the strength of what their housing officer told them would happen (or not happen) at the hearing. An undue influence point might therefore be useful, for example, in a Hammersmith v Monk scenario. On the Articles 8/14 point, Mrs B argued that the second succession rule was discriminatory against children of married tenants because the rule would not apply to the children of single parents. I'm sure that a more suitable case will come along soon to develop this 'interesting point.'

**Phoenix from the flames**

*Sat, 23 Mar 2013 18:01:21 +0000*

J

There was an interesting case-note on *Lawtel* this week which I suspect most of you saw. The case was *LB Enfield v Phoenix and others*, High Ct, March 19, 2013, and seemed to concern the circumstances in which a possession claim can properly be issued in the High Court. I have been provided with a note of judgment and so can give you a bit more detail.

Imagine, if you will, that a large number of the good people of North London are, to put it mildly, somewhat dissatisfied with the Tory/Lib Dem cuts to public expenditure (a view, I should add, which is plainly shared by all right-thinking people). One aspect of the cuts is that many local authorities, including LB Barnet, have reduced their library services. Well, these fine people weren't prepared to stand for this and occupied one of their local libraries, and, as I understand it, although a possession order was granted against them, the local authority and the occupiers have now reached an agreement to ensure that the
library stays open, albeit with significant volunteer involvement (see here, for example).

At least some of the "guerrilla librarians" (as I will call them, because I like the mental imagery) then moved on to occupy other property, including a non-residential property in Enfield which was owned by LB Enfield.

As one might have expected, Enfield issued possession proceedings in the Barnet County Court. They were seeking an interim possession order. Regrettably (for them at least), something went wrong at Barnet CC. According to the note of judgment, there were unspecified procedural irregularities which led to the claim being dismissed. It also seems that the council, although represented at court, failed to appreciate that the case had been called on and, presumably, this meant that no-one appeared for the council. And so the claim was dismissed.

Enfield LBC then decided to issue fresh proceedings. In the High Court. This is relatively unusual. CPR 55.3 generally requires a possession claim to be issued in the court for the area where the land is situated. Claims can be issued in the High Court, but there needs to be something "exceptional" about the case (CPD PD 55, para.1.1). In the case of a claim against trespassers there needs to be "a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination" (CPR PD 55, para.1.3).

Both the judge and the first defendant (represented pro bono by the marvelous Emily Wilsdon, and instructed by the well-known housing law nut, Giles Peaker) took the point that, well, the claim didn't come within the scope of the practice direction. For Enfield, it was said:

(a) that the occupiers were raising human rights defences under Arts.10 and 11, ECHR which involved complex issues of law; and,

(b) there was a risk of disorder at the eviction stage.

HHJ Reddihough was having none of it. The defences were well within the competence of a Circuit or District Judge to deal with (which must be right - there are quite a few judgments on this issue, e.g. here). The Practice Direction required an immediate, present and/or substantial risk. The possibility of future risk was insufficient. There was no evidence to suggest that the occupiers posed any such risk nor was there even any likelihood of such a risk occurring.

The appropriate order was to transfer the claim to the Barnet County Court. As to costs, the costs of issuing in the High Court and certain costs of attending the hearing were ordered not to be recoverable by Enfield, regardless of the results of the trial. And, as counsel and solicitor had acted pro bono, Enfield were ordered to pay £500 to the Access to Justice Foundation.

For those who want a slightly more sober write-up, see here and here. Aside from my amusement, there is actually a useful practice point in here about the (very limited) circumstances in which a possession claim can properly be issued in the High Court.

Unclear judgment on unclear occupancy

Sun, 24 Mar 2013 18:41:46 +0000

NL

London Borough of Brent v Tudor [2013] EWCA Civ 157
This was an appeal of a Circuit Judge's finding that LB Brent's possession claim under Ground 16, Schedule 2 Housing Act 1985 failed because the property was reasonably needed to accommodate those living there. Very unusually, the appeal was in large part a challenge to the Judge's findings of fact.

Ms Tudor had succeeded to her mother's tenancy of a six bedroom property. The mother had died in March 2009. Ms T had applied to succeed in July 2009 after Brent served an NTQ. She named four members of her family as living with her. The Council replied in August 2009 making clear that it considered the house was under-occupied. In October 2009, Ms T applied again, naming eight members of her family as living there.

Ground 16 of Schedule 2 to the 1985 Act provides that where a person succeeds to a tenancy by virtue of section 89 it is a ground for possession if the accommodation afforded by the property "is more extensive than is reasonably required by the tenant" and the notice is served less than twelve months after the date of the previous tenant's death.

Brent served an Notice Seeking Possession, raising Ground 16, in March 2010 and bought possession proceedings in March 2011. Key to the whole case was whether Ms T's brother Christopher and two of his children lived at the property. It was accepted that Ms T, and her disabled brother Valentine lived there. Ms T also asserted in her defence that her niece Roberta and Christopher's infant daughter Saraiya lived at the property. However, it was later admitted that Roberta had moved out at a date prior to the Defence being filed. It isn't entirely clear what was decided about Saraiya, but it appears that the Judge did not consider there was a reasonable requirement for her to be accommodated at the property.

Brent's view was that while it:

accepted that Christopher had lived at the Lydford Road property between October 2009 and early 2010 after his marriage broke down and he left the matrimonial home in Dartford, it had concluded that, at the material time, the only member of the Cheryl's family living with her at the property was Valentine. It alleged that, although Christopher had connections with Lydford Road, he lived with his partner Maria Mathura at 51 Sidcup Road in Lee.

The primary issue then was the factual question of Christopher's occupation.

At first instance trial in March 2012, there was, to put it mildly, very mixed evidence. Christopher asserted his occupation began in 2007 and continued. However, there was evidence from a Mr & Mrs Bass, cousins of Ms T, which appeared to put his occupation from some two years before at most. Ms Mathura had only claimed single person council tax discount from 2009.

Further Christopher had been registered for Council Tax and the electoral register at the Sidcup Road address in 2011 and 2012. He had completed a car insurance form giving the Sidcup Road address (about which Christopher said it was done to get a discount for Ms M).

Christopher had documents, including bank statements, employer's letters, a telephone bill, his daughter's birth certificate, correspondence with the Child Support Agency and National Insurance, CRB checks, case notes, all with the property address, mainly from 2010 and 2011. Ms M did not give evidence. Christopher was given the opportunity to collect further documents at lunchtime, but was still unable to produce documents relating to two insurance policies, a TV licence and a Sky TV account for which he was making regular payments.

The Judge at first instance found that Christopher and two of his children were 'substantially living' at the property at the material time, and that therefore 4 of the bedrooms were reasonably required. It was not reasonable to hold that the property was more extensive than was reasonably required.

Brent appealed to the Court of Appeal.
The initial difficulty in the appeal was the transcript of Judgment. It was an extempore judgment, but even so, the transcript was less than clear in places. The Court of Appeal had some words to say about this:

The transcript of the judgment approved by the judge contains a number of passages marked "inaudible". The judge stated that counsel should be able to deal with at least some of these from their own notes. They have done their best, but the transcript still contains passages marked "inaudible" and "no note". It is not clear why the judge in this case was unable to complete rather more of the gaps in the transcript. In most cases, a judge will have sufficient notes from the hearing to resolve gaps in a transcript without leaving the matter to counsel. A judge can, moreover, refresh his memory if needs be by asking for the case papers to be returned to him for the purpose of approving the transcript. Counsel's note of a judgment is generally used in this court only where there is no official recording. It is important to keep in mind that a defective transcript may lead to a party not being able to establish his case on appeal. For that reason, judges should assist the appeal process by completing gaps in transcripts themselves so far as reasonably possible.

Brent had four grounds of appeal:

The first is that the judge was wrong to find that the reasonable requirement for Cheryl and her household included rooms for Christopher and his two sons. Ground two contends that the manner in which the judge requested and admitted evidence about the Sidcup Road Lee address was procedurally unfair, inter alia because the Council was not given any proper opportunity to investigate the evidence. Ground three is that the judge did not give any reasons for accepting some parts of Christopher's evidence but rejecting other parts, for example that Saraiya needed to be accommodated with him. Ground four is that the judge did not give reasons as to why he rejected the evidence which contradicted Christopher's claim to have lived at the property since 2007.

The Court of Appeal noted that the hurdles for an appeal against findings of fact are very high, particularly where the credibility of the witness is involved:

The height of the hurdle is illustrated by two of the three cases decided by this court in English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409. In English's case itself, this court stated (at [53] and [57]) that the first instance judgment "gave little indication of the process of reasoning that led to the result", and that it took "the appellate process and the assistance of counsel who appeared at the trial to enable [the court] to follow the judge's reasoning". However, having done so the appeal was dismissed.

In the Withers Farms case the court stated (at [74]) it did not find the section of the judgment dealing with causation easy to analyse; a number of different reasons for the judge's conclusions were not set out in logical order but intertwined. It also stated (at [89]) that on a number of occasions it had to consider the underlying material to which the judge referred in order to understand his reasoning and on one occasion it failed to follow his reasoning even with the benefit of the underlying material. But in this case also, since, at the end of the exercise the court was able to identify reasons for the judge's conclusions which justified his decision, this and the fact he made sufficient reference to the evidence that had weighed with him, enabled it to follow his reasoning and to dismiss the appeal based on inadequacy of reasons.

Brent rehearsed the evidence that went against Christopher having occupied since 2007, as he asserted, and raised further disclosure, such as the Sky records showing he was paying for a service for the Sidcup address, and was using that address as a registered office for a company. Brent argued that no reasonable Court could have accepted Christopher's account as more likely than not to be true. "None of this evidence was rejected in the judgment and Miss Cooper [for Brent] complained that no reasons were given for preferring Christopher's largely uncorroborated testimony". Indeed the Judge had failed to
address how the evidence undermined Christopher's credibility.

However, the Court of Appeal decided that this resembled English's case in that "it unfortunately took the appellate process and the assistance of counsel who appeared at the trial to enable the court to follow the judge's reasoning. But, having done so, I consider that, on the evidence before the judge" it was open to him to reach the conclusion he did.

This was, in short, that the Judge had considered the credibility of Christopher's account in the course of evidence, indeed this was why he was given permission to fetch more documents, but there was documentary evidence and the evidence of Mr & Mrs Bass to support his residing at the property since 2010 at least, which was sufficient to satisfy an inquiry into 'the reality of the situation' where people had moved in since the death of the original tenant, pace Kensington and Chelsea RBC v Pascall [2009] EWCA Civ 212 at [6]:

There were before the judge a considerable number of documents from a number of sources which supported Christopher's assertion. Most were from 2010 or 2011, although there was an O2 telephone bill from 2007 and Saraiya's birth certificate was from 2009. The other documents included a Notice including Christopher's name claiming the right to buy dated 30 March 2010, letters from the Child Support Agency and HMRC dated August and October 2010, a CRB certificate dated November 2010, letters from Jobcentre Plus and the Maidstone and Tunbridge Wells NHS Trust dated February 2011. Other documents including a wage slip dated February 2012 and a telephone bill dated March 2012 were dated very shortly before the hearing and, in themselves, were not of much weight in establishing "genuine" occupation.

On ground 2:

I do not consider that there is anything in the complaint that this evidence about the Sidcup Road Lee property was obtained during Mr Sandham's closing submissions in a procedurally unfair way. Mr Sandham had stated on instructions that the property had been marketed as a three bedroomed house, but that Cheryl's case was that the third bedroom was in fact a box room [192 §1443]. Miss Cooper submitted that the Council was not given any proper opportunity to investigate the evidence, and did not agree to that characterisation of it. She also submitted that there was no proper basis for the judge to find the property could not accommodate Christopher, Maria and the three children without difficulty. There is, however, no finding in the judgment to this effect although in the transcript of proceedings Miss Cooper had said [193 §1451] it was "a standard three bedroomed semi-detached house in which many families with three children live" and the judge stated (as the Council had contended) that its "an estate agents' three bed and as with all houses as Miss Cooper rightly says, it can accommodate someone there if forced to ..." It is therefore difficult to see how this issue adversely affected the Council.

Ground 3 and 4 on the failure to give reasons for accepting part of Christopher's evidence but not others, did not succeed either:

It is clearly desirable for judges to give reasons for their decisions. But it is also clearly established, see eg Knight v Clifton [1971] Ch 700, at 721 and Eagil Trust Co Ltd v Pigott-Brown [1985] 3 All ER 119, 122 that there is no duty on a judge when giving his reasons to deal with every submission presented by counsel. What is important is for the parties to know why one has lost and the other has won. In English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 at [19] this court stated that this requirement: "... does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained." In this case, after the examination of the documentary material before the judge and parts of the transcript of the
proceedings we undertook with counsel, it has become apparent why the Council lost.

Appeal dismissed.

Comment

If proof were needed that an appeal on the issue of the first instance decisions of fact is very, very, very difficult, this case presents it. While from the portions of the first instance judgment quoted, and from the Court of Appeal's own comments, it appears that it was hard or impossible to discern the basis on which the Judge had reached a decision, the Court of Appeal was here prepared to consider the evidence and other materials quite closely to see if there was a plausible or viable route for the Judge to come to the conclusions he had.

A decision where the reasoning on the finding of facts is obscure may well be insufficient for an appeal. One suspects that the decision must be clear, but clearly wrong, or even simply not possible on the available evidence, to merit an appeal on decisions of fact.

Non-qualifying successors and counting time

Sat, 30 Mar 2013 22:34:12 +0000

J

Just a short note to alert readers to the case of LB Islington v Doner [2012] EWCA Civ 1745 (casetrack only, as far as I can tell). Since 2007, Doner had moved into a flat owned by LBI. The secure tenant was the former partner of Doner's grandmother. Doner cared for the secure tenant until his death in November 2008. LBI issued possession proceedings which Doner defended on art.8 grounds.

Both the county court found for LBI. Jackson LJ granted permission to appeal at an oral hearing. The primary issue seems to be the length of occupation. The trial judge seems to have treated it as about 14 months (i.e. the period during which Doner was providing care) whereas Doner argues it is 5 years or so (i.e. as at the date of the possession hearing).

We will, of course, bring you the result of the substantive appeal once we know it.

How Limited is that Partnership?

Thu, 25 Apr 2013 09:42:22 +0000

David Smith

Salvesen and Riddell & Anor v. The Lord Advocate (Scotland) [2013] UKSC 22

It is not common for us to cover Scots Law, or Agricultural Law, here. However, both mores are to be broken in the face of an interesting convention decision from the Supreme Court.
Facts

You will have to bear with me as the facts are complex. I promise to keep it simple. Scottish Agricultural tenants have historically had very substantial security of tenure along with very powerful succession rights. Much the same situation has existed in England too at times. This is said to be good for land husbandry but is equally a reflection of post-war concerns about domestic food production. There were theoretically routes to the recovery of possession through the Land Court but this had proven to be a fairly unsuccessful route for landowners and only of use in the most extreme cases where land management had broken down. Over time, a practice had grown up in Scotland which was intended to defeat this security. This operated by new tenancies being granted, not to the farmer, but to a limited partnership. The farmers, or their nominees, would be the general partners while the landowner, or his nominee, would be the limited partner (I am not going to explain Scots partnership law, just trust me on this). This allowed termination of the tenancy at various points by the simple expedient of serving a partnership dissolution notice. The partnership would dissolve and there would accordingly be no tenant to hold the land, problem solved!

All would have continued as normal but for the decision by the Scottish Executive to modernise the position and to create new limited duration tenancies. They also proposed to prevent the future creation of limited partnership tenancies as they would not be necessary. These proposals eventually became the Agricultural Holdings (Scotland) Act 2003 which is the subject of the appeal. As part of the Act a set of anti-avoidance provisions were included in s72 such that if a previous limited partnership tenancy was ended by the limited partner dissolving the partnership the general partners could then serve a notice that they wished the tenancy to continue and they would then become tenants in their own right. There was a power included for the Land Court to allow the termination if it was satisfied the dissolution notice had not been served with the intention of depriving the general partner of rights under s72. There was also a new s73 which allowed for termination of tenancies continued by s72 in an orderly way through the Land Court. It's details do not concern us.

All good you might think, there is a means of termination and it runs through a properly constituted tribunal. However, it's not that easy! During the passage of the Bill, landowners in Scotland woke up to what was happening and a rash of partnership dissolution notices were served. The Scottish Executive became annoyed by this and slipped another provision into s72. This provision had the effect of not permitting the use of the orderly process of termination provided by s73 where a dissolution notice was served in a specific window, which was 16 September 2002 (the date the Bill was introduced) and 30 June 2003. In fact it captured notices served until 1 July because s72 was brought into force before s73 was. The provision was therefore retrospective and may even have had an element of punishment to it. The Scottish Minister involved certainly described the actions of landowners who had sought to serve dissolution notices during passage of the Bill as "immoral" on the floor of the Parliament.

So, to summarise, limited partnerships were prohibited by the 2003 Act and notices seeking to dissolve them would give rise to a new tenancy which could then be terminated by the Land Court. Notices served during a specific window gave rise to a new tenancy which the Land Court could not easily terminate. It was this point that ended up being the subject of the appeal as Mr Salvesen had served his notice during the window.

The Protocol Issues

In lower courts the Lord Advocate for the Scottish Government had tried to suggest that Article 1, Protocol 1 was not engaged. By the time he reached the Supreme Court he accepted it was engaged. There is a clear line of decisions from the ECtHR that restrictions on the landlords right to recover possession can amount to an A1P1 breach. The Lord Advocate sought to argue that there is a wide discretion afforded to the legislature in these matters and that A1P1 does allow limitations where these are proportionate in the context being carried out to achieve a legitimate aim. The Supreme Court broadly agreed with this and so turned itself to a consideration of whether a legitimate aim was being achieved here in a proportionate manner.

Article 14

There was also a potential issue under Article 14 as it was suggested that the, fairly arbitrary, exclusion of notices served during a specific period and the deprivation of rights that went with it could be
discriminatory. This was even more the case as some of the exclusion period was not caused by a decision of Parliament but rather by delays in drafting the relevant Scottish Statutory Instruments which brought s73 into force. In the end though this issue went away for reasons that will become clear.

**The Supreme Court View** It is probably best if I do this section by giving you the most important quotes from the decision. This may be seen as lazy but frankly I could not say it better than Lord Hope! The Court, having identified the test it had to apply in the A1P1 issue as whether the restriction was proportionate set out the parameters of the test as follows:

An interference must achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights

It reminded itself of the substantial discretion allowed to the legislature in this area and its own limits, saying:

Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the court to say whether the legislation represents the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.

The Court noted the negative statements of the Scottish Minister involved and the conclusion that might be reached that the provisions were punitive. However it dismissed this with:

one must be careful not to treat a ministerial or other statement as indicative of the objective intention of Parliament. It should not be supposed that members necessarily agreed with the minister’s reasoning or his conclusions.

More interestingly, a warning was given by the Court as to how the ECHR operates. The Court said:

A reader of what the deputy minister said during that debate might be forgiven for thinking that it displayed a marked bias against landlords. If there was, this was a regrettable attitude for a minister to adopt in a system where both the legislature and the executive are required to act compatibly with the Convention rights. As a minority group landlords, however unpopular, are as much entitled to the protection of the Convention rights as anyone else:

One cannot help but think that this is a warning to a Minister who works somewhat further South and who may be seeking the assistance of the Supreme Court in the near future!

The fact that the legislation was retroactive and slightly punitive was not necessarily a problem for the Supreme Court:

it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy that was being adopted. Legislation which is retroactive is not necessarily incompatible with A1P1...The question is whether the retrospective application of section 72 imposed an unreasonable burden on landlords who had served notices before 1 July 2003, and thereby failed to strike a fair balance between their interests on the one hand and preserving the integrity of the legislation on the other.

The Court then acted to limit the scope of its consideration and effectively gave a flag as to where it was headed. Instead of considering all of s72 as the appeal to it asked it limited itself to considering just one subsection, s72(10). It was this subsection that actually had the effect of permitting or denying the ability to go to the Land Court under s73 to seek termination of the tenancy when a dissolution notice has been served and it was this same subsection that acted to prevent that option where the dissolution notice had been served in the window. Without this section the benefit that was gained by the farmer of having his tenancy continued was counterbalanced by the ability to serve a further notice to seek termination of the
continued tenancy. With the section this counterbalance was denied to a group of landlords on a fairly
arbitrary basis. To use the words of the Court again:

The difference in treatment has no logical justification. It is unfair and disproportionate. It is
no answer to this criticism to say that there was an urgent need to meet the problem that had
been identified. The legislation was intended to have an effect which was permanent and
irrevocable.

The subsection was therefore contrary to A1P1 in itself as it was interference which was not a
proportionate means of achieving a legitimate aim. Article 14 was irrelevant because the decision was
made on the basis of A1P1 alone.

The Supreme Court was not able to read the subsection in a compatible manner but I will not go into this
further as it is a function of the stark way it has been worded as opposed to disclosing any useful point of
law.

The Order This was a bit complex. The appeal was allowed and an order made that s72(10) was
incompatible with the Convention and therefore unlawful. However, this created a new problem. Making
it unlawful would mean that tenants who had gained security of tenure by way of the sub-section and had
spent money on their holdings in consequence would be disadvantaged. However, if the decision did not
have retrospective effect it would be largely pointless. The need for certainty was considered and a
solution was found in decisions of the ECtHR which allow the Court to suspend its order to allow for
alternative legislation to be enacted. This the Supreme Court duly did and it has made a declaration of
incompatibility which it has then suspended for 12 months while the Scottish Executive consults on how
to deal with the issue.

Discussion While this is a Scots case it was a unanimous decision by five Supreme Court judges and so
must be taken to be the clear position of the Court on A1P1 on both sides of the border. The Court
reaffirmed the right of the legislature to take steps which would appear to limit a landlord's rights under
A1P1 but also set out the parameters by which it would consider a balance. The key point is that where a
right is removed there must be a balancing benefit or ability to have the issue considered by an
independent Tribunal and this cannot be arbitrarily denied to one group of landlords on the basis of a
narrow window of dates or some other category.

So, appeal denied and the decision of the Court of Session upheld.

Gateway B and Equality Act - summary hearing?

Mon, 17 Jun 2013 22:37:34 +0000

NL

A quick note on an ongoing County Court case that raises some interesting questions. (As it is an ongoing
case, all apparent statements of fact are as set out in the judgment and should be taken as being untested at
trial).

_Leicester Housing Association Ltd v Armstrong_. Leicester County Court 5 March 2013 [Not published
elsewhere, we have a copy].

This was the summary hearing of Mr Armstrong's defence to LHA's claim for possession. Mr A had a
'starter' tenancy from LHA, which was an assured shorthold of 12 months term. At the end of the 12
months, the tenancy would automatically convert into an assured tenancy, provided that no steps had been taken to gain possession in the meantime. The property was a 2 bed flat in a new build scheme, a mix of social housing and private ownership. Barretts (for they were the developers) still had a sales team on site.

On the evidence at the summary hearing, (and therefore as yet untested), Mr A was homeless, a former serviceman and police officer. At interview with LHA it was noted that Mr A was subject to fits and seizures. He also had mental health issues, resulting from service experience, and an ongoing battle with alcohol dependence. LHA had a medical report on these issues prior to granting Mr A a tenancy.

The tenancy agreement had usual sort of clause on not causing a nuisance to people living, visiting or otherwise lawfully in the vicinity of the property.

The tenancy agreement said that a s.21 notice could be used to end the starter tenancy if the tenant's behaviour was a breach of tenancy conditions. It went on to set out a review procedure of a decision to use a s.21 notice. The tenant could request a review of the decision within 14 days of service of the notice. The review would be carried out in accordance with the 'starter tenancy policy'.

The policy stated:

7.7 At the appeal hearing the Officer (responsible for serving the Notice) will present their evidence for the case. This should include the following . . Evidence (eg case note, diary sheets, witness statements, warning letter) . . . Vulnerabilities/support needs. . .

7.8 The resident will then be called on to explain their version of events and the reasons why LHA-ASRA should not start legal proceedings to claim possession of their home. The resident may bring along someone for support but this should not be a legal representative.

7.9 The Chair of the meeting will review all the evidence and inform the resident of their decision within 7 days of the appeal hearing. This should be done via letter and should include a summary of the key findings.

There were apparently a number of complaints about Mr A's alleged behaviour. There was a meeting about Mr A between a police officer, a consultant psychiatrist and a housing officer from LHA (Mr PW), about which Mr A was not informed. Nor was Mr A provided with the notes of the meeting. Shortly afterwards Barretts sent an email with complaints about Mr A's alleged behavior. A few days later, Mr PW served a section 21 notice on Mr with a letter stating that this was "because complaints of anti-social behaviour had been made against you, members of your household and/or visitors to your home". There was no further detail of the alleged behaviour or complaints.

Mr A put in an appeal against the section 21 notice, without knowing the specific allegations against him. Mr A accepted that he had been ill because of changes in his medication, that ambulance teams had attended, with the police as this was required by the ambulance service, but denying being violent, threatening or committing ASB.

Before the hearing of the appeal, LHA told Mr A they were to discuss 'complaints from four residents regarding police having to be called [...] because of inappropriate or dangerous behaviour in your home and the surrounding area". This was apparently the extent of the information given to Mr A about the allegations before the hearing.

Immediately before the hearing and apparently at the Claimant's request, Mr A's Community Nurse wrote to the Claimant setting out that Mr A had maintained his abstinence from alcohol and that there had been no incidents involving the police since the 'professionals meeting'.

The appeal hearing resulted in a decision to uphold the section 21 notice. However, the note of the meeting raised 5 specific incidents apparently raised by Barretts and other residents. It was no clear if
these had been put to Mr A. The incidents as noted did not tally with those raised in the 'professionals meeting', either by date or in the detail, such that it did not appear that the appeal hearing had the full facts in front of it. Mr PW was not at the hearing and did not 'present the evidence' for the case. The conclusions of the note of the hearing also appeared to have failed to take into account the information from the Community Nurse.

A claim was issued. Mr A's Defence raised:

- An Article 8 proportionality defence,
- A Gateway B public law defence that the Claimant had failed to follow its own policies and procedures with regard to the decision to invoke and pursue the section 21 proceedings
- That Mr A had a disability within the meaning of the Equality Act 2010 and issuing and continuing the proceedings was discriminatory.

At first hearing, the matter was listed for a 2 hour summary hearing to determine whether the Art 8 and gateway B arguments could proceed. However, and perhaps oddly, the Equality Act defence was also considered. LHA conceded it was a public body, reserving its position on this should the case go to the Supreme Court.

On the Art 8 and Gateway B, the test the Court set was that the defences cross the threshold of being 'seriously arguable' with guidance from the higher courts that the threshold was likely to be crossed in very few cases.

On the Equality Act, the Court noted that 'there appears to be no decided case on the applicable test as to whether an Equality Act defence should be allowed to run at trial. We'll come back to this.

**On the Gateway B argument**

Mr A argued that the review process was unfair, unreasonable, in breach of natural justice, and failed to follow the Claimant's procedures, policy and tenancy agreement.

Mr A did not know the case he faced at the appeal hearing, *Eastland Homes Partnership v Whyte* [2010] EWHC 695 [our report]. The Appeal hearing considered matters of which MR A had had no advance warning and evidence with which he had no been provided. The appeal hearing was not conducted according to the starter tenancy policy, Mr PW did not 'present the evidence' and the evidence had not been supplied to Mr A. Mr A was not then allowed to explain his version of events.

Further, the policy required the Claimant to be satisfied that there was a breach of Clause D of the tenancy agreement (the nuisance clause for the purpose here). The Claimant had not attempted to so satisfy itself that there was a breach.

The Claimant argued that their scheme followed the Introductory Tenancy statutory scheme. Therefore *R (Ex p McLellan) v Bracknell Forest BC* [2001] 33 HLR 86 should be followed, the appeal hearing was not a formal hearing, there was no obligation to provide witness statements or schedules of allegations. The panel could determine how it carried out is function and reach a view as to the credibility of the Defendant. There was no requirement to make findings. The Claimant was entitled to take a broad view of matters. The Defendant should not be given a higher degree of protection than the Introductory tenancy regime. In any event, the available powers on a successful gateway B defence were akin to judicial review, so that at most the matter would be remitted back to the Claimant for fresh consideration, which would in practical terms make no difference [apparently pre-deciding any remitted decision].

The Court found on this ground that the Claimant's scheme differed from the Introductory tenancy scheme. It was not statutory and was regulated by contract. While for an Introductory tenancy termination it was not necessary (pace Powell) for the Local Authority to be able to show that complaints were well founded, in this case the termination procedure could only be used if the tenant's behaviour amounted to a
breach of tenancy obligation. Therefore the Claimant had to determine whether the Defendant's behaviour amounted to a breach of tenancy and the review should consider this issue. It was not sufficient for the Claimant simply to be satisfied that the Defendant was not a suitable person to be a tenant. This point crossed the 'seriously arguable' threshold.

When a review occurred it should:

- Be conducted in accordance with the rules of natural justice
- Address the key issue of whether the Defendant was in breach of the tenancy agreement and, if so, whether it was proportionate to seek an order for possession. Unlike Powell, this required a factual determination.

The Defendant was entitled to, at least, know the dates and substance of allegations against him. In this case it appeared that there were differences in nature and extent of allegations in the various accounts relied on by the Claimant.

The Officer serving the Section 21 did not 'present the evidence' at the review hearing. In the absence of other steps being taken to ensure the case and evidence was properly and fairly put, this might amount to a breach of the rules of natural justice.

The Defendant's medical position and the report from the Community Nurse was not considered. The Defendant was apparently not even aware that a report had been obtained. Again a seriously arguable breach of natural justice.

On the Claimant's argument that remitting the decision would make no difference, not only was it uncertain that this would be the case, a valid gateway B defence would be a complete defence to these proceedings.

On Article 8.

The Defendant argued that the Claimant proceeding with the claim for possession was disproportionate where there was no evidence or allegations of any bad behaviour since March 2012 (this hearing taking pace in January 2013).

The Claimant said that this had not been raised before, nor was any evidence of good behaviour filed. There was a last minute statement from Mr PW setting out more allegations between July 2012 and November 2012.

The Court rather oddly refers to the Claimant relying on 'the dicta' of Cranston J in Southend BC v Armour [2012] EWGC 3361 (QB) [our report] and then 'to the view of Cranston J as 'per incuriam', apparently finding that subsequent good behaviour should not be taken into account (it may be that the transcript has errors here, but this is what it says). In any event, the Article 8 defence was found not to pass the 'seriously arguable threshold' and was not permitted to go to full trial, at least insofar as it was not the same as the gateway B and Equality Act defences.

On the Equality Act defence.

This was dealt with pretty much at the last minute, as the Defendant had assumed the matter would have to go to full trial and the Claimant had accordingly not responded on the point.

The Defendant argued that the Defendant had been discriminated against, unlawfully under section 15 Equality Act 2010, and that the Claimant had failed to take into account a mandatory consideration, section 149 Equality Act, in dealing with the Defendant.

The neighbours were upset because of the police attending the property, but this only occurred because of
the Defendant's mental state and because the ambulance crews required the police presence due to the Defendant's medical history. Taking proceedings against the Defendant on the basis of those complaints from neighbours was a direct result of the Defendant's disability and prima facie discriminatory.

The Claimant argued that the Equality Act defence should be subject to summary determination, although possibly on a lower threshold of 'an arguable case' rather than 'seriously arguable'. But the answer was no, the possession claim was a proper and proportionate way of achieving a legitimate aim.

The Court found that, although this was not one of the types of cases to which summary determination applied, the issues raised were similar to the Gateway B and Art 8 issues. So, as there was a summary hearing it seemed sensible to consider the Equality Act issues at the same time.

In the absence of any authority for the threshold for doing so, the Court assumed the CPR 24 rule of 'a real (as opposed to fanciful) prospect of success', taken as being lower than 'seriously arguable'.

On the basis of the pleaded case, the Defendant suffered from a disability within the meaning of the Equality Act 2010. The Claimant was aware of the Defendant's disability.

The Decision to serve the section 21 notice and issue possession proceedings was taken (at least in part) on the basis of the Defendant's mental health and therefore amounted to unfavourable treatment on account of his disability.

The issue was whether this was a proportionate means of achieving a legitimate aim. While the legitimate aim was likely to be the Claimant's management of its housing stock and protection of others in the neighbourhood, the question of whether it was proportionate would involve evidence on whether there were other means of managing whatever risks might be posed by the Defendant's health issues and a finding as to what those risks were. On the limited available evidence, it was arguable it was not proportionate.

The Equality Act claim should therefore go to full trial.

Directions given to trial.

Comment

While this is a first instance decision, and on a summary hearing at that, it is interesting. There is a practical interest in the way in which the court deals with the Art 8 and Gateway B defences, but there are also some substantial issues to consider, not least as they are likely to come up fairly often.

The distinction between a starter AST arrangement and an Introductory tenancy strikes me as right. One does not obtain the quality of a statutory regime simply by emulating its form. A starter tenancy is a creature of contract to the extent that it differs from the basic statutory provision.

The view taken of Southend v Armour, frustratingly briefly addressed, is puzzling. While Armour is indeed under appeal to the Court of Appeal, I have trouble seeing how the decision of Cranston J could be said to be 'per incuriam' or indeed 'dicta'. As a High Court appeal, Armour would seem to be binding. But the transcript is not wholly clear through this whole section, so frankly, who knows what was meant!

Then the substantial issue of the Equality Act defence. Should there have been a summary hearing on this issue at all? Granted, the Court adopted the CPR 24 test for a summary judgment, rather than carrying over 'seriously arguable', but while CPR 24 does provide for the court to deal with summary judgment of its own motion, it seems odd in circumstances where there was no strike out application from the Claimant and, as the court admits, very little evidence on the issue before it.

It would be worrying to see courts adopting what would be a self-directed summary judgment hearing on
Equality Act cases as a kind of proxy for the summary hearing in Art 8/Gateway B cases, even on a lower threshold. Not least as Equality Act issues are often complex and evidence dependent.

As this matter is ongoing, we will not be commenting on evidence or the merits of the case.

## Deposit received, one way or another

**Sat, 15 Jun 2013 11:31:55 +0000**

**NL**

There are still some questions to be cleared up on tenancy deposit law and this Court of Appeal case neatly deals with one of them, while opening up what might be a very large can of worms.

*Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669

Where a deposit was taken on an assured shorthold tenancy before April 2007, when the Housing Act 2004 provisions came into force, but the tenancy became a statutory periodic tenancy after April 2007, does the deposit fall to be dealt with under the Housing Act 2004 requirements and do the penalties for non compliance apply?

The facts in this case are straightforward. Rodrigues was the assured shorthold tenant of Superstrike. The tenancy began in January 2007 with a term of 12 months. A deposit of £606.66 (a month's rent) was paid in January 2007. In January 2008, the tenancy became a statutory periodic tenancy. In June 2011, S served a s.21 Notice and then brought possession proceedings. In May 2012, the possession claim was dismissed, though for reasons not at issue in this appeal. On appeal to a Circuit Judge, a possession order was granted, on the basis that the deposit had been taken before April 2007. So, to the Court of Appeal.

There was one main ground of appeal.

On the statutory periodic tenancy arising in January 2008, a deposit was received in respect of a tenancy, which fell under the requirements of s.213 HA 2004, thus failure to protect meant s.215 applied and the s.21 Notice was invalid.

There were two questions for the Court to decide. First, did the statutory periodic tenancy constitute a new tenancy? Second, had the deposit been 'received' by the landlord in respect of that tenancy in the meaning of section 213.

The Court of Appeal made short shrift of the first issue:

> It is clear from the 1988 Act that what happens at the end of the fixed period tenancy is the creation of a new and distinct statutory tenancy, rather than, for example, the continuation of the tenant's previous status. I do not see that there can be any doubt as to that. It was so held in relation to a comparable provision in the 1988 Act in N & D (London) Ltd v Gadson (1991) 24 HLR 64.

This left the second issue, of whether the deposit had been 'received' in January 2008 at the start of the new statutory periodic tenancy. The landlord argued that:

section 213 only applies when the deposit is "physically received" after 6 April 2007. By physical receipt he meant payment by cash, cheque, bank transfer or in some other
comparable way, such as occurred in the present case in January 2007. He supported this argument by a submission that, if the appellant's contention were correct, many private landlords would have been caught, and caught unawares, by a need to comply with section 213 on the expiry, after the commencement date, of a fixed term assured shorthold tenancy created before that date, if the tenant remains in possession, no new tenancy agreement being entered into, and the deposit, which had previously been paid and was still held, simply staying where it was with nothing said about it. He pointed to the absence of any transitional provision in the Act or in the commencement order. If so, he argued, the landlord would have to go to the otherwise unnecessary and pointless trouble and expense of arranging for the deposit to be held in accordance with an authorised scheme, simply in order to be able to recover possession of the premises by serving a section 21 notice.

R argued that

even though no money changed hands and no book entries were made at that stage, nevertheless the landlord had to be treated as having received the amount of the deposit, referable to the new tenancy, on 8 January 2008. Otherwise the deposit would only have been held as security for obligations and liabilities under the original fixed period tenancy, which would make no sense, at least for the landlord. If the landlord is, therefore, treated as holding the deposit in relation to the new tenancy, it must be treated as having received it for that purpose.

As s.212(8) referred to money in the form of cash or otherwise, it was clear that it didn't have to be physical currency, payment by cheque or bank transfer could amount to payment and receipt. This provision should be construed broadly. Payment had been held to cover situations other than cash, cheque or bank transfer in *White v Elmdene Estates Ltd* [1960] 1 QB 1, [1960] AC 528, where an obligation to give a £500 discount on a sale associated with a tenancy letting had been found to be payment of a premium. This had been approved in *Hanoman v Southwark London Borough Council (No 2)* [2009] UKHL 29.

The Court of Appeal agreed with R.

The 2004 Act has to be construed in the light of the provisions of the 1988 Act as regards assured shorthold tenancies, including section 5. Once the new statutory periodic tenancy had come into being after the commencement date, a tenant's deposit being already held, it would be necessary to consider whether and if so how the 2004 Act applied. As I have said already, it must have been the landlord's position, by then, that it held the sum of £606.66 as a deposit as security for the performance of the tenant's obligations, or for the discharge of any liability of the tenant, arising under or in connection with the new tenancy. That could only be the correct legal position if that sum of money was to be treated as having been paid pursuant to the tenant's obligation under the periodic tenancy to provide a deposit. That obligation only arose on the expiry of the fixed term tenancy, so the payment at the beginning of that fixed term cannot have given rise to the position which obtained once the fixed term had expired. [...]

The tenant should be treated as having paid the amount of the deposit to the landlord in respect of the new tenancy, by way of set-off against the landlord's obligation to account to the tenant for the deposit in respect of the previous tenancy, given that the landlord did not seek payment out of the prior deposit for the consequences of any prior breach of the tenancy agreement.

It follows that, on my analysis, the tenant did pay, and the landlord did receive, the sum of £606.66 by way of a deposit in respect of the new periodic tenancy in January 2008, and so the obligations under section 213 applied to the deposit so received. As is common ground, they were not performed. Section 215(1) therefore applied so that the landlord could not
validly give notice under section 21 of the 1988 Act. The notice purportedly given on 22 June 2011 was thus ineffective and the grounds for possession were not made out.

As there had been no claim by the tenant, as yet, for the return of the deposit and a penalty under s.214, the only order was for the dismissal of the possession claim.

Intriguingly, but also frustratingly, the Judgment notes a second line of appeal by the tenant, that the wording of s.215(1) meant that no s.21 notice could be served if a deposit was not protected, regardless of when the deposit was received, so even if taken for a statutory periodic before April 2007. There was not need to decide on this and it was left for another case, where the facts of this case wouldn't apply.

**Comment**

It is good to finally have this point settled by the Court of Appeal. I have long argued that a statutory periodic was a new tenancy, and that in order for the landlord to hold the deposit against the tenant's performance of that new tenancy, the deposit must have been received anew, even if by a notional set off against repayment of the old deposit. But apparently this decision has come as a surprise in some quarters.

The s.215(1) argument remains to be heard. It is also worth recalling that the commencement order for the Localism Act 2011 amendments to Housing Act 2004 stated that the amended scheme applies to all deposits held for ASTs in effect on or after the commencement date, with no exemption for pre April 2007 deposits. But even if successful, these arguments would now only be required where a tenancy had become a statutory periodic prior to April 2007.

There is a further issue, however. If a deposit is 'retained' from one tenancy to the next (whether statutory periodic or new tenancy agreement), and therefore 'received' in respect of the new tenancy, there is also the obligation to provide the prescribed information. So even if the deposit was already protected, when a tenancy goes from fixed term to statutory periodic, does the obligation to serve the prescribed information arise again? While the actual information may be unchanged, and has arguably already been served ahead of the new tenancy, it might also be the case that it should be served again when the deposit is 'received' in respect of the new tenancy.

If the prescribed information is not served within the 30 day period (since April 2012), no s.21 notice is valid until it is served (and a failure to serve within 30 days opens up a potential s.214 claim). So, if there is a requirement to serve the information again on a new tenancy, whether statutory periodic or by agreement, when the deposit is held over/received again, I suspect that a very large number of landlords and/or agents would be in breach. I expect to see this issue come up very soon indeed.

Congratulations to Martin Westgate QC and Ben Chataway for the tenant for this case.

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**There's no place like home**

*Sun, 23 Jun 2013 20:59:47 +0000*

*SJM*

[Reading BC v Holt](https://example.com) is an important case on the approach to be taken by the courts when making possession orders under Ground 16 (and since 1/4/12, 15A) of the Housing Act 1985.
Mrs Holt has occupied 28 Southdown Rd, Emmer Green, Reading since her birth in 1953 and she became the successor tenant following the death of her mother on 24th July 2010. Mrs Holt provided round the clock care for her mother in the latter stages of her life and predictably, Mrs Holt formed a strong emotional attachment to the property. Nevertheless, the Council decided in January 2011 that the 3-bed property was too large for her needs and it made available for bidding/viewing 5 one-bed properties between February and May 2012. Mrs Holt declined to show an interest in any of these properties.

The Council issued possession proceedings against Mrs Holt and the case came before Mrs Recorder Moulder in Reading CC, who made a possession order conditional on the Council making available a one bedroom property within 1.5 miles of the present property and with a storage facility for Mrs Holt's bicycle.

Mrs Holt appealed, arguing firstly that her personal circumstances were so compelling that it was not reasonable to make a possession order against her and secondly, that the Judge ought to have identified a suitable and available unit before making any order.

On the first of these arguments, the Court of Appeal agreed with the Recorder. There was no medical evidence to show that Mrs Holt would not adjust or that she would be deprived of support in a new property. Mrs Holt was reasonably active and it had been two years since her mother's death. Against these factors, the Court agreed that the balance lay with the Council in its heavy demand for 3 bed properties and it stressed (para.45) that these cases are highly fact-sensitive and comparisons with previous reported cases are of limited assistance.

On the second point, the Court of Appeal held that the court had jurisdiction to make the Order in conditional terms. The reference in s.84(2)(b) was to accommodation that 'will be' (rather than merely 'is') available, which did not necessarily require a court to assess what accommodation was available at the date of hearing. Indeed, a conditional order provided a greater degree of flexibility for the parties when assessing what might be suitable, without the need for the Council to keep a property vacant pending the conclusion of the hearing.

However, the Court of Appeal also stipulated that the court, before making a conditional order, should be sensitive to the question whether it was desirable to bring the matter back to court. Furthermore, there should be express liberty to apply should circumstances change in the interim and there should be a time limit within which a suitable property is made available, after which time the Order ought to lapse (paras 58-60).

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McFail

Sun, 07 Jul 2013 19:01:34 +0000

NL

Malik v Fassenfelt & Ors [2013] EWCA Civ 798

The idea that an Englishman's home is his castle is firmly embedded in English folklore and it finds its counterpart in the common law of the realm which provides a remedy to enable the owner of the castle to secure the eviction of trespassers from it. But what if the invaders occupy for long enough to establish their home within the keep? Whose castle is it now? Whose home must the law now protect? [Sir Alan Ward]
This was a case that was potentially important for establishing whether Article 8 defences could be run by private tenants, or by licencees and occupiers of private land. Despite Sir Alan Ward's opening, the case falls short of being that, as we shall see.

This was the appeal of a possession order made against 'Grow Heathrow', squatting a patch of wasteland that would be needed for any expansion of Heathrow. At first instance, the Circuit Judge had held that article 8 was engaged, but that an immediate possession order would be given.

Consequently while Article 8 does apply in principle to cases involving a private landowner and a trespasser, it is difficult to envisage circumstances where it would have any consequence and the eviction would not be found to be a proportionate means of achieving a legitimate aim.

In addition, s.89 Housing Act 1980 did not apply to trespassers and the Court refused any extension of time before the order was to take effect.

The squatters appealed, arguing:

that the judge's error is that she approached the matter on the basis that a failure to make anything other than a forthwith possession order would undermine the concept of private ownership of land. He [Jan Luba QC] submits that the stark choice the judge perceived to be applicable was between the land being "taken" by the occupiers and the owner being "deprived" of it and the immediate eviction of the occupiers: see paragraphs [83] and [85] of her judgment. That he submits, was a serious misdirection because the ownership of the land was never in issue nor was the existence of a right to possession. In essence he submits that the judge misdirected herself because she approached the question of possession on the basis of whether or not it was proportionate to make a possession order which took effect forthwith and not when it was proportionate to make a possession order. Article 8, he submits, introduces in the current context a temporal question, not shall the owner have possession (because he always should have possession) but when he should have possession.

The landlord had been given permission to appeal on the applicability of an Art 8 defence, but did not do so. This was significant.

On the squatters' appeal points, all three judges were in broad agreement. Sir Alan Ward found:

Having found that Article 8 was engaged she correctly identified the issue to be whether Article 8 afforded "any additional protection to the defendants", the question being whether eviction was a proportionate means of achieving a legitimate aim. It seems to me to be beyond question that she was considering whether to extend the time at which possession to be given. She started with the difficulty of envisaging a circumstance where eviction would not be found to be a proportionate means of achieving a legitimate aim. I can see nothing wrong with that approach. An owner is entitled to the return of his property unless some exceptional circumstances militate against it. Mr Luba does not appear to challenge her conclusion that the work they did on clearing the land did not give them any right to added time. He did, however, attack her conclusion on the grounds that her order for immediate eviction did not have regard for the fact that the land was being occupied for a beneficial social purpose. He submits that the judge's approach precluded her from considering that as a relevant factor. I do not read her judgment in that way at all. She was fully alive to the fact that these were, if I may paraphrase, "good" squatters and not "bad" squatters and she was obviously impressed by them and to that extent sympathetic towards them. I, too, can admire the good work they have done. Nevertheless, as the Supreme Court has emphasised, see [57] in Pinnock, the wide implications involved in a consideration of the proportionality of making an order for possession is "best left to the good sense and experience of judges sitting in the county court." I could not possibly find that the judge was not entitled to conclude that
the benefits to the local community arising from the occupation of the defendants were not enough to preclude the landowner seeking to vindicate his ownership rights to the immediate return of his property.

Lord Toulson and Lloyd LJ agreed that on the facts of the case, the Judge was right to make an immediate possession order.

Where there was dissent was on the issue of the application of Art 8 and the rule in McPhail v Persons, Names Unknown [1973] Ch. 447

A summons can be issued for possession against squatters even though they cannot be identified by name and even though, as one squatter goes, another comes in. Judgment can be obtained summarily. It is an order that the plaintiffs "do recover" possession. That order can be enforced by a writ of possession immediately. It is an authority under which anyone who is squatting on the premises can be turned out at once. There is no provision giving any time. The court cannot give any time. It must at the behest of the owner, make an order for recovery of possession. It is then for the owner to give such time as he thinks right to the squatters. They must make their appeal to his good will and consideration, and not to the courts [Lord Denning at 458]

Sir Alan Ward trails through the subsequent Art 8 case law, from Harrow London Borough Council v Qazi [2004] 1 AC 983 from to Thurrock Borough Council v West [2012] EWCA Civ 1437 [Our note].

He then comes to the conclusion that McPhail can no longer be regarded as good law, for the following reasons:

i) It is rightly common ground that the squatters have established a home on the land by reason of the existence of a "sufficient and continuous link with a specific place" which is the autonomous test in European jurisprudence. The squatters are, therefore, entitled to respect for their homes by virtue of Article 8(1).

ii) Even if Article 8 has no direct application between a private landowner and the trespassers on his land, the Court as a public authority is obliged by section 6 of the Human Rights Act 1998 to act in a way which is compatible with that Convention right.

iii) The basic rules are not now in doubt, per Lord Hope in Powell at [33]. So the court will have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable. The question will then be whether making an order for the occupiers' eviction is a proportionate means of achieving a legitimate aim.

iv) Proportionality is, therefore, in issue. The rule in McPhail that the court has no jurisdiction to extend time to a trespasser can no longer stand against a requirement that proportionality may demand, albeit most exceptionally, that a trespasser can be given some time before being required to vacate. In Pinnock the court held at [63] that the conclusion that the court must have the ability to assess the Article 8 proportionality of making a possession order in respect of a person's home may require certain statutory and procedural provisions to be revisited and it seems to me this is one of those procedural provisions that does require fresh treatment.

v) There are subsidiary, but not very compelling, reasons for reconsidering McPhail. Part of the ratio of that decision was that the landowner has the remedy of self help but the Criminal Law Act 1977 has prevented the use of force to evict an occupier. His opportunity to obtain immediate relief by resorting to self-help may be curtailed if the squatters refuse to leave without a fight. Standing alone the changes in the criminal law would not lead me to depart
vi) Another crucial factor distinguishing the present position from McPhail is the fact that in McPhail there was no defence to the claim of possession whereas, if Article 8 is engaged, then there is at least a potential defence.

For this reason, the Judge below was wrong to find that s.89 HA 1980 did not apply to trespassers and McPhail was still binding. But this had no material effect on her judgment.

However, s.89 HA 1980 must then apply, with the 6 week limit. Noting that this was found to be compatible with Art 8 in Hounslow London Borough Council v Powell [2011] UKSC 8, Sir Alan Ward also notes that in Yordanova v Bulgaria (Application No. 25446/06, dated 24th April 2012) our note the ECtHR said: "However, Article 8 does not impose on Contracting States an obligation to tolerate unlawful land occupation indefinitely..."

Therefore:

I conclude that the court must approach the claim made by a private landowner against a trespasser in a similar way to that adopted to claims of various sorts made by a local authority as set out in the cases to which I have referred. Thus the test is whether the eviction is a proportionate means of achieving a legitimate aim. The fact that the landowner has a legal right to possession is a very strong factor in support of proportionality: it speaks for itself and needs no further explanation or justification. Thus, even if the defendants have established a home on the land but where they have otherwise no legal right to remain there, it is difficult to imagine circumstances which would give the defendant an unlimited and unconditional right to remain. The circumstances would have to be exceptional.

If Sir Alan Ward's was the sole judgment, then the position would be clear, at least insofar as the application of Art 8 to private landowner cases. But it wasn't. Both Lord Toulson and LLoyd LJ also address McPhail in their judgments. Or rather, in view of the landowner not appealing the point, they decide not to.

Lord Toulson:

It would be a considerable expansion of the law to hold that article 8 imposes a positive obligation on the state, through the courts, to prevent or delay a private citizen from recovering possession of land belonging to him which has been unlawfully occupied by another. There would also be a weighty argument that for the state to interfere in that way with a private owner's right to possession of his property would be contrary to a long standing principle of the common law, which finds echo in article 1 to protocol 1. The principle was stated in Entick v Carrington (1765) 19 State Tr 1029, 1060: "The great end for which men entered into society was to preserve their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole." The potential consequences of such a development and implications for other situations would need careful thought, particularly since the concepts of private life and home are so wide. For those reasons I do not agree that we should hold that McPhail has ceased to represent the law in cases of trespass to privately owned land, and I would wish to reserve my opinion until such a case comes before the court in circumstances where the applicability of article 8 is in issue.

Lloyd LJ:

I too agree that the appeal should be dismissed. In a way it is matter of regret that the Respondent did not pursue the permission to appeal given to him by the judge on this point so as to challenge the judge's conclusion that article 8 was engaged as between a private
landowner and squatters because of the position of the court as a public authority. It would have been an interesting question on which I have no doubt that we would have received valuable submissions from both sides. Some of the difficulties with which it would have been necessary to grapple are interestingly discussed in Gardner and Mackenzie, Introduction to Land Law (3rd ed.), Hart Publishing 2012, at Chapter 2. There a degree of frustration is expressed as to the uncertainty: "To this extent, we are still waiting to learn the horizontal reach of the ECHR into the domestic understanding of land law. It is once again disappointing that one should be reduced to awaiting a judicial announcement as to the state of the law in this way, rather than having a reasonable opportunity to deduce it, and so converse with the judges about it, oneself." The authors and other commentators will have to wait somewhat longer, though with the benefit of what Sir Alan Ward has said. It has also to be said that, if the point had been taken, it might have led to an even longer delay in giving judgment than that which has occurred, which I regret. However, the fact is that the point was not taken before us, we had no submissions on it, and it does not seem to me that we ought to enter upon it so as to venture a view as to whether the judge was right or wrong. Like Lord Toulson, therefore, I reserve for a future case the question whether McPhail is good law in a case where a landowner who is not a public authority seeks possession of land occupied by a trespasser.

Comment

Well, this could have been the case to settle the application of art 8 to private landowner/landlord cases. Not only the rule in McPhail in regard to trespassers, but the application of Art 8 to section 21 possession cases, terminated private contractual tenancies and the whole panoply of private possession matters would have followed.

But it isn't. Though Sir Alan Ward's reasons for applicability are clear, this is not an effective precedent, given the refusal to address the issue from the other two Lords. It is, of course, quite right that the issue was not before them as a question under appeal.

That said, while it is not binding, there may well be some weight to this case in persuading County Courts that Art 8 argument can be raised in such cases, on 'exceptional facts' (which, I think must be pointed out yet again, is not an 'exceptionality test').

An indicator of the struggle between A1P1 and Art 8 right that will occur in such as case is to be found reading across Sir Alan Ward's and Lord Toulson's judgments in this appeal.

The position on an 'all or nothing defence' is clearly set out at the conclusion of Sir Alan Ward's judgment. As Jan Luba QC points out, if the Court thinks that possession within 6 weeks would not be proportionate, the only option is to dismiss the claim for possession. Sooner or later, I suspect the Supreme Court will have to revisit s.89.

Incidentally, quite literally as Sir Alan Ward's parting shot, and amongst praise for the advocacy in the case, there is what might just be a side swipe at the current level of political debate on human rights:

Article 8 is often much criticised, surprisingly even by those in a position of authority, as if it has incorporated some undesirable foreign jurisprudence into our law. I do not intend to enter into that debate, but read the opening words of my judgment. What I do want to emphasise is that this case demonstrates one aspect of our way of doing things which does represent the very best of British. That is our procedure for extended oral advocacy in our courts, especially in the appellate courts.
Urgent appeals in warrant suspension cases

Thu, 01 Aug 2013 18:09:14 +0000

chief

We’ve all been there. Perhaps more frequently, litigants in person have been there (although hopefully not the same LiP over and over again). A warrant for possession is due to be executed the next day. It may even be the same day. The occupier has applied to a District Judge to suspend the warrant. The District Judge has, rightly or wrongly, dismissed that application. The occupier, understandably (even more so if the DJ fell into the “wrongly” category), wants to appeal that decision.

Now we know that such an appeal must be to a Circuit Judge. So far, so good. Many courts (and the number is growing) either have no CJ or only have one at limited times. So what do you do? Whaddya do hotshot?

For the London courts that fall into that category we appear to have an answer (h/t the Garden Court bulletin). The designated Civil Judge for London county courts, HHJ Mitchell, has issued Guidance for litigants seeking to appeal the refusal to suspend a warrant by a district judge when no circuit judge is available at that court, which can be downloaded here.

HHJ Mitchell says that:

“In the event that a circuit judge is not available at a particular court, arrangements have been put in place to ensure litigants have access to a circuit judge for the purposes of appealing the refusal to suspend a warrant of possession. If you wish to appeal from the particular court where the District Judge has refused to suspend the warrant of possession the court staff will inform you to which court you should address your appeal. The court where the application to suspend was heard on occasions would take the notice of appeal from the appellant. This practice will cease forthwith.” (emphasis in original)

HHJ Mitchell goes on to say that:

“The appellant will be directed to the appropriate court where the appeal will be heard and he must file the notice of appeal at that court and not at the court where the original application to suspend the warrant was heard. This is entirely in accordance with the rules whereas the previous practice was not. CPR 52.3(2) (b) provides that an application for permission to appeal may be made ‘to the appeal court in an appeal notice’. CPR 52.1(3)(b) defines appeal court as ‘the court to which an appeal is made’. The reality of the situation is the onus is on the appellant to act promptly and make his application to suspend in sufficient time to enable an appeal to be lodged if necessary. Appellants should be aware that until the notice is received at the appeal court no attempt will be made to contact the bailiff to request that he does not enforce the warrant until an appeal has been heard.” (emphasis in original)

Now, I wholeheartedly agree with the statement that the “reality of the situation is the onus is on the appellant to act promptly and make his application to suspend in sufficient time to enable an appeal to be lodged if necessary”, although I am sure that in many cases there are good and complex reasons why it is not quite so straightforward as all that.

Note though that HHJ Mitchell says that this is “entirely in accordance with the rules”. Well, easy fella, I’m not so sure that is right.
I can certainly see why, on the face of it, CPR 52.1 and 52.3 point towards that conclusion.

CPR 52.2, however, provides that “All parties to an appeal must comply with Practice Directions 52A to 52E”.

We need to turn to our old trusty friend, CPR Practice Direction 52B. No need to take that framed copy down off the wall, the current version is here. Hold your horses - there’s no need to click through as I’ll quote it for you (I’m too good to you).

First para 2.1:

“Appeals within a county court, appeals from a county court and appeals within the High Court to a judge of the High Court must be brought in the appropriate appeal centre and all other notices (including any respondent's notice) and applications must be filed at that appeal centre. The venue for an appeal within a county court will be determined by the Designated Civil Judge and may be different from the appeal centre.”

But how do you know where the appeal centre is? HOW DO YOU KNOW. Oh, wait, here comes para 2.2 to save the day:

“The tables at the end of this Practice Direction set out the Appeal Centres for each circuit.”

Then at the end of the Practice Direction is that very table (here and then scroll down a bit). There are some county courts for which the appeal centre is a different court, e.g., Boston goes to Lincoln, Dudley goes to Walsall, while closer to civilisation Reading goes to Oxford. Unless there is an update that has not made it onto the website, it is quite clear that Bow, Brentford, Edmonton, Lambeth, Romford, Wandsworth, West London, and Woolwich, are their own appeal centres.

It follows from para 2.1 that it is at that court that the appellant’s notice must be filed (and I know this is right for one of those courts as I had to check recently, albeit not for a warrant suspension case). Now while the Designated Civil Judge can change the appeal venue (e.g. an appeal from West London could be heard in Central London as is, I think, normally the case, but it could, in theory, be heard at any other court), I don’t read the rules as allowing him to change the appeal centre, much less as allowing him to, in effect, provide that an appeal that is filed (or attempted to be filed) in accordance with CPR Practice Direction 52B should be rejected.

Now I am happy to be corrected on this*, so please let me know if I have got it wrong, but isn’t this Guidance mistaken? Does anyone know of any similar guidance for outside of London? What would happen in those, admittedly incredibly rare, cases where the DJ dismisses the application to suspend but grants permission to appeal?

I applaud the intention of this Guidance, but I am not sure that it achieves what it sets out to do. That would require a change to the Practice Direction.

* Obviously I will not be happy and will be even more curmudgeonly than normal, but I do think it is important that we know the right answer. Even if I then accept it with appallingly bad grace, as is my way.

Human Rights Round-up

Sun, 04 Aug 2013 22:35:09 +0000
SJM

3 cases have recently been decided by the ECtHR Chamber

**Busuioc v Republic of Moldova [2013] ECHR 684 (16/7/13)**

The Applicant (B) complained to the Court under Arts 3 and 8 ECHR about the State's failure to protect her and her two children under the provisions of Moldovan national law from domestic violence perpetrated against them over several years by B's former husband, VB, when they failed to order his eviction from the flat which they occupied together.

The parties had divorced in 2007 but B was repeatedly beaten by VB after their divorce. B's application to have VB evicted from the flat was heard by the Supreme Court on 20/5/09, who noted that the parties had shown the capacity for reconciliation, that there had been insufficient evidence of violence in some instances and in others, there was evidence of provocation. The Court concluded that the parties' interests could be protected adequately by partitioning their occupation of the flat.

B applied to the Courts again when the violence continued and she obtained medical evidence of her injuries. Nonetheless, the Moldovan Courts found that there was no evidence of harm to the children, that B had the benefit of a protection (or non-molestation) order and that VB would otherwise become homeless if his eviction from the flat were ordered.

The ECtHR found that the local Courts had failed to protect B and her children adequately. Firstly, the allegations of rape were sufficiently serious to justify a full criminal investigation, which ought to have proceeded even though B subsequently withdrew her complaint. Secondly, the State's failure to act meant that B was exposed to an intolerable level of anxiety and suffering in having to confront her assailant in her own home. Accordingly, Article 3 was violated and the Court held that VB's potential Article 1 Protocol 1 property rights over the flat could have been protected by a temporary eviction order. Thirdly, it followed that the State had failed to protect B's physical and psychological integrity and that there had been a violation of the positive duty under Article 8 (applying X & Y v Netherlands). B was awarded 15,000 EUR in non-pecuniary damages.

Comment: it is noteworthy that Moldovan national law provided for a perpetrator's eviction from property in cases of domestic violence. The ECtHR observed that States enjoy a wide margin in terms of the measures to be adopted in complying with Arts 3 and 8. However, it is obvious that the Moldovan Courts' decisions were weighted far too heavily in favour of the perpetrator and there does now appear to be a legal consensus on a victim-centred approach to resolution of DV disputes.

**Brezec v Croatia [2013] ECHR 705 (18/7/13)**

The applicant (B) took up occupation of her publicly owned flat in Dubrovnik in 1970. B no longer possessed a copy of her original agreement but she maintained that her entitlement to occupy the flat could be supported by witness evidence. On 9/7/1997, the State sold the building containing B's flat to Mlini hotels, a private company. On 9/5/05, the company began proceedings for B's eviction from the flat on the grounds that B had no legal basis to occupy the flat. The relevant law merely stated: "An owner has the right to seek repossession of his or her property from a person in whose possession it is." After several hearings and appeals, B's eviction took place in November 2010.

B applied to the ECtHR alleging a violation of Article 8 ECHR. The Court found that the Croatian Courts had limited themselves to finding that B's occupation was without legal basis without proceeding to analyse whether B's eviction from the flat which she had occupied for 40 years, while paying rent, was proportionate. The Court also noted that the company did not raise any issue about B's right to occupy the flat when it purchased the property and it delayed 8 years before taking proceedings.

The ECtHR found that there had been a breach of the procedural safeguards required by Art 8 and that B's
rights had been violated. No damages were awarded as B had failed to respond to a Court direction within the time limits.

Comment: this case provides further evidence of the applicability of Art 8 to the private sector (see for example our notes on Pelipenko and Buckland here and here). Furthermore, it is also interesting that lengthy periods of unchallenged occupation are likely to be relevant when a Court considers proportionality under Article 8.

Rousk v Sweden [2013] ECHR 746 (25/7/13)

Mr R was the director of a company who, between 2002 and 2003, ran up income tax debts in the region of 27000 EUR. The Swedish Enforcement Authority applied for an order for sale of the family home and at the same time, R challenged his tax assessment through the appeal courts. R and his wife were eventually evicted from their home following the sale of the property at public auction on 22/10/03, despite R's attempts to have the sale postponed. R petitioned the Court of Appeal and the Supreme Court on the grounds that it was disproportionate to evict him for a debt which, in R's estimation, had been reduced to about 800 EUR. However leave to appeal was refused and R was reimbursed the sum of 61000 EUR from the sale.

Following R's application to the ECtHR, Sweden attempted to have the application struck out from the lists once it had made an offer of settlement of 80000 EUR. The Court refused the State's request, observing that the offer was not accompanied by an admission that a violation of the Convention had occurred. On its examination of the merits, the Court found that there was a violation of R's Article 1 Protocol 1 rights. By the time of the eviction, the State could have satisfied itself that R's enforcement debts amounted to about 800 EUR and it could have taken alternative enforcement action, which would have avoided the loss of R's home.

In respect of R's Article 8 complaint, the Court found that R was unable to pursue his appeal to the higher courts in an effective way because his eviction and the sale had already taken place, in circumstances where there was genuine dispute about the amount of tax debt owed to the State. This meant that R had been deprived of the benefit of the requisite Article 8 procedural safeguards.

In terms of just satisfaction, R was awarded 65000 for pecuniary damage and 15000 for non-pecuniary damage.

Comment: applying the facts of this case to a domestic example, might it be disproportionate to evict where there is a pending housing benefit appeal which, if successful, could significantly reduce or extinguish the arrears which have resulted in the claim for possession? It should be noted that R suffered from a serious depressive condition and this might have been an aggravating factor in the Court's proportionality assessment. However, this is a useful case to rely on where there are disputed arrears in an Article 8 or A1P1 scenario.

Dog whistles

Mon, 12 Aug 2013 21:58:50 +0000

NL
The DCLG has trumpeted a new Guide on Council and Police powers on 'Dealing with illegal and unauthorised encampments'.

A new guide will give more power and a stronger voice to local residents and councillors to challenge council officers if they claim ‘nothing can be done’ about this problem. It follows on from the recently scrapped diversity and equality guidance which discouraged councils from taking enforcement action.

So says the DCLG press release, which also trumpets that 'New Temporary Stop Notices now give councils powers to tackle unauthorised caravans, backed up with potentially unlimited fines.'

However, the Summary of Available Powers' makes clear that the only 'new' power is the revocation, on 4 May 2013, of The Town and Country Planning (Temporary Stop Notice) (England) Regulations 2005, removing some restrictions on the use of temporary stop notices against caravans.

The tenor and approach of the DCLG release and the stated purpose of the guidance, have unsurprisingly attracted criticism. Travellers groups have highlighted the lack of duty to provide adequate legal sites, but also highlighted that the DCLG's original press release included the word 'blight' in regard to 'illegal encampments', a word that vanished between the release of the embargoed version and the final release.

The purpose of this release is presumably summarised in the paragraph quoted above. It is to place pressure on Councils, or more accurately, to put the perceived blame for the 'problem' (the 'blight') on councils. But the nature of the language, in a situation where the lack of legal sites is acknowledged to be a large-scale problem, in a now familiar manner, is to largely blame the victim for their situation.

Ending it all. Or not.

Wed, 14 Aug 2013 12:18:57 +0000

NL

A question on tenant's notice to quit, to keep minds occupied during the silly season.

Fareham BC v Miller [2013] EWCA Civ 159. (our report here) states in no uncertain terms that the common law position is that a landlord's notice to quit is irrevocable once served.

30. As a matter of law it was impossible for the Council to revoke the notice to quit. Once served it was effective to determine the tenancy according it its terms. Even if the Council had made an irrevocable decision not to rely on the notice the tenancy would still have come to an end: see Tayleur v Wildin (1868) LR 3 Ex 303. [...] 

Tayleur v Wildin concerned waiver of notice served by a landlord. The waiver took place before the expiry of the notice period. It states that the effect of the waiver/withdrawal is not that the tenancy continues but that a new tenancy arises as of the expiry date of the notice. This was upheld in Freeman v Evans [1922] 1 Ch. 36.

I have been told that this is the largely accepted position in commercial lets. Waiver/withdrawal of Notice creates a new tenancy from date of expiry of notice (similarly with waiver of notice served to exercise break clause). Eg see this note on the SDLT site (although that is saying SDLT would not be applied).

Now, what I had thought about tenant's notice to quit is as per Defending Possession Proceedings (Luba
A valid notice to quit will end the tenancy on expiry.

Thus, it was of course possible for the landlord and tenant to agree to waive the notice prior to expiry and for the tenancy continue.

But the common law position set out in Fareham v Miller applies equally to tenant's notice to quit as it does to landlord's.

Per Kelly CB, Tayleur v Wildin:

But it is clear that, whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both. If that is so, then the consent of the parties makes a new agreement, and if there is a new agreement there is a new tenancy created to take effect at the expiration of the old tenancy. [our emphasis]

So, any waiver of tenant's notice would give rise to a new tenancy on the date of expiry of the notice.

The impact of this could be significant, particularly on private tenancies. Any guarantor would fall away (precisely the issue in Tayleur). (Though would it be a 'replacement tenancy' for s.21(7) HA 1988 purposes, if an AST?). And after Superstrike, the deposit implications are obvious. For social tenants, RTB wouldn't be affected (it is aggregate time) but previous rent arrears would not be collectable or ground for possession, just a debt, and possibly succession rights would revive. I am sure there are plenty of other implications that I haven't had time to think about.

Also obviously, this is the common law position, and would not affect statute - so an assured (or AS) tenancy would exist until eviction, regardless of landlord's NTQ. But tenant's NTQ seems to me to be a more problematic question, and still largely common law..

I have probably got something hideously wrong, or overlooked something, but no-one has yet pointed me to anything conclusive.

Thoughts?

Of Superglue and Residence

Tue, 05 Nov 2013 22:58:15 +0000

NL

A prosecution under s.144 LASPO that came unstuck*

R v D Duputell 31 October 2013 Hove Trial Centre [Newspaper report]

This was the retrial of Mr Duputell after his earlier trial on charges of breach of s.144 LASPO together with two other co-defendants resulted in the cases against them being thrown out.

Mr D had been arrested in what I understand to be a former (empty) pub in Hove. The prosecution was brought on the basis of s.144, (1) of which provides:
A person commits an offence if— (a) the person is in a residential building as a trespasser having entered it as a trespasser, (b) the person knows or ought to know that he or she is a trespasser, and (c) the person is living in the building or intends to live there for any period.

Leaving aside the issue of whether this was a 'residential building' for now, the key issue in the trial was whether Mr D was living or intended to live there.

Mr D had been arrested when "he was found superglued around the joist of a wooden beam" in the property.

The prosecution evidence was that there had been "a sighting of a man fitting Mr Duputell’s description with a distinctively shaved head and blond Mohawk spotted on the roof of the building hours before" the arrest. Also:

that video evidence taken by police officers at the scene showing bedding in the property as well as fresh food in the fridge was evidence that there were people living in the building.

The Court found that this was simply nowhere near adequate to show that Mr D was living or intended to live in the property. 'His presence could have been because he was a visitor or someone who “had gathered in support with this group making a political point”.

Case dismissed.

It is worth noting that the Court suggested that convictions would need "evidence gathered through forensic work, surveillance and door-to-door inquiries", unless, as with the unfortunate Mr Haigh, the trespasser simply admits to living there.

The difficulties in s.144 that this case highlights do not come as a surprise. But that is what happens with hasty legislation.

I understand the Judge was invited to make findings on whether the property could be considered 'a residential building' for the purposes of s.144(1)(a), specifically whether it was designed or adapted for use as a place to live, but declined to do so.

I think that the building had first floor rooms that were formerly lived in, presumably by the pub manager. Any more details on this would be interesting, though, in view of the Court dismissing the case on the 'living or intending to live' point, it will take further cases to deal with 'a residential building' - s.144(3) providing:

For the purposes of this section— (a) "building" includes any structure or part of a structure (including a temporary or moveable structure), and (b) a building is "residential" if it is designed or adapted, before the time of entry, for use as a place to live.

[*I'm sorry. Really sorry.]*

Who'd be a judge?

Thu, 07 Nov 2013 16:29:27 +0000
I've just been reading *Ahmed and others v Mahmood and others* [2013] EWHC 3176 (QB) (Lawtel only I think) and I'm totally confused. If anyone who was in the case can help, I'd be very grateful.

The defendants lived in a property owned by the claimants. The claimants issued a claim for possession. The defendants unsuccessfully applied to adjourn the trial. The claimants then obtained a possession order. There were outstanding appeals against both the refusal of the adjournment and the possession order.

Notwithstanding those appeals, the case was transferred to the High Court for enforcement. The claimants then filled in the form asking for a High Court Enforcement Officer to execute a writ of possession. In that application, they incorrectly certificated that there were no applications pending (note, there is no suggestion in the judgment of dishonesty). The writ was executed. The property was then re-let. The defendants applied to set aside the execution of the writ.

Now, pausing here for a moment:

(a) I'm clear on the law on setting aside a warrant/writ in these circumstances. You either need to set aside the underlying possession order (*Governors of the Peabody Donation Fund v Hay* [1987] 19 H.L.R. 145, CA) or set aside the warrant on the basis of fraud, abuse of process or oppression: *Leicester CC v Aldwinkle* [1991] 24 H.L.R. 40, CA (amongst other authorities);

(b) but setting aside is discretionary, and a warrant/writ won't be set aside if there is no practical purpose (*Southwark LBC v Sarfo* (2000) 32 HLR 60 - building demolished so no point setting aside, even where oppression proven);

(c) if you set aside a warrant once a property has been re-let, you'll create a concurrent tenancy (*Wordsley Brewery Co v Halford* [1903] 90 L.T. 89 CA) and, because the original tenants (here, the defendants) can no longer satisfy the tenant condition, they'll lose their security of tenure (see the discussion in this case);

(d) all of which is very unattractive in terms of a set-aside (to say nothing of the position of the new tenants, who don't seem to have been represented in this mess).

So, it seems to me that the best thing to do is *not* to set aside the warrant/writ, given the prejudice to third parties, but to see if there is a claim in unlawful eviction (or similar torts) by the original tenant against the landlord.

This is not, however, what the High Court did (although it seems Lang J was concerned about my (c), above and it doesn't look like anyone explained (b)-(d) to her). She granted the application and set aside the writ as the false statement in the application for the writ amounted to an abuse of process.

As to my (c), she accepted an undertaking by the defendants not to seek to re-enter the property until all matters had been resolved.

I'd welcome any thoughts or comments on both the case and my analysis!
You may recall that, on August 3, 2011, the Government launched a consultation paper on its proposals to introduce a “mandatory power of possession” against tenants who are responsible for acts of anti-social behaviour. On August 15, 2011, following the riots in England, the consultation was widened to include a new discretionary ground for possession against tenants who have committed certain criminal offences at the scene of a riot anywhere in the United Kingdom.

On May 22, 2012, the Government published their response. It proposed, unsurprisingly, to introduce both proposals.

In relation to the new discretionary ground, I cannot add to what Andrew Arden QC and Caroline Hunter said in their editorial on the subject in the Journal of Housing Law last year (see [2011] JHL 115) and do not intend to do so. It is worth noting, however, that the Government intends to press ahead with the proposal despite noting that opinion was "evenly divided" and that "there were strong reactions to this question" (para 3.1). For such a controversial proposal one might expect a detailed analysis of the pros and cons of the change of the law. Not in this case: two paragraphs out of 32 were given to the question and neither paragraph contained any evidence or analysis to support the proposal. Evidence based policy this is not.

To be fair to the Government, they do give more detailed consideration to the question of whether to introduce a mandatory ground for possession. The problem, as is set out below, is that the analysis supporting the introduction of such a ground appears to be fatally flawed.

Mandatory ground for possession

The new mandatory ground for possession will be based on the current introductory tenancy procedure (i.e. the landlord will be required to give its reasons for seeking possession in a notice and the tenant will have the opportunity to request that his landlord conduct an internal review of their decision before the court is required to make a possession order). Such grounds will be available in circumstances where:

(i) the tenant, or a member of the tenant’s household, or a visitor to the property has been convicted of a violent or sexual offence, an offence against property, supplying drugs or production with intention to supply drugs, where the offence was indictable and committed within the locality of the property within 12 months;

(ii) the tenant or a member of the tenant’s household or a visitor to the property has breached the terms of a final Crime Prevention Injunction (i.e. a new civil injunction obtained in circumstances where a tenant has been guilty of conduct capable of causing a nuisance or annoyance) within the last 12 months and the CPI was obtained by, or in consultation with, the landlord;

(iii) the property has been closed as a result of the magistrate’s court granting a CPO for more than 48 hours;

(iv) the tenant or a member of the tenant’s household or visitor to the property has been convicted by the magistrate’s court for breaching a noise abatement notice in respect of the property made under Environmental Protection Act 1990.

Why is the mandatory ground being introduced?
The Government, in its response to the consultation, stated that the purpose of the mandatory ground was to “speed up the [eviction] process to better protect victims in the most serious cases of anti-social behaviour and criminality” rather than to increase the number of evictions (para 4.27). The Government acknowledges that more evictions are not necessarily desirable and the eviction of a tenant should be “a last resort to be used exceptionally and where other interventions to tackle anti-social behaviour have been tried and failed” as an eviction may “simply move the problem elsewhere” (para 4.26).

**Will there be more evictions?**

If the intention is to speed up the eviction process rather than to increase evictions it is not at all clear why the court’s discretion to suspend or postpone the eviction has not been retained in circumstances where there is persuasive evidence that the tenant’s behaviour will improve, *i.e.* the only circumstances in which a court should suspend or postpone a possession order under the current discretionary ground (see *Manchester City Council v Higgins* [2005] EWCA Civ 1423). Removing this discretion will mean that tenants who can demonstrate that their behaviour has improved will none the less be evicted where they otherwise wouldn’t have been. At first blush, it would appear therefore that this change can only have the effect of increasing the number of evictions and any assertion to the contrary must be wrong.

The Government is confident, however, following the responses it has received from landlords, that this will not be the case. The Government, assured by the consultation responses, takes the view that the mandatory ground for possession will only be used for cases which would have resulted in an outright order possession being made under the current discretionary grounds (para 4.28).

This confidence seems misplaced. First, it is hard to envisage circumstances where a landlord will opt to use the discretionary ground where the mandatory ground is available and the landlord wants an outright possession order. While not always the case, landlords do not generally bring claims for possession unless they are confident that an outright order is both obtainable and the appropriate remedy. It is not uncommon, however, for the court to take a different view and suspend the possession order. Therefore it must logically follow that the removal of the courts discretion will lead to more outright orders of possession than is presently the case.

Second, the mandatory ground’s conditions are likely to be satisfied in circumstances where at the moment landlords are unlikely to obtain an outright order for possession. It is hard to imagine many courts granting possession orders, let alone outright orders for possession, where a tenant has breached an injunction by entering an exclusion zone on one occasion or breached a noise abatement notice. Yet a court will, if the ground is relied upon by the landlord, be forced to evict a tenant in such circumstances. The Government expressly rejected calls for the ground to be limited to serious or persistent anti-social behaviour and does not intend, through guidance, to limit the use of the ground.

Third, while the majority of landlords indicated that they would not use the mandatory ground in all of the cases where it was available, certain landlords were clear that they would look to use the mandatory ground in most of the instances where it was available (para 3.33) and only 15% of the landlords consulted said that they not consider the using the mandatory ground at all. While it is unclear from the consultation responses, it is not hard to imagine that landlords will tend to use the discretionary ground where all they want is a suspended possession order and the mandatory ground where an immediate possession order is desired.

Fourth, nor will there be any restriction or regulation, through statutory guidance, on the use of the mandatory ground. The Government has emphasised that “it will entirely be for landlords locally to decide whether to make use of the new mandatory [ground]... in circumstances in which we intend [it] will be available (para 4.24).

On any view it must follow that, contrary to the Government’s intention, evictions will increase.

**Will it speed up the eviction process?**
Supporters of the ground in the consultation argued that the mandatory ground was necessary as the eviction process was too cumbersome.

It is hard to see, however, how the proposals will actually speed up the eviction process. First, for any of the mandatory ground’s conditions to be satisfied a county, crown or magistrates’ court must have found a tenant guilty of anti-social conduct. This will inevitably involve there being a trial, unless the allegations are admitted or the tenant chooses not to defend the claim. Thus, the mandatory ground may replace the need for a possession trial, but it will not replace the need for a trial at all. Such trials, whether they are in the county, magistrates’ or crown court, are subject to the same delays that affect possession claims. Moreover, wherever a court, be it civil or criminal, has found an allegation of anti-social behaviour proved, the tenant is prevented from denying that he did not do it and thus avoiding the need for the landlord to prove anything at trial.

Second, any claim for possession brought on the mandatory ground is susceptible to a public law or Article 8 defence. While such a defence is unlikely to be successful, a defence that is seriously arguable must be allowed to proceed to a trial and should not be dealt with summarily. The Supreme Court envisaged that defences which warranted a trial would be rare, but so far, in certain parts of the country, this has not proved to be the case. In such circumstances, this will also delay the eviction process.

We would have thought, as did various respondents to the consultation, that the more effective way to speed up the eviction process would be to invest more, and curb inefficiencies, within the court system. Alas, that proposal is rejected.

**Conclusion**

No proponent of a change in the law can ever be sure that the change they propose will achieve its purpose. By introducing a mandatory ground for possession, however, it ought to be obvious from the consultation responses that the change to the possession process is unlikely to speed up the eviction process and yet would increase the number of evictions. They cannot say that they were not warned.

**Monkey on my back**

*Fri, 25 Jan 2013 00:45:21 +0000*

NL

Even since *McCann v. UK* (2008) 47 EHRR 40, a lot of people (around these parts) have been waiting for a case on Article 8 and the rule in *Hammersmith v Monk* (*Hammersmith and Fulham LBC v. Monk* [1992] AC 478) to reach the higher Courts. Is the rule that notice by one joint tenant determines the tenancy for both/all compatible with Article 8 (or Protocol 1 Article 1)? Now one case has got to a higher stage. In a somewhat eccentric fashion, the Court of Appeal has given a distinctly forthright view, even if what the Court could actually do with the appeal was, more or less, nothing at all.

*Sims v Dacorum Borough Council* [2013] EWCA Civ 12

This was an appeal by Mr Sims from a first instance possession order. Mr & Mrs Sims were the joint secure tenants of Dacorum BC, in a 3 bed house. The relationship broke up in March 2010 and Mrs Sims and the two youngest children moved a refuge. She told the Council she wanted to give up the tenancy. The Council suggested she serve a notice to quit. On 25 June 2010, she gave a month's notice. The Council had not previous informed Mr Sims of any of this. The Council then refused Mr Sims request to
transfer the tenancy into his sole name, a decision upheld in internal reviews in December 2010 and June 2011. Possession proceedings had been issued against Mr Sims in October 2010. It should be noted that the tenancy agreement provided

"100. Where either joint tenant wishes to terminate their interest in a tenancy they must terminate the full tenancy as in (92) above. 101. We will then decide whether any of the other joint tenants can remain in the property or be offered more suitable accommodation."

The defence in the County Court pleaded:

that Monk was incompatible with the Article 8 rights of Mr Sims and that the court should construe the common law to make it compatible. The plea failed and a possession order was made. Mr Sims appealed on a number of grounds. The only ground now pursued is that the deputy district judge was wrong in law to decide that the service of the notice to quit by one joint tenant was effective to terminate the joint secure tenancy when that state of the law breached the rights of Mr Sims under Article 8 and Article 1 of the First Protocol of the ECHR. The latter ground was added by amendment.

The application for permission to appeal went ahead on one ground only

"The judge was wrong in law in deciding that the service of a notice to quit by one joint tenant was effective to terminate a joint secure tenancy. This breaches the appellant's rights under Article 8 and/or article 1 of the First Protocol of the European Convention on Human Rights."

The peculiarity of the application for permission was that both parties agreed that the appeal must be dismissed. The Court of Appeal was bound by the House of Lords decision in Hammersmith v Monk. Further, the common law 'adjustments' argued by Mr Sims also conflicted with binding authority in Burton v Camden LBC [2000] 2 AC 399 and Notting Hill HT v Brackley [2001] EWCA Civ 601, [2002] HLR 10, following Crawley BC v Ure [1996] QB 13

The issue, therefore, was whether permission to appeal to the Supreme Court should be granted.

The argument from Andrew Arden QC for Mr Sims was summarily summed up by Lord Justice Mummery as follows:

he submits that the effect of Monk is not reconcilable with the trend of authority from the Strasbourg Court on Article 8 and Article 1 of the First Protocol. The common law, "which belongs to the judges", should evolve as "a living and developing entity" to achieve the result that is most compliant with the ECHR, so that there is no interference or deprivation, by treating the notice to quit as the release of one joint tenant's interest to the other. Although that course is not open to the Court of Appeal, it was a good ground for granting permission to appeal to the Supreme Court.

There is no dispute that, as the claim for possession is by a public authority, the case falls within the scope of the 1998 Act. Mr Arden's key point on the merits is that the effect of Monk is to destroy the legal rights of Mr Sims in the secure tenancy of his home without giving him any opportunity to participate in, or to influence the outcome of, the relevant legal process of service of the notice and its termination of the joint tenancy. The effect of the termination by Mrs Sims was to deprive her husband of his statutory protection in relation to the property.

Mr Arden QC developed his propositions by extensive citation from a long line of English and Strasbourg authorities. One could fill many, many pages with legal citations without adding anything of substance to the basic proposition that the private law rules on joint tenancies have to be re-fashioned by the Supreme Court in order to meet the requirements of
The cases show, for example, that a "home" can exist without legal rights of occupation, so that a property can still be a "home" within Article 8 after the termination of a tenancy. *Cosic v Croatia* (2011) 52 EHRR 1098 at [21] states the general proposition that "no legal provision of domestic law should be interpreted and applied in a manner incompatible with [the UK's] obligations under the Convention." Mr Arden argued that the termination of a right of occupation may engage Article 8 as being an interference with respect for the home. The Supreme Court has recognised the possibility that a court should be prepared to entertain an Article 8 challenge to the validity of the notice to quit, as well as to a claim for a possession order: *Hounslow LBC v Powell* [2011] 2 AC 186 at [120] and [122]. However, no case was cited by Mr Arden for converting a joint tenancy of residential property into a sole tenancy of property contrary to the wishes of the owner of the property.

The termination of the joint tenancy was also, Mr Arden submitted, an interference with the peaceable enjoyment of a possession within Article 1 of the First Protocol. The interference must be proportionate. A notice to quit given by one joint tenant to the landlord was incompatible with Article 1 of the First Protocol as interfering with the peaceable enjoyment of possessions: the other joint tenant, in this case Mr Sims, is disturbed in occupation and is threatened with eviction.

The Council's arguments were summed up as:

First, the position of the Council in relation to Article 8. The article is not engaged by the rule in Monk. The aim of that Article is to protect the citizen from unjustified interference with respect for his home per se. The Council has done nothing to interfere with the respect for a home to which Mr Sims is entitled. The notice to quit in this case, which terminated the tenancy, was not given by it, but to it by Mrs Sims. It is not said that the possession proceedings taken by the Council are in themselves an unjustified interference with respect for the article 8 rights: *McCann v. UK* (2008) 47 EHRR 40 at [47]-[48]. The rights of Mr Sims in relation to those proceedings are adequately safeguarded by the court's assessment of the proportionality of possession orders and eviction.

Secondly, the nature of the common law rule on unilateral termination of a joint tenancy. It is not in itself an interference with the rights of Mr Sims within the meaning of Article 8 and is not incompatible with it. A bargain was made when the joint tenancy was entered into between the Council and the tenants and between the tenants themselves. That bargain created legally binding rights and obligations, which were explained to Mr Sims at the commencement of the tenancy. It is not open to Mr Sims to argue that the common law rule on joint tenancies has interfered with his right to respect for his home.

Thirdly, Article 1 of the First Protocol. The Council says that the article is not engaged and that there has been no interference with those rights. The termination of the joint tenancy by Mrs Sims was allowed by the nature of the bargain that the parties have made on the letting of the property.

Fourthly, margin of appreciation. The common law rule falls squarely within the broad margin of appreciation afforded to Member States. It strikes a fair balance between the rights of the landlord and the tenant respectively. The Council entered into the tenancy agreement on the basis that more than one person would be liable under the tenant's covenants contained in it and that each of them could at any stage determine his liabilities as tenant under the agreement. Possible policy objections to a situation in which not all the joint tenants under a secure tenancy occupy the property as their only or principal home should be taken into account.

To sum up, the points taken on behalf of Mr Sims are not arguable points of law of general public importance which would justify consideration by the Supreme Court. If the law needs
to be reviewed with a view to possible amendment, that is not a matter for the Supreme Court, whose proper constitutional function is to declare and apply the law. It is not so supreme that it can legislate for changes in the law. That is the function of Parliament which has procedures for more widespread consultation, debate and scrutiny than a court hearing a single case argued only by the parties to it in their own respective interests.

It would be fair to say that the Court of Appeal, in Lord Justice Mummery's sole judgment, was not at all impressed with Mr Sims' arguments.

My conclusions need only take five short paragraphs. To some extent they overlap by revert to the same inescapable basic points.

First, the compatibility issue. In this appeal from a possession order obtained by the Council, the ECHR challenge is solely about the compatibility of the rule in Monk with Article 8 and Article 1 of the First Protocol. It is not about the engagement of those articles by the Council's possession proceedings against Mr Sims nor is it about whether such proceedings are justifiable by the Council.

Secondly, the objective of enhancement. It is not the object of this appeal to secure respect for the home lived in by Mr Sims as a joint tenant or even to protect from interference or deprivation the property and contract rights that Mr Sims had acquired (with his wife) from the Council as joint tenants. The sole aim is to enhance property rights conferred by contract by securing for him a sole tenancy of the Council's property without the concurrence of the Council as owner of the property. If Mr Arden is right, Mr Sims would acquire, by force of ECHR law and in the absence of any agreement with the owner of the property, greater and different property and contract rights binding on the Council than he and his wife had originally acquired from the Council by agreement. Stating the matter quite baldly, he is aiming, by use of the ECHR, to obtain a tenancy of a three bedroom family house for himself in place of the joint tenancy of a family home which the Council had originally granted. That seems to me to be more a case of interference with the Council's enjoyment of its possessions than of an interference by the Council with the possessions of Mr Sims.

Thirdly, Article 8 is not engaged. Monk laid down a substantive rule of property and contract law under which one joint tenant has the right to serve notice unilaterally terminating a periodic joint tenancy. Mrs Sims had that right, as did Mr Sims: its defeasibility by an act of one of them was inherent in the legal nature of the joint tenancy granted to them by the Council. Mrs Sims exercised her right. There is nothing in the legal rule per se or in its exercise by Mrs Sims that was an interference by her or by the Council with respect for the home of Mr Sims.

Fourthly, Article 1 of the First Protocol is not engaged. As (a) the rule in Monk is a proprietary and contractual legal right inherent in the joint tenancy of the property granted by the Council to Mr Sims and Mrs Sims and (b) the notice given by Mrs Sims to the Council was in exercise of her rights as a joint tenant, there was no "interference" by her or by the Council with the enjoyment of the possessions of Mr Sims. His relevant possession was an interest in a joint tenancy that was, in its very nature, terminable unilaterally by Mrs Sims or by him. The Council's role regarding the rule in Monk was simply as recipient of the notice given to it by Mrs Sims terminating the joint tenancy. The Council itself did nothing in relation to the termination of the joint tenancy that could possibly be described as an interference by it with the peaceable enjoyment by Mr Sims of the property.

Finally, the proposed appeal to the Supreme Court. It is unarguable. There is no incompatibility between the rules of English property and contract law relating to the termination of a joint tenancy by one joint tenant and the ECHR. I cannot think of a sensible purpose that would be served by the expenditure of yet more public funds (on both sides) on
The appeal was refused permission and permission to appeal to the Supreme Court was refused as being "a waste of the publicly funded resources of the Supreme Court".

Comment

Some initial hasty thoughts.

This is a brusque dismissal of the Art 8 (and Protocol 1 Art 1) arguments. While it is certainly the case that the position on termination of joint tenancies was both a common law and contractual position, that does not adequately deal with the 'home' under Art 8 case law, (Pinnock, Powell v Hounslow etc.. Though to be clear, the framing of this appeal was a full on challenge to Monk, not a proportionality case, or at least not as it went in front of the Court of Appeal)

Because this case was not on all fours with McCann v UK, in which the Council had effectively sought and procured a notice to quit from the departed joint tenant, the Court feels able to assert that there was no interference by the Council with Mr Sims' Art 8 rights in the termination of the tenancy by Mrs Sims. Yet it is not in the contractual termination of the tenancy by Mrs Sims that the interference with Art 8 arguably arises, but in the Council seeking mandatory possession on that basis.

I would admit to being less convinced by the Prot 1 Art 1 argument on behalf of Mr Sims. To the extent that the secure tenancy was a creature of statute and contract, it is hard to see how termination according to the contractual provisions could amount to a P1A1 breach.

It may also be a stretch to say that compatibility would require a reading that would mean conversion of a joint to sole tenancy. As Mummery LJ, voicing the Council's argument, puts it, it is not the Supreme Court's role to amend the law. However, to see this as conclusive of the argument is again to elide the distinction between a contractual position, and that of 'the home' under Art 8. The common law rule in Monk and indeed the Council's and court's role in eviction would be susceptible to the Supreme Court's power to change common law to be compatible with the convention.

I strongly suspect that this one doesn't end here. We shall see if the Supreme Court beckons...

- "Monkey on my back: This term emerged in the late 1800s to describe someone who was bothered and in a bad mood by something that wouldn't go away" (Allegedly, possibly apocryphally)

A bit too unrestrained

Sun, 17 Nov 2013 20:16:16 +0000

NL

Emery v Wandsworth LBC (2013) QBD 14 November 2013 [not reported elsewhere, note on Westlaw]

This was an application by Ms E for permission to apply to discharge a Civil Restraint Order made against her in the High Court. Ms E had made an urgent application in person to the High Court for a stay of eviction. This had been granted by a High Court judge who was unaware (and not told by Ms E) that she had a CRO against her in the County Court, and ongoing County Court proceedings on the eviction. In fact, the County Court case was due to have a hearing on the same day as Ms E's application to the
High Court. The District Judge was unaware of Ms E's application to the High Court or the High Court's order, and refused a stay of eviction.

When the High Court found out the true position, a CRO was made covering the High Court (as the County Court CRO could not prevent an application to the High Court).

Ms E applied for permission to seek to discharge that High Court CRO. She argued (1) she had been forced to go to the High Court in order to seek relief as she had been denied relief in the county court; (2) she had told her counsel in the county court that she had obtained a High Court order but had not been permitted to address the judge on that point; (3) the High Court judge had not been entitled to extend the CRO.

This was less than successful. On (1) Ms E had made several statements that were false, but even assuming, with the benefit of the doubt, that she had no alternative but to go the High Court, it was wholly unacceptable that she had done so while the matter was being considered by the County Court, where Ms E had actually instructed solicitors and counsel. The High Court order hadn't come to light until after the District Judge had refused her stay application.

On (2), it was simply inconceivable that if Ms E had indeed informed her solicitor or counsel in the County Court of the High Court order that they would not have informed the District Judge. In fact, the transcript of the County Court hearing showed that Ms E had been told not to address the court, because she had counsel to make submissions on her instructions.

On (3) the submission that the High Court could not extend the CRO was misconceived. The County Court CRO did not extend to the High Court and it was necessary for a High Court judge to so extend it. The purpose of a CRO was to prevent ill founded applications, but to allow well founded ones to proceed. It was therefore to the benefit of both the local authority landlord and Ms E herself. The High Court judge had taken a balanced and proportionate approach.

Finally, it was clear that Ms E had a history of making ill founded applications, both in the present proceedings and previous ones.

While it was possible for a party subject to a CRO to apply to discharge it on the basis that there was a material change in circumstances, the dispute was behind them and evidence that there was no risk that they would continue to make vexatious applications, the history of this case since the High Court's CRO, and the volume of material it had generated, suggested that there was no such evidence in Ms E's case. As an example, there was her attempt to apply for permission to judicially review a refusal of temporary accommodation.

Permission to challenge the CRO refused.

Comment

Oh, so, so many questions. Starting with why did the High Court entertain what appears to have been an ex parte application for stay of eviction? And ending with but what was wrong with a JR of refusal to provide temporary accommodation? It can be the only route to challenge such a decision.

And then, the question that will be forever unanswered, what did she tell her solicitors?!

Allocation, Allocation, Allocation
**Leicester CC v Shearer** is a rare example of a successful public law defence to a claim for possession.

Mrs S was the wife of the late Mr Shearer, who was himself the successor tenant to the property that was the subject of the possession claim at 35 Martival, Leicester. They married in 2005 and Mrs S left in 2010 to take an assured shorthold tenancy following incidents of domestic violence. Mrs S's children continued to have staying contact with Mr S at the property. The parties later reconciled and were staying at another property in Leicester in February 2011 when Mrs S tragically found her husband hanged on the morning of 28/2/11.

Mrs S and her 2 children set up home at 35 Martival from 28/2/11 and she asked the Council to allow her and her family to continue living there. Mrs S was told that it was not possible for her to continue residing at 35 Martival and she was invited to complete an application form for alternative rehousing. The Council's advice that it would not be possible for her to continue living in the property was repeated but Mrs S did not provide the documentary evidence required to support her rehousing application.

There followed internal discussions amongst the Council's officers regarding the possibility of a direct offer of 35 Martival to Mrs S (although Mrs S was told nothing about this). Paragraph 5.6 of Leicester's allocation policy states:

**Direct Offers**

In limited circumstances the Council may allocate properties directly to applicants outside of the Choice Based Letting Scheme. Illustrative examples of Direct Lets are as follows....Where there are exceptional circumstances that merit priority rehousing associated in managing risks, emergencies and making best use of management stock

It was considered that making Mrs S a direct offer of 35 Martival would create an unhealthy precedent for future failed succession applications and the decision was taken instead to issue possession proceedings. Article 8 and public law defences were raised and the County Court recorder dismissed the Council's claim in a written judgement on 10/1/13. The judge concluded that no proper consideration was given to the making of a direct offer of 35 Martival, no enquiries were made of e.g. Social Services to assess the impact on the children of a move and had Mrs S been advised correctly of the possibility of a direct let, she would have furnished them with the supporting documentation.

The Council appealed, arguing a) that the recorder had misdirected himself and/or acted irrationally, when the Allocations Scheme expressly required supporting proof for a valid application; b) there was no obligation on the Council to undertake enquiries; and c) there was no evidence for the finding that a direct let was not considered.

The Court of Appeal's response to the first ground is summarised at para.59: "the Council effectively prevented the defendant from providing the necessary proofs by the misleading advice which it gave to her" and at 62: "a public authority cannot rely upon an applicant's non-compliance with procedural requirements, when the authority has itself caused that non-compliance." In the Court's view, Mrs S had a "respectable case" for an award of a direct let, the facts were exceptional and it was incumbent on the Council to deal properly and lawfully with her request. The Court also rejected a submission that the possession claim did not preclude the possibility of making Mrs S a direct offer at a later date. The decision to issue proceedings was bound up with the refusal to consider Mrs S for a direct let.

The Appeal was therefore dismissed.
Comment: This case raises a number of interesting issues. Firstly, presumably there was no cross-appeal against the recorder's finding that there was no Article 8 defence and therefore there was no need for the CA to consider it. The facts of the case were, after all, exceptional enough for the public law defence to succeed.

Secondly, we have a rare example of the Court interfering with a management decision of the Council vis-à-vis their housing stock. We know from the various Article 8 cases (Qazi [at 54], Powell [at 35] and Thurrock v West [at 25]) that local authorities are considered to know their own communities best and are better equipped than courts to make decisions about the use of their housing stock. Although Shearer is not strictly an Article 8 case, I mention the point because para.5.6 does refer to the 'best use of management stock'. For example, the Council would appear to have raised a valid concern about the risk of creating an unwanted precedent. Perhaps the lesson to be drawn from this case is that where there has been an obvious failure to complete a lawful Part VI assessment (or there has been some other policy which has not been properly applied), the Courts will be more inclined to intervene in possession proceedings than would be the case in a straight Article 8 scenario.

The Permissive Notice

Sun, 08 Dec 2013 01:33:39 +0000

David Smith

Spencer v Taylor [2013] EWCA Civ 1600

This case was flagged recently on the Arden Chambers eflash service. This flash gave some bare bones details and led to much debate on the internal NL email discussion list. However, we now have the vital transcript and so we can give a proper report.

[Update 11/12/13 - Judgment now on Bailii ]

[Update 1/3/13 - There is a mistake in the transcript as regards the day of the notice. This post has been corrected.]

Facts S granted an Assured Shorthold Tenancy under the terms of the Housing Act 1988 to T on 6 February 2006, a Monday. It was for a fixed terms of 6 months with rent payable weekly. Thus the first day of each period was a Monday and the last day was a Sunday. The fixed term of the tenancy ended on a Saturday. At the end of the fixed term a periodic tenancy arose by way of s5 of that Act and so it would also have been a weekly periodic tenancy running from a Sunday to a Saturday. In October 2011 a notice under s21 of the Act was served giving an expiry date of 1 January 2012 (which was a Sunday) and also including, as an alternative, the usual saving provision of the type approved by the Court of Appeal in Lower Street Properties v Jones [1996] 28 HLR 877. In this case it read:

"Or (b) at the end of your period of tenancy which will end next after the expiration of two months from the service upon you of this notice."

The Law So Far Section 21 reads, as far as is material to this case:

(1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling house let on the tenancy in accordance with chapter one
above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy a court shall make an order for the possession of the dwelling house if it is satisfied –

(a) that the assured shorthold tenancy has come to an end and no further assured tenancy, whether shorthold or not, is for the time being in existence other than an assured shorthold periodic tenancy, whether statutory or not and – (b) the landlord, or in the case of joint landlords at least one of them, has given to the tenant not less than two months notice in writing stating that he requires possession of the dwelling house.

(2) A notice under paragraph (b) of sub-section (1) above may be given before or on the day on which the tenancy comes to an end and that sub-section shall have effect notwithstanding that on the coming to an end of the fixed term tenancy a statutory periodic tenancy arises.

(3) Where a court makes an order for possession of a dwelling house by virtue of sub-section 1 above, any statutory periodic tenancy which has arisen on the coming to an end of the assured shorthold tenancy shall end without further notice and regardless of the period in accordance with section 5(1A).

(4) Without prejudice to any such right as is referred to in sub-section 1 above, a court shall make an order for possession of a dwelling house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied –

(a) that the landlord, or in the case of joint landlords at least one of them, has given to the tenant a notice in writing stating that after a date specified in the notice being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling house is required by virtue of this section, and – (b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest day on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a) above.

In general most commentators (including me) have taken the view that s21(2) is a deciding factor and controls which flavour of notice is to be served under the section. If the notice is being given before or on the day on which a fixed term tenancy ends then a notice complying with s21(1)(b) is appropriate. If the notice is served during a periodic tenancy then a notice complying with s21(4)(a) is appropriate. A s21(1)(b) notice must simply give two calendar months notice while a notice under s21(4)(a) must give two months notice and must expire at the end of a relevant period and must not give less notice that a common law notice to quit.

On that reading of the law the notice in this case should have been seeking to comply with s21(4)(a) as it was served during a periodic tenancy. Further in giving its date of expiry as a Saturday that element of the notice was defective.

A New View The case came before the Court of Appeal and LJ Lewison gave the leading judgement with which LJ Macfarlane and the President of the QBD agreed without comment.

Surprisingly, LJ Lewison did not simply turn to the second component of the notice, the saving provision and rule the notice as valid on that basis, which he could easily have done.

Instead LJ Lewison embarked on a careful reading of the section. I am going to take this out of order a little as I think the conclusions reached are more useful in this way. Starting with a view of s21(2), what we have always all seen as a compulsion which prohibits a landlord from using s21(1)(b) once the fixed term has expired was read very differently by the Court. In fact s21(2) was described as permissive rather
than as proscriptive. S21(2) states that an s21(1)(b) notice "may be given before or on the day on which the tenancy comes to an end" (emphasis mine). It does not say that such a notice must be given or can only be given but rather that it may be given. LJ Lewison therefore read this as suggestive as opposed to requiring an outcome.

If s21(2) allows an s21(1)(b) notice to be given in a periodic tenancy then does the wording of s21(1) allow for the same conclusion? LJ Lewison felt that it did. S21(1)(a) merely requires that the fixed term of any AST has ended and that no further fixed term has come into existence. S21(1)(b) simply requires that two months notice has been given. Nothing in s21(1) specifies that the notice is only applicable to a fixed term tenancy or cannot be given during a periodic tenancy.

Therefore LJ Lewison rules that the s21 notice was valid as the expiry date of 1 January 2012 on the notice was more than two months from the date of service and under s21(1)(b) this is all that was required.

**Different Dates** At this point the notice was valid and the appeal was lost for the tenant. However Lewison LJ went on to review the position under s21(4)(a) in the light of the tenant's argument that the notice was defective because it essentially gave more than one date, 1 January 2012 and the date calculated under the saving provision. Lewison LJ dismissed this argument. He held that if one date is clearly primary and the other is seen as a fall-back then the position is clear to a reasonable reader of a notice. Additionally, it was clear from the notes on the back of the notice that the 1 January date was wrong and so a reasonable reader would see that this first date was incorrect and so turn automatically to the other.

**Comment** This case is a bit of a shocker in that it overturns a common belief structure. In summary the position is now that if a tenancy has at some stage had a fixed term then a notice which complies with s21(1)(b) will always be an acceptable means of termination, whether it is being served during a fixed or periodic part of the tenancy. Accordingly, a notice under s21(4)(a) is only for tenancies that were periodic from the outset and have always been so. This means that for the majority of tenancies in England & Wales the s21(4)(a) notice is now irrelevant as almost all of them have at some stage been operating under a fixed term. This also means that for these tenancies cases such as *Church Commissioners v Meya*, *Macdonald v Fernandez*, and *Lower St Properties v Jones* are also all irrelevant as they all deal with aspects of s21(4)(a) notices.

It is also worth noting that Lewison LJ did not bother with a review of the legislative history and what was intended. This was a surprise as it seems almost incredible that this outcome was what the legislation intended. In fact, the entire structure of the Housing Act 1988 has been built around trying to keep the tenancies similar to the common law position. Hence the use of the s21(4)(a) notice and its linking with a notice to quit. Breaking this undermines that intent. I also find it hard to accept a reading of any Act that sets out a piece of legislation as optional in nature.

Finally, it will of course be a great relief to landlords and agents as the vagaries of s21(4)(a) have defeated a great many possession cases over the years.
This is a very important decision from the summer. For some reason we haven’t got round to writing it up before now. In the meantime England have managed to retain (yay) and then lose (boo) the Ashes, so it just goes to show that there are worse things in the world than tardy blog writers.

The issue in the two cases is neatly stated by Kitchin LJ at [2]:


(In addition to those citations, Kitchin LJ could have referred to this on Pinnock and this on Powell. Manek and Desnousse are before our time).

The Protection from Eviction Act 1977 provides that a landlord cannot recover possession of premises “let as a dwelling” or “occupied as a dwelling under a licence” without first getting a court order for possession (s.3). The 1977 Act also provides that a notice to quit a periodic tenancy of premises “let as a dwelling” or notice to determine a periodic licence “to occupy premises as a dwelling” must give at least 4 weeks’ notice and contain prescribed information (which is set out in the Notices to Quit etc Prescribed Information Regulations 1988.

In Mohamed v Manek & RB Kensington & Chelsea (1995) 27 HLR 439, the Court of Appeal held that where a local housing authority provides B&B accommodation to a homelessness applicant, while the authority carries out its enquiries to decide the extent of the duty owed under Pt 7, Housing Act 1996,* that accommodation is generally not let as a dwelling, so s.3, 1977 Act does not apply to it.

In Desnousse v LB Newham [2006] EWCA Civ 547; [2006] QB 831, the Court of Appeal was asked to reconsider Manek in light of the Human Rights Act 1998 having come into force. A majority of the Court of Appeal considered that Manek still applied.

As we all know, in Pinnock and Powell, the Supreme Court held that art.8 of the European Convention on Human Rights required the availability of a proportionality assessment of an eviction in a claim for possession brought by a public authority. In Powell, one of the occupiers was housed under Pt 7 duties, but this was under s.193(2) (the “full” housing duty).

In CN & ZH, the claimants argued that the Manek and Desnousse could no longer stand, given the Supreme Court decisions in Pinnock and Powell.

The brief facts of the two cases are that CN was born in August 1994. In 2011 his family were evicted for rent arrears. They applied to Lewisham for assistance. Lewisham placed them in temporary accommodation and then decided that they were intentionally homeless. Lewisham told them to leave the temporary accommodation. When challenged by the family’s solicitors, Lewisham said that they did not need to obtain a possession order before evicting them. Judicial review proceedings were launched, challenging Lewisham’s decision to evict without a court order. Although an interim injunction was granted, requiring Lewisham to continue to accommodate, the High Court then refused permission for JR. That was successfully appealed to the Court of Appeal, which decided to retain the substantive JR.

ZH was born in March 2012, just a few months after his mother had given up her tenancy in Liverpool and moved in with her sister and aunt in East London. In August 2012 the aunt asked her to leave and she then approached Newham for assistance. Newham placed her and her son in temporary accommodation and then decided that she had made herself intentionally homeless by giving up her tenancy. Newham told her that she had to leave the temporary accommodation. As with CN’s case, JR proceedings were issued challenging the decision to evict without a court order. An interim injunction was granted and this time...
the High Court granted permission for JR. The claim was transferred to the Court of Appeal, so that the two cases could be heard together.

The Court of Appeal (Moses, Kitchin & Floyd LJJ) dismissed the claims. The lead judgment is given by Kitchin LJ. Moses LJ adds a few words and Floyd LJ agrees with both of them.

Kitchin LJ said that Manek and Desnousse were still good law, notwithstanding Pinnock and Powell. Temporary accommodation under s.188 or s.190, 1996 Act, was to be treated differently to accommodation granted under the full housing duty contained in s.193: [75].

Although a proportionality assessment is, in principle, available, that could be achieved through a JR claim rather than forcing local authorities to bring possession proceedings in every case. Moses LJ cites R (JL) v Secretary of State for Defence [2012] EWHC 2216 (Admin) as an example of a proportionality assessment being conducted in JR (our note here, this decision was upheld by the Court of Appeal: [2013] EWCA Civ 449).

Nor did s.5, 1977 Act, apply so that the detailed requirements for NTQs needed to be followed. That provision only applied where a licence “to occupy premises as a dwelling” was involved. Manek had decided that temporary accommodation under s.188, 1996 Act, was not “occupied as a dwelling under a licence” for the purposes of s.3, 1977 Act. The language used in s.3 and s.5 was so similar that this meant that this sort of accommodation also did not fall within s.5: [77].

Counsel for the occupiers appears to have recognised that it was going to be tough to convince the Court of Appeal to take this step, so sought to persuade them that if they were going to dismiss these cases they should still grant permission to appeal to the Supreme Court. That did not convince the CA (see [83]).

The Court of Appeal decision will definitely not, however, be the last word on the matter - the Supreme Court has granted permission to appeal and has placed a stay on the CA's order. Expect a hearing in the spring or early summer next year, with judgment probably after the summer vacation and a write-up here sometime in 2015...

* Actually, Manek considered the predecessor provisions to Pt 7, 1996 Act, which were contained in Housing Act 1985.

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**Paying the cost.**

*Mon, 30 Dec 2013 17:55:25 +0000*

*NL*

**Watson v Simpson** Croydon County Court 4 October 2012

Not a stunningly important appeal to a Circuit Judge, this one, but a useful case to be able to wave around on costs.

Ms Simpson was a private AST tenant of Mr Watson, whose tenancy had become a statutory periodic one. Mr Watson apparently wanted her out. He served what was described as notice to quit, then began possession proceedings. He did not serve any s.21 Notice (of any sort, vide Spencer v Taylor). The Particulars of Claim were on form N119. There were no particulars of any rent arrears, or other breach, nor was there a claim for use and occupation charges.
Unsurprisingly, the District Judge dismissed the possession claim. However, the Order stated 'no order as to costs'.

Ms S was apparently represented and legally aided. It appears this was a factor. It also appears that the DJ may have heard and taken into account the history between Ms S and Mr W.

Ms S appealed. HHJ Ellis held that when departing from the usual costs order under CPR 44.2, 'the conduct' of the parties meant litigation conduct, not the conduct of the relationship of landlord and tenant as a whole. Further, following Governing Body of JFS [2009] 1 WLR 2353, how a party was funded was irrelevant to determining the inter partes costs order.

Our thanks to December 2013 Legal Action's 'Recent Developments in Housing Law' for alerting us to this case.

'We are the world'- Brent LBC

Fri, 24 Jan 2014 23:52:10 +0000

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One test for establishing succession to a secure tenancy by a gay partner (not being a civil partner) has been established since Nutting v Southern Housing Group Ltd [2004] EWHC 2982 (Ch). This test is "that the relationship must be openly and unequivocally displayed to the outside world".

In a possession claim heard at Central London County Court on, I think, 23 January 2014, Brent Council took what one might call a solipsistic approach to the meaning of 'outside world'.

It is, so far at least, just a County Court case, but is very interesting in terms of approach and issues arising. The Defendant has requested that his name is not used in reports. While a court case is a matter of public record unless an anonymity order is made, given the circumstances of the case, we shall call him Mr P.

Mr P was the partner of the secure tenant of Brent LBC for some 5 years before the tenant died. Both Mr P and the tenant were gay and deaf, Mr P being profoundly deaf and unable to speak. Both lived at the property.

On the death of the tenant, Mr P asserted his succession to the tenancy. Brent refused to acknowledge the succession and brought a claim for possession. Mr P defended on the basis that he was the late tenant's partner and had succeeded.

This is where it gets a little odd. Brent claimed that the late tenant and Mr P could not have been living together as partners because they had not been open with the Council about their sexuality and their relationship. Therefore they had not displayed their relationship to the outside world, pace Nutting.

This interesting definition of 'the outside world' did not go down well with HHJ Lochrane. There were witnesses from the community Mr P and his partner spent most of their time in to the effect that they were open about their relationship. Being open and unequivocal about a relationship did not require being open with the entire world and certainly not with a landlord or local authority.

There was no need to enter into an 'unedifying' examination of Mr P's private life. It was clear that Mr P and the late tenant had been open and there were external witness to that. They were not required to be
'open' with the landlord/council. Moreover, Brent had failed to show the required delicacy and sensitivity that was required, both in regard to the devastating effects of homelessness on a vulnerable individual and in failing to make proper inquiries. Instead, Brent had imposed inflexible criteria which were inappropriate for lesbian or gay relationships.

Brent sought permission to appeal (yes, really) and were refused. Will they try again?

For notes on the case, see Garden Court (John Beckley, Counsel) and Anthony Gold (Debra Wilson, Solicitor)

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**Housing and Human Rights Round-Up Pt 1**

*Mon, 03 Feb 2014 22:39:25 +0000*

*SJM*

**Winterstein v France 17/10/13 (judgement in French only)**

The applicants in this case were travellers who were part of a community that had occupied land on a site (known as bois du Trou-Poulet) in the Herblay region of France and had made it their home over a period of 30 years. In 2003, this area was designated a protected conservation area and on April/May 2004, the Local Authority commenced proceedings for the community's eviction from the land.

Although the applicants received a favourable hearing at first instance, the decision to evict was upheld on appeal. The Courts found that the decision was within the framework of the law, the lengthy period of occupation did not confer on the applicants a legal right to occupy the land and moreover, their right to call themselves 'travellers' was called into question by the amount of time they had spent there. After the Cour de Cassation declined jurisdiction, various households were relocated either to alternative sites or to 'bricks and mortar' accommodation.

The applicants to the ECtHR comprised households who had remained on site, others who had been relocated to social housing and the remainder who had left the region. They relied on Article 1 of Protocol 1 and Articles 3, 8 and 14 of the Convention.

The Court found that the applicants had established the bois du Trou-Poulet as their home within the meaning of Article 8 and that the Order for their eviction was an interference, albeit one that pursued a legitimate aim by reason of the conservation proposals.

The question was therefore whether the eviction was proportionate and necessary in a democratic society. The Court reminded itself of the decision in *Yordanova* (see our note [here](#)) and noted in that case that inactivity on the part of the Bulgarian authorities had, over many years, allowed a Roma community to become established and to thrive on land that they occupied illegally. The Grand Chamber accordingly adopted the reasoning of the Court in *Yordanova* and found that the national Courts, in ordering the applicants' eviction from the bois du Trou-Poulet, had similarly failed to undertake an adequate proportionality exercise. Furthermore, special consideration had to be shown towards disadvantaged and vulnerable groups such as the traveling community, by either regularising their occupation of the land or failing that, by making offers of rehousing (para.160).
In this instance, the needs of the families relocated to social housing had been met, which left those who remained on site and those who had left the region. The Court noted that the situation of those groups remained precarious and it reserved the question of damages.

The Court rejected the complaints under A1P1 and Art. 3 and found that no separate issue was raised by Art.14 (although it is useful to recall that States are also required to take account of the needs of travellers as a disadvantaged group for the purposes of that Article—see e.g. DH v Czech Republic para. 207)

**Zrilic v Croatia 3/10/13**

Between 1992 and 2005 the applicant shared a property in Croatia with her husband. The parties divorced in 2005 but they continued to occupy the family home together. A Court in 2009 established that the parties' shares in the property was 2:1 in favour of the husband, who then applied for a judicial sale or in the alternative, a partitioning of the premises.

An expert's report was commissioned, which concluded that a partitioning of the premises was impossible. Ms Z did not dispute the expert's oral evidence and on 22/4/10, the Municipal Court ordered a sale of the property. Ms Z appealed unsuccessful and the property was sold on 18/9/12 with Ms Z ordered to vacate the premises.

Ms Z complained to the ECtHR that the judicial sale of the premises interfered with her right to respect for her home and with the peaceful enjoyment of her possessions, contrary to Article 8 and Article 1 of Protocol 1. The Court gave the complaints short shrift. Ms Z had had opportunities to object to her ex-husband's partition plan, to cross-examine the expert and to raise arguments before the national courts that the proceeds of sale were insufficient to fund a suitable alternative property. However, Ms Z failed to take advantage of these opportunities and it was therefore impossible to say that the eviction was not proportionate or that there was a breach of A1P1.

There was no violation of the Convention and a reminder instead of the Court's limited powers to deal with new or contested evidence.

**Skrtic v Croatia 5/12/13**

Ms S was a specially protected tenant of a flat in Croatia, which she and her family were forced to vacate in 1991 following a bomb alert. Temporary accommodation was granted to Ms S's husband but the parties separated in 1992 and she and her son continued living in the flat. The husband's occupation rights were terminated in 2000 and eviction proceedings were brought against Ms S, which concluded with an order for her eviction in 2008. An appeal was dismissed in August 2009, despite Ms S's assertions that 1) she had been promised a specially protected tenancy to replace the one she had lost through no fault of her own; 2) the duration of her occupation of the flat and 3) she had been reassured she had nothing to worry about.

The key question for the ECtHR was whether the interference was proportionate to the aim pursued. The Court accepted the representations made by Ms S and referred to the earlier case of Bjedov v Croatia (see our note here). In the face of Ms S's strong arguments that her eviction was disproportionate, the national authorities had not discharged the burden of justifying the eviction as necessary and it was not enough merely for the courts to find that her occupation had no legal basis. Ms S had therefore been deprived of the requisite Art. 8 procedural safeguards. Damages of 3000 EUR were awarded.
Pelipenko v Russia 16/1/14

We reported the ECtHR's decision on the merits here. There now follows the Chamber's decision on the claim for just satisfaction. The Applicants' claim for the breaches of Art 6 and Art 8 broke down into 4 parts: 1. the purchase costs of a new flat (150K Euros); 2. the costs of maintenance and repair of their former accommodation (17K Euros); 3. temporary accommodation costs following eviction (3K Euros); 4. loss of belongings and ancillary costs (20K Euros); 5. non-pecuniary losses (170K Euros).

The Court noted that this was unlike other cases where the State had thwarted claims against private parties and where it was appropriate for the State to compensate the Applicant directly for their loss. In this case, there was an enforceable judgement requiring the original Defendant to provide the Applicants with a flat. The Defendant was now prepared to comply with the judgement and it was up to the State to take the appropriate steps to ensure it was enforced and to accommodate the Applicants until the judgement was enforced. It was not therefore appropriate to order the State to pay for the cost of a replacement property.

As for the other heads of claim, the Court allowed the cost of lost belongings and the stay in temporary accommodation in the sum of 13K Euros. The Court also ordered the sum of 10K Euros for distress and inconvenience.

Bitto v Slovakia 28/1/14

This case concerned the Applicants' right to challenge rent controls imposed on their properties in post-communist Slovakia. The Grand Chamber in Hutten-Czapska v Poland had found a breach of Article 1 of Protocol 1 where rent restrictions imposed by the State had prevented the owners from adequately maintaining and keeping their properties in repair. Poland had failed to ensure a fair balance between the owners' rights to make even a modest profit from their homes and the provision of social housing to those in most need.

In Bitto, the Applicants had had their properties restored to them from 1991 onwards but subject to their existing tenancies, the rents for which were capped at a level set by the State. Furthermore, the owner could not evict their tenant without compensating them and they could not sell their home to anybody other than their tenant. The Applicants calculated that for the relevant period, they were recovering rent from their tenants at a mere 13-19% of the market rate.

While noting the wide margin of appreciation allowed to States in socio-economic matters, the Court found that the Applicants' right to derive profit from their properties had not been met given the wide disparity between controlled and market rents. A fair balance had not been struck and there was a breach of A1P1. The Court reserved the question of damages in anticipation of a friendly settlement.

Zabor v Poland 7/1/14

In this case, Mr Z attempted to enforce his right of succession to a protected tenancy of a flat in Wroclaw held by his late mother, who died on 13/1/01. Mr Z had occupied the flat from 1955 until his marriage in 1980 and once his mother died, Mr Z's brother was recognised as successor. Mr Z attempted to persuade the Wroclaw municipality to accept him as a successor but it refused, stating that it had ceased to be Mr Z's home for many years. At some point in 2002, Mr Z was forcibly expelled from the property by his brother.
Mr Z commenced court proceedings and on 6/11/02, his application to succeed was allowed. Nevertheless, the municipality refused to conclude a tenancy agreement with Mr Z and repeated the contention that he had not demonstrated any continuity of occupation. The District Court granted Mr Z a declaration on 25/02/05 that a tenancy agreement existed between him and the municipality and the municipality conceded this right on 28/3/06.

The municipality later commenced possession proceedings for rent arrears. Although an order was made against Mr Z's brother, the court refused to order Mr Z's eviction from the flat as Mr Z could not have been expected to make arrangements to pay rent when the municipality had obstructed his succession application, had refused to sign a tenancy agreement with him and had made no demand for rent from him.

On 14/11/2011, Mr Z started an action for damages against the municipality for the 10 years he had been forced to remain homeless following the death of his mother. The Court found that the real reason for Mr Z's predicament was his dispute with his brother and the municipality could not be held responsible when it had no power to force the brother to allow access to Mr Z and when Mr Z had taken no action of his own against his brother.

Following the dismissal of his damages claim, Mr Z complained to the ECtHR that his rights under Article 8 and Article 1 of Protocol 1 had been breached. The Art. 8 complaint fell at the first hurdle. Despite Mr Z's obvious intention to return to the property, he had been absent from it for 30 years and had not established the sufficient and continuous links necessary to demonstrate it as his 'home' under Art. 8. As regards A1P1, the Court makes a curious comment (para. 79) that the municipality was not exercising public law powers in recovering rent or in taking possession proceedings. However, this is not material to the Court's decision. Notwithstanding the obstacles that the municipality placed in the way of the applicant's succession application, the actual cause of Mr Z's absence from the flat was the conduct of his brother rather than the municipality or the courts. It was not the responsibility of the State to resolve a family dispute in order for Mr Z to obtain possession. Given moreover that Mr Z was not liable to pay rent, there was likewise no breach of A1P1.

Article 8 and the Private Sector

In one sense, the possession claim in Manchester Ship Canal Developments v Persons Unknown [2014] EWHC 645 (Ch) follows a fairly predictable course. The Defendants were a group of activists who had set up camp on Barton Moss Lane, Manchester, in protest at the drilling program being undertaken by a company, Igas Energy plc. The Claimants had granted Igas a licence to drill on the land nearby and the protest was intended to deter the controversial fracking process which the activists feared would ensue.

The Claimants sought their eviction from the land and the Defendants argued that their eviction would be a disproportionate interference with their rights under Articles 8, 10 and 11 of the ECHR. The parties agreed that the matter should be dealt with on written evidence only if the Defendants were unable to show that they had a reasonably arguable defence to the Claim.

HHJ Pelling decided that there was no reasonably arguable defence. As regards Arts 10 and 11 (the rights to freedom of expression/peaceful assembly), the Defendant's occupation was without the permission of the landowners exercising their A1P1 rights and it had resulted in a loss of amenity to members of the
general public. Furthermore, there was no question of a possession order denying the Defendants the effective exercise of their Convention rights given that a protest could take place elsewhere. As for Article 8, the Defendants had not established a sufficient and continuous link with the land (Buckley v UK (1996) 23 EHRR 101) and/or there was nothing exceptional about the case to give them an arguable defence.

So, a possession order was granted but the interesting part of the judgement concerns the treatment of the parties to the Claim. We have been monitoring the progress of the argument in the ECtHR that Art. 8 applies to private as well as public entities (see our notes here, here and here) and now, following the comments of the Court of Appeal in Malik v Fassenfelt [2013] EWCA Civ 798, HHJ Pelling expresses his views in clear terms (para.46):

Any view I express on this issue is unlikely to be anything more than the platform for an appeal so I express my conclusions on this issue shortly. Firstly, it is difficult to see on what logically defensible basis it could be said that Articles 10 and 11 are engaged in relation to claims for possession by private landowners - as to which see the discussion above - without also concluding that Article 8 is also capable of being engaged in relation to such claims. Secondly, I do not see how it is open to the Court to opt out simply because the Claimant is a private landowner given the terms of s.6 of the Human Rights Act 1998. There is nothing artificial in this – the private landowner is seeking to use a public authority (the court) in order to assist him to vindicate his ownership of his land. The court as the public authority concerned can only do so on terms that respect the convention rights of all relevant parties, which on this analysis would include the Article 8 rights of the trespasser and the A1P1 rights of the landowner. The landowner accepts this by seeking the assistance of the court. Thirdly, although extending Article 8 to claims by private landowners would be an extension I question whether it would be an unprincipled one given that anyone relying on Article 8 in this context would have to establish that the land concerned was a home applying the convention test applicable to that concept, and given that once that threshold has been passed the only obvious justification for treating a trespasser on land owned by a local authority any differently than a trespasser on privately owned land is that the Article 8 rights of the trespasser would have to be balanced against the A1P1 rights of the private landowner. If that is so, I do not see why that cannot be catered for by treating the fact that the land is owned privately as the primary factor in deciding whether ordering possession is proportionate much as is the effect of Appleby (ante) in relation to Article 10 and 11 cases concerning claims for possession by private landowners with the result that it will only be in exceptional cases that the A1P1 rights of a private landowner are treated as trumped by the Article 8 rights of a trespasser. For those short reasons I proceed on the basis that Article 8 is capable of being engaged even in relation to land owned by a private landowner. This was the approach favoured by both the first instance judge and Sir Alan in Malik v. Fassenfelt and others (ante).

I imagine that an appeal is unlikely in this case but we will surely see this issue crop up again in the higher courts.

A game of forfeits

Sat, 22 Mar 2014 23:59:14 +0000

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The flexible tenancy, that marvellous and oxymoronic invention of the Localism Act, is now in place and in use by a number of Councils. The last time I considered flexible tenancies it was largely about how they were created and how they were terminated at the end of the fixed term (there was also this CPD Cast. Which may or may not still be free).

Now, given that they exist, and given that people will do things like get into arrears or cause a bit of a nuisance, before the end of their fixed term, it is time to have a look at how flexible tenancies can be ended during the fixed term. I am prompted to do so by an excellent article in the Journal of Housing Law (Vol 17 Issue 1) by Andrew Dymond of Arden Chambers. His article really should be read - anything of interest in the following is due to him, and any errors are of course my own. (Also, if you are not reading the JHL, why not? It routinely has very good and useful pieces in it.)

The first thing to note is that because a flexible tenancy is not a weekly or monthly periodic secure tenancy, Housing Act 1985 s.82(1), (1A) and (2) do not apply. Instead sections (3) and (4) do.

(3) Where a secure tenancy is a tenancy for a term certain but with a provision for re-entry or forfeiture, the court shall not order possession of the dwelling-house in pursuance of that provision, but in a case where the court would have made such an order it shall instead make an order terminating the tenancy on a date specified in the order and section 86 (periodic tenancy arising on termination of fixed term) shall apply.

(4) Section 146 of the Law of Property Act 1925 (restriction on and relief against forfeiture), except subsection (4) (vesting in under-lessee), and any other enactment or rule of law relating to forfeiture, shall apply in relation to proceedings for an order under subsection (3) of this section as if they were proceedings to enforce a right of re-entry or forfeiture.

So, i) the tenancy agreement must have a provision for re-entry or forfeiture. ii) A possession claim is actually forfeiture proceedings. iii) when an order is made under s.82(3), it terminates the fixed term, but a periodic tenancy arises, via s.86:

(1)Where a secure tenancy (“the first tenancy”) is a tenancy for a term certain and comes to an end— (a)by effluxion of time, or (b)by an order of the court under section 82(3) (termination in pursuance of provision for re-entry or forfeiture), a periodic tenancy of the same dwelling-house arises by virtue of this section, unless the tenant is granted another secure tenancy of the same dwelling-house (whether a tenancy for a term certain or a periodic tenancy) to begin on the coming to an end of the first tenancy. (2)Where a periodic tenancy arises by virtue of this section— (a)the periods of the tenancy are the same as those for which rent was last payable under the first tenancy, and (b)the parties and the terms of the tenancy are the same as those of the first tenancy at the end of it; except that the terms are confined to those which are compatible with a periodic tenancy and do not include any provision for re-entry or forfeiture.

This means, I think, that any claim to bring to an end a flexible (fixed term) secure tenancy as a forfeiture claim should also simultaneously be pleaded a claim for possession against the periodic tenancy that arises via s.86 on an order made under s.82(3). I suspect this may not be widely understood.

The grounds for possession are the familiar grounds of Schedule 2 Housing Act 1985, and there are the usual requirements for it to be reasonable to make a possession order and/or suitable alternative accommodation being available. But the notice seeking possession is in a different prescribed form, as per Part II of the Schedule to the Secure tenancies (Notices) Regulations 1987.

And then to the good bits. Remember s.82(4) HA 1985 above?

Section 146 of the Law of Property Act 1925 (restriction on and relief against forfeiture), except subsection (4) (vesting in under-lessee), and any other enactment or rule of law
relating to forfeiture, shall apply in relation to proceedings for an order under subsection (3) of this section as if they were proceedings to enforce a right of re-entry or forfeiture.

I suspect not that many housing lawyers, let alone Council housing departments, will be altogether familiar with the enactments and rules surrounding forfeiture. A few quick points...

The forfeiture clause in the tenancy agreement, for rent arrears cases, must specify that the right to forfeit arises 'whether rent has been formally demanded or not'. If it doesn't then the landlord must formally demand the rent before the right to forfeit arises on arrears of rent.

Rent arrears claims do not require the additional step of a notice under s.146 Law of Property Act 1925, on which more below. But they are not without perils of their own for the landlord.

The provisions for relief from forfeiture in the County Courts Act 1984 apply.

S.138(2) provides that if the lessee (tenant) pays all the arrears of rent and the costs of the action into court or to the landlord not less than 5 clear days before the return day of the claim (first hearing), then the action shall cease and the tenancy continue without interruption. This is perhaps a little unclear, as forfeiture ends a tenancy on issue of claim - hence the emphasis on 'without interruption', but s.82(3) require an order of the court to end the tenancy. Quite what the courts ill make of that remains to be seen, but the best guess is that making the payments in s.138(2) 5 clear days ahead of hearing would stop the landlord obtaining an order ending the fixed term.

But, if this payment of arrears and costs is not made 5 clear days ahead of hearing, then s.138(3) applies. This means an order for possession must give at least 4 weeks before date of possession, and if the arrears and costs are paid within that 4 weeks, the possession order will not take effect. In terms of a flexible tenancy, this presumably (though not certainly) means that the fixed term would be re-instated.

For non-rent arrears claims (e.g ASB, or other breach of tenancy), there must be another step. S.146 Law of Property Act 1925 requires service of a notice, which must:

1. Specify the breach complained of
2. If the breach is capable of remedy, require the tenant to remedy it (no time period needs to be specified but a reasonable time must elapse before proceedings)
3. require compensation in money for the breach (though a failure to require compensation does not invalidate the notice)

This, it is worth noting, is in addition to the Notice Seeking Possession. It is a separate notice.

There is a whole set of case law on whether nuisance and annoyance is a remediable breach, entirely separate and quite different from the Housing Acts. I'm not going to go into detail here, but this is something people should be aware of.

It is also worth noting the very wide discretion of the court to grant relief from forfeiture under s.146(2):

Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor’s action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

Again, relief from forfeiture would presumably mean that the fixed term tenancy continued. But if
forfeiture is granted, as noted above, a periodic tenancy arises under s.86 Housing Act 1985. So the possession claim must deal with both.

Waiver. Now waiver is going to be an issue! If the law on forfeiture applies, as s.82(4) states, then the common law rules on waiver must also apply.

Once the landlord has elected to forfeit, any action incompatible with the decision to forfeit can (and often does) amount to the landlord having waived the breach. The most common example of waiver would be a demand for, or acceptance of rent after service of a s.146 notice. So, if there is a demand for, or acceptance of rent by the landlord, in the period between electing to forfeit (service of notice seeking possession and/or a s.146 notice) and the issuing of proceedings, there is an arguable waiver of the right to forfeit.

While in rent arrears cases any payment will usually be appropriated to the arrears, and thus not be taken as an acceptance of post-election rent, it remains the case that a demand for rent - for example, a post-NSP letter demanding payment of arrears and current rent - could arguably be a form of waiver. If the courts do apply the law of forfeiture rigorously, this will present difficulties for the local authority landlord.

S.86 also has a curious effect on the mandatory ground for possession under s.107D Housing Act 1985 (as amended). This is the ground for possession at the end of the fixed term. But consider the position if the landlord has brought possession proceedings during the fixed term (so not under s.107D), and has either not sought at the same time to terminate the periodic tenancy that arises under s.86, or perhaps the court has terminated the fixed term but made a suspended possession order on the periodic that arises.

The fixed term has been terminated, so s.107D is of no use to the landlord (including all the potential reasons for not granting a further term - earning too much, not being in employment or training etc.). But a periodic secure tenancy has raised by operation of s.86 and has not been terminated. The result is that the tenant has an old style secure periodic tenancy, albeit potentially one with an SPO hanging over it. Perversely, then, the former 'flexible tenant' who has faced possession proceedings may be in a rather better position than a flexible tenant who hasn't.

Overall, there appears to be quite a lot of action in the courts ahead to be had. Housing lawyers should be doing a crash course in forfeiture, for starters...

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**Infamy, infamy, they've all got it in for me***

Sat, 29 Mar 2014 11:16:09 +0000

J

*Gustovarac v Croatia* App. No, 60223/09 is a game-changer of a case. A possession case in which the European Court of Human Rights *seems* to be saying you don't need a proportionality assessment.

Now, as you'll all know, there is a line of European Cases, starting with *McCann v UK*, taking in *Zehentner v Austria* and meandering through a range of *Croatian cases* (*Blecic, Orlic, Cosic*, etc - see generally, [here](#)), which have stated that:

the loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention,
notwithstanding that, under domestic law, his or her right of occupation has come to an end.

Well, that might now be overstating matters. In *Gustovarac*, the applicants had, in 1972, been allowed into possession of a flat owned by the Yugoslav People's Army. There didn't ever seem to have been any formal tenancy agreement; rather, an employee of the YPA just gave them a hand written note authorising their occupation. In 1974, that same official was convicted of various offences relating to the misuse of his position, including, *inter alia*, the way he gave the flat away. The first applicant even testified against him at trial.**

Following the collapse of Yugoslavia, Croatia acquired the flat and issued possession proceedings. A possession order was duly granted and, as with so many other Croatian cases, the applicants applied to the ECHR contending that there hadn't been a proportionality assessment.

Remarkably, however, the claim was dismissed. The earlier cases were expressly distinguished on the basis that the occupiers had had the legal right to reside whereas, in the present case, the applicants knew or must have reasonably known that they had no such right. In particular, as the first applicant had testified against the corrupt official, he must have known his right of occupation was tenuous at best. The domestic court was entitled to say that nothing could "trump" that illegality.

Unlike in the previous cases, where the applicants moved into the flats they occupied on the basis of decisions granting them the right to dwell in those flats, the applicants in the present case moved into the flat at issue on the basis of a handwritten note issued by an employee of the YPA. In the first place, the applicants ought to have known that such a note could have no validity before the law since neither of them had at any time been employed with the YPA in any capacity. Use of YPA flats could be granted to employees of the YPA only, whether military personnel or civil servants. Furthermore, the applicants must have been aware that a handwritten note on an ordinary piece of paper could not serve as a decision granting them use of the flat. Lastly, as early as 1974 the person who issued that note was convicted of a criminal offence in that connection and the first applicant was a witness in those proceedings. All these elements show that the applicants did not act in good faith when they moved into the flat in 1972.

... However, the national courts concluded that because the applicants had acquired possession of the flat as a result of the criminal offence of a third person and had known about it, no further factors could justify their occupation of the flat. (at [37]-[38])

So, we *appear* to have an exception to the *McCann* line of cases. You don't get a proportionality hearing if you're not occupying in good faith and/or pursuant to a criminal arrangement. Where does that leave trespassers? Hard to say that trespass is in good faith and, in certain circumstances, it can even be a crime. I rather suspect we'll see authorities trying to extend the scope of this exception. It might even give someone a chance to resurrect the approach Lord Scott wanted to take in *Doherty*.

* Not just in honour of Kenneth Williams; I find it quite amusing that someone has finally managed to lose an art.8 case in Strasbourg; it's sort of like *Southend v Armour*, but in reverse. Infamous for being the first ones to lose in the face of oh-so-helpful case-law.

**Incidently, has anyone else noticed how much residential property the YPA seemed to own? Did anyone
Here is an interesting prospect* (and a big tug of forelock to Beatrice Prevatt at Garden Court for the initial suggestion). Can a counterclaim for disrepair be brought after a possession order is made?

Conventionally, we’ve thought that a counterclaim would have to be raised before a possession order, or the complex and fraught option of applying to set aside the possession order would have to be followed, even assuming there was actually any basis for such an application. But there appears to be a solid argument based on Court of Appeal precedent to suggest otherwise.

*Rahman v Sterling Credit Ltd* [2001] 1 WLR 496 [Also on Bailii] was a mortgage possession case. A possession order had been made, but Mr R remained in the property and sought to counterclaim to re-open a loan transaction with the mortgagee as an extortionate credit bargain under s.139 of the Consumer Credit Act 1974. At first instance and first appeal Mr R was unsuccessful and a warrant ordered. At the first appeal Mr R accepted that he could not raise a defence to the possession order, it having been made, but maintained that a counterclaim could be brought. If successful, the counterclaim could then lead to an application to set aside the possession order.

The crucial parts of the Court of Appeal judgment granting Mr R permission to bring a counterclaim are at 502G to H:

> In my judgment the fact that the possession order has been made and that there is no present claim to have it set aside does not affect the power of the court to permit Mr Rahman to make a counterclaim for relief under s.139.

In CSI (supra) it was held that the defendants were unable to serve a counterclaim on the plaintiffs after the plaintiffs had obtained summary judgment in respect of a dishonoured cheque and had been paid in full the amount of the judgment debt, with interest and costs. Roskill LJ said at 1075 C-E that he rested his decision on “this simple point”:

> “... where a counterclaim, even if it has previously been raised, has not been the subject of a summons for directions or when required of a formal pleading before the time when the plaintiff has received full satisfaction of the judgment which he has obtained against the defendants, I do not think there is still extant any action by the plaintiffs in which the defendants could properly counterclaim against them. The action had, for all practical purposes, come to an end when satisfaction of the judgment had been obtained.”

Mr Neville attempted to distinguish CSI as a decision on the special provisions on summary judgment in Rules of the Supreme Court 1965 O 14 rule 3 (2) and contended that, in any event, on the facts of this case the judgment had been satisfied.

I do not accept those submissions. The real question is whether the action is at an end, so that there are no longer any proceedings by the claimant to which defendant can respond with a counterclaim. This action is not at an end. Mr Rahman and his wife are still living in the Property. Sterling continue to accept monthly instalments. Sterling have not yet obtained
possession of the Property. They cannot do so without a further application to the court for a warrant of execution, the existing one having expired at the end of twelve months and more than six years has elapsed since the possession order was made: CCR O 26 rule 5 (i) (a) and The Mayor and Burgesses of the London Borough of Hackney v White (1995) 28 HLR 219. Although judgment for possession has been obtained, it has not been satisfied and it cannot be satisfied without a further application to the court for a warrant of execution. Such an application would be proceedings to enforce the security relating to the credit bargain within the meaning of s.139 (1) (b).

The situation seems to be parallel to that of a tenant having had a possession order or suspended possession order made, but before application for and execution of the warrant. The tenant remains in the property, rent is paid, and the landlord has not yet obtained possession of the property. There is the possibility for the tenant (at least a secure or assured tenant) to apply for a stay of warrant, or to apply to vary or discharge the possession order. The action is not at an end. If this is right, and I am persuaded that it may well be, or at least should be, then a social tenant could seek the court's permission to bring a disrepair counterclaim after the possession order has been made but before execution of the warrant. If the counterclaim was successful to the extent of extinguishing arrears (or more), there is the obvious opportunity to apply to discharge the possession order.

The next question is the relation of the counterclaim to the possession proceedings. The Court's permission is required. As it is put in Rahman v Sterling.

Mr Rahman requires the permission of the court to make his counterclaim under Part 20: CPR 20.4. In deciding whether that claim should be dealt with in separate proceedings the court may have regard to the matters specified in CPR 20.9 These provisions are subject to the overriding objective in CPR Part 1. In my judgment, this is a case in which it is appropriate to grant permission to make a counterclaim rather than to direct that the issue of the s.139 application be made by separate action. There is a connection between the claim for the enforcement of the charge taken to secure the money advanced under the credit bargain in respect of which Mr Rahman seeks relief.

For rent arrears possession claims, there is arguably a clear connection between the possession order obtained for arrears of rent on the tenancy agreement, and the breach of obligation by the landlord for which the tenant seeks relief.

So, is this worth trying? I think it is. In fact I am doing*.

There is also the obvious benefit for the client that a counterclaim for disrepair should still obtain full legal aid funding, for eligible clients, where a stand alone claim may or may not be suitable for a CFA, even if one is available (e.g. small claims risk if works done promptly).

Also, it must be arguable that limitation - the 6 years on a tenant disrepair - is the six year prior to the date of issue of the possession claim and then subsequently (assuming the disrepair was extant for this period, of course). S.35(1) Limitation Act 1980 provides:

For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced— (a)in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and (b)in the case of any other new claim, on the same date as the original action.

And a disrepair counterclaim would fall under s.35(1)(b) as far as I can see.

[*By the end of tomorrow, 10 April 2014, it may no longer be just a prospect. I'll update if an update can be made.]
Spoiling the Broth

Sun, 13 Apr 2014 22:40:11 +0000

SJM

Blake and others v LB Waltham Forest [2014] EWHC 1027 (Admin) is a judicial review challenge to the local authority's decision to terminate a licence held by Christian Kitchen (the 3rd Claimant) to operate its soup kitchen out of the Mission Grove Car Park, Walthamstow, London, E17.

The soup kitchen has been providing hot meals and refreshments to local homeless people on a nightly basis for the past 25 years and it has occupied its current site for the last 20 years. The Council issued its decision to terminate the kitchen's licence on 17/4/13 as part of its urban regeneration programme. There were also concerns that the site had become a magnet for alcoholism and anti-social behaviour.

By way of a compromise, the Council offered an alternative site (the Crooked Billet lay-by), which the kitchen refused on safety and accessibility grounds. The 1st Claimant, Ms Blake, was a long-standing user of the service and she complained that she would be unable to access the proposed new site given her mobility problems and her inability to afford the bus fare. She would also fear for her safety in a more remote and isolated part of town. It was established that the kitchen's 'clientele' included a number of elderly and vulnerable people for whom the same considerations would apply.

It was accordingly the kitchen's position that it would be forced to close if the only option were to relocate to the Crooked Billet lay-by.

A judicial review pre-action protocol letter followed, which included a complaint that the Council had not had regard to the public sector equality duty (PSED) under s.149 of the Equality Act 2010. The Council undertook an Equality Analysis, which identified the following measures to minimise the impact of a move on older and disabled service users: (i) signposting to the site (ii) details of bus routes with information about eligibility for freedom passes (iii) assistance with means of food preparation and (iv) publicity about other sources of homelessness and welfare support. Although it was accepted that relocation would disproportionately affect certain ethnic groups, there would be a net benefit to all users by the reduction in ASB in the kitchen's present area.

Paragraph 54 of Simler J's judgement contains a useful 10 point checklist of the relevant principles underpinning s.149 and the PSED. The relevant point here is at "(g) In considering the impact, the authority must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated."

The problem with the Council's Analysis is that it failed to grapple with the kitchen's unambiguous statement that the service would have to close following termination of the licence. The impact assessment was premised on a move to an alternative site that was never likely to occur and it was therefore fundamentally flawed. There was no consideration of the impact on service users by the gap created by the closure of the kitchen and what measures might be available to fill that gap.

[Update. I've now been told of several cases on this point having been successfully run in the Leeds and London areas, and others in the North West. So, this is a viable line of argument with a track record.]

[update 10/04/2014 - my application effectively conceded, subject to limitation from date of Counterclaim, which made no odds on the facts.]
Nevertheless, the Judge considered that even if the new site was adopted, the measures proposed to minimise the disadvantages to those in Ms Blake's position fell short of the 'conscious and open-minded consideration' required by the PSED (paras 71-72).

The Court therefore declared that the notice to terminate was unlawful and quashed that notice with a view to its reconsideration.

Oh Mr Ghopee.

Tue, 22 Apr 2014 23:07:12 +0000

NL

God, we are told, loves a trier. Perhaps fortunately, the Court of Appeal takes a less emollient approach with an unlawful money lender who has been repeatedly featured on this site.


Ghana Commercial Finance is one of Mr Ghopee's companies (See here and here and here and here for coverage of Mr Ghopee AKA Mr Gopee). Mr Ghopee was and is director and controller of a large number of companies which had been making loans without a consumer credit licence or, in some few instances with a licence but in a form that was in significant breach of the requirements of the Consumer Credit Act 1974. The only company that had a licence was Reddy Corporation and that was revoked in 2011. One of the companies, Barons Finance Limited, is in liquidation and it appears that the Barons Finance loan book was transferred to other Ghopee companies (some at least after the service of the winding up petition, thus under challenge from the liquidator).

Most recently, Mr Ghopee was subject to the following order in the Mercantile Court, dated 29 January 2014:

_I will therefore order that any claim in any County Court which falls within the terms of my Order of 19 July, as amended, which has not been notified to this Court by close of business on Friday 28 February 2014 will be struck out, or on that date, transferred to this Court and struck out. Any future claim within the terms of the Order of 19 July not brought in this Court will be on issue be transferred to this Court and struck out. Any applications for relief will be heard in this Court, not the County Court._

Notwithstanding any of this, Mr Ghopee was to be found pursuing this second appeal in the Court of Appeal, arising from the setting aside of possession orders and striking out of his possession claims in two joined cases in the Medway County Court (though apparently appealed from the Birmingham Civil Justice Centre). Following a convoluted route, two claims in which Mr Ghopee as Ghana Commercial Bunks [sic] had gained possession orders, had come to appeal before HHJ Simpkiss on the basis that the
loans were made under unlicensed credit agreements and therefore unenforceable. HHJ Simpkins found:

firstly, that the agreement for a loan secured by a mortgage was a regulated agreement pursuant to section 8 of the Consumer Credit Act 1974. Secondly, he held that the claimants were not acting as agents for Reddy Corporation which did have a licence. Thirdly, he held, as was conceded that the claimants, Ghana Commercial Bunks and Barons Finance, were either unlicensed lenders or unlicensed credit brokers and, unless they obtained an order under section 65 of the Act from the court, or under section 40 of the Act from the Office of Fair Trading, the court had no power to make a possession order or a money judgment.

This was in July 2012. Mr Ghopee sought permission to appeal to the Court of Appeal and, in what can only be described as an undaunted if foolhardy manner (given that his cases in the Mercantile Court were falling apart around him in the meantime) pursued the appeal to oral permission. It availed him naught.

This is a second appeal. The question is, therefore, whether or not the appeal raises some important point of principle or practice, rather than the less exacting test of whether the appeal has a realistic prospect of success. I do not regard the appeal as satisfying either test. Neither Barons Finance, nor Ghana Commercial Bunks, which is as I understand it now named Ghana Commercial Finance Limited, was licenced to carry out Consumer Credit Act business. They were, accordingly, unauthorised lenders and, under section 40, the relevant Credit Agreements, which were regulated, were not enforceable in the absence of a decision of the Office of Fair Trading under section 40 of the Consumer Credit Act 1974, which has neither been made nor sought, despite the fact that the averment that they were unlicensed lenders has been clear on the face of the pleading since at least February 2011.

Mr Ghopee advanced various arguments. Firstly that the Judge below should have allowed an amendment to a claim for unjust enrichment because Dimond v Lovell [2002] 1 AC 384, which found against such a possible claim, could not stand after the introduction of the Human Rights Act. The trouble is, Mr Ghoppe had already tried that line in Barons Finance and Reddy Corporation v Amir Ul Haq [2003] EWCA Civ 595 and in that case, Dyson LJ described that argument as misconceived. Such a conclusion as it seems to me applies with even greater force in a case where the agreement is not merely improperly executed but is one made with a creditor who lacks the requisite licence. In the Ul Haq case, Dyson LJ refused Barons Finance and Reddy Corporation permission to appeal.

The declaration of incompatibility in Wilson v County Trust [2003] All ER 229 had no force and there had been no parliamentary amendment.

Next Mr Ghopee threw in a hodgepodge of grounds. None of which got him anywhere.

It was said in the notice of appeal as originally drafted that the result reached by the judge was procedurally irregular because of the nature of the pleadings in which it appeared to be being suggested that payment should be made of the outstanding principal. I regard that argument as misconceived for a number of reasons. Firstly, the defence denied that the claimants were entitled to any relief. The judge was entitled on the pleadings to reach that conclusion. Secondly, the fact that the defendant's counterclaim sought relief in reliance on section 65 and section 140A, which would have involved or might have involved repayment, did not affect the nature of the relief applicable if the court held, as it did, that section 40 applied. Thirdly, if the remedy of unjust enrichment was not available in law, it was not open to the court to give it to any of the claimants. Fourthly, conducting Consumer Credit Act business without a licence is a criminal offence under section 39 and agreements made in that context are unenforceable under section 40. Criminality is a point which the court should take of its own motion, whatever the pleadings say. Some reference was made to the doctrine of estoppel. It does not seem to me that the claimants, who were carrying on business without
the requisite licence and acting criminally can invoke the assistance of equity to enable them to recover the monies loaned. Lastly, reliance was placed upon the decision of HHJ Birtles where he found the loan agreement to be unenforceable but, nevertheless, ordered repayment of the principal and interest. The fact that there was another decision at the same level which reached a different conclusion does not mean that it was a decision which HHJ Simpkiss was bound to follow; the question is whether that other decision was right.

Mr Ghopee then sought an adjournment, apparently on the basis that a letter from the OFT to HHJ Mackie QC dated 5 February 2014 in the Mercantile Court proceedings set out a change in the law. Things then got a bit murky. The Court of Appeal found the relevant passage in HHJ Mackie's judgment, not it was not provided by Mr Ghopee.

"It appears that trading without a CCA licence has the consequence that: a, loan agreements and any linked security entered into before 6 April 2007 where the court makes a declaration of unenforceability under section 140 of the Consumer Credit Act are rendered void; b, loan agreements and any linked security dated on or after 6 April 2007 cannot be enforced without an order of the OFT or the court (though the agreement/security continues to exist); c, unlicensed trading is (and taking enforcement proceedings without a licence may also be) a criminal offence."

When Mr Ghopee was asked what this change in the law taking effect on 6 April 2007 was and how it impacted this case, he said "he did not have the necessary material with him and that it could be produced at any adjourned hearing".

The Court of Appeal was not happy.

This appears to be manifestly unsatisfactory. Mr Stone, who has been present on behalf of the respondent this morning, informs me that a similar reference to 6 April 2007 was made at the hearing before HHJ Simpkiss, without Mr Gopee being able to indicate what exactly it was that had happened 6 April 2007 that made the difference. It is not clear to me what it is either. I suspect that it may be the fact that at some stage subsections (3) to (5) of section 127 of the Consumer Credit Act were repealed. That that is so appears from the fact that they are omitted from the current issue of the statutes and they are said to have been repealed by the Consumer Credit Act 2006.

If that is so, that is not of assistance to Mr Gopee, by reason of the fact that the principal problem that lies in the way of success on the part of the two lending companies is the fact that they were unlicensed suppliers of credit carrying on business in breach of section 39 of the Act and in circumstances where section 40 of the Act applied. Those sections remain in full force and vigour. That, as it seems to me, is the end of this point.

Mr Ghopee lastly complained he had been ambushed at the first appeal by the Defendants seeking to set aside the charges he had on their properties. This got very short shrift. It was the almost inevitable consequence of the Defendants' arguments that the agreements were invalid under s.40 and s.65 of the Consumer Credit Act, so hardly an ambush.

Permission to appeal refused.

Adverse possession through criminal trespass
NL

Way back when s.144 LASPO 2012 was first proposed, I noted that one of the unaddressed questions (indeed a question that nobody even thought to consider) was how what because s.144 would interact with statute and case law on adverse possession. Now we have an answer (at least pro tem)

*Best v The Chief Land Registrar & Anor* [2014] EWHC 1370 (Admin)

The brief facts asserted by Mr Best where that he had noticed an empty and vandalised property while working on a property next door in 1997. He had been told that the owner had died and that a son had not been seen for years.

Mr Best entered the property, and did work to it, notably repairing the roof in 2000, clearing the garden for £2000, and taking other steps to make it wind and watertight. As time went on, he replaced ceilings and skirting boards, and electric and heating fitments; he plastered and painted walls. He did this intending to make it his permanent residence. He moved in at the end of January 2012. He said that he had treated the house as his own since 2001. There had been no disputes about his possession of the property. But he occupied it without anyone's consent. Mr Best asserts that he is a trespasser in the property; and although Mr Rainey QC for Mr Best was reluctant to admit it, in reality as a trespasser, Mr Best has been living in the building in breach of the criminal law as from 1 September 2012, when s144 LASPOA came into force.

Mr B sought to register title through adverse possession in November 2012, the application being on the basis of the 10 years required by Schedule 6 paragraph 1 to the Land Registration Act 2002. The Chief Land Registrar decided (and upheld a decision) that the application would be cancelled on the basis that:

the effect of s144 LASPOA prevented the Claimant relying on any period of adverse possession, which involved a criminal offence, to establish the basis for an application for registration as the proprietor. Accordingly he could not satisfy Schedule 6 of the LRA 2002, which impliedly required that the applicant's possession should not have constituted a criminal offence for any part of the ten year period of adverse possession relied on.

Mr B made a claim for judicial review of that decision. Rather reluctantly, his counsel put forward the submission that he was a trespasser and indeed, from September 2012, as a criminal trespasser residing in the property.

Mr B's argument was that:

s144 LASPOA has no effect on the operation of the carefully structured and balanced provisions of the 2002 Act, and that the Defendant erred in law in so treating it. This is either because it has no such effect in any circumstances, or because an offence only has that effect where the same act committed by the legal owner would also be a crime, which could not be the position with criminal trespass under s144, or where the owner had no power to consent to the act which would have made it lawful. That, again, could not be the position under s144.

Mr Rainey's second contention is that as s144 only criminalises "living in" residential premises, it does not affect other physical acts of adverse possession being sufficient, such as securing doors and windows being a sufficient basis for an application for registration. Further, Mr Best had not lost his intention to possess, and could rely on his pre – LASPOA acts to succeed.

Thirdly, s.144 should be read, in accordance with the HRA, to avoid a breach of Art 8, or Art 1 Prot 1.
This could mean reading "as not affecting applications to register title, or as not preventing "living in" a house amounting to adverse possession; the 2012 Act could be interpreted so as not to apply to abandoned buildings. Schedule 6 to the 2002 Act, alternatively, could be read as permitting 10 years' adverse possession, accrued before LASPOA came in to force on 1 September 2012, to suffice".

Fourthly, if all else failed, s.144 should be declared incompatible with ECHR "on the grounds that it criminalised residence in what was the Claimant's home, one in respect of which, as at 1 September 2012, he was already entitled to apply for registration as proprietor".

The Chief Land Registrar argued from the "general principle that no system of jurisprudence should create, and no judicial system should enforce, rights which derive from the criminal acts of the person who seeks to rely on them".

ON the first point, the interrelation of s.144 criminalisation and LRA 2002, the Admin Court went through an extended consideration on how far the principle of not enforcing rights arising from criminal acts went. While "There is to my mind a general and fundamental principle of public policy that a person should not be entitled to take advantage of his own criminal acts to create rights to which a Court should then give effect", the situation was not necessarily such where the issue was s.144:

The public interests which lie behind enabling a trespasser to acquire title by adverse possession, and, after a shorter period to apply for registration as the proprietor of registered land are clear. Of course, the enactment of s144 of the 2012 Act was not the first time when an act of trespass was criminalised. But the public policy purposes behind the operation of the Limitation Act are not diminished by the fact that an act of trespass may be a crime; it is merely that there is a stronger countervailing public interest in preventing a criminal taking advantage of his crime than there is preventing a tortfeasor taking advantage of his tort.

The Registrar relied heavily on the first instance High Court decision in *R (Smith) v Land Registry* [2009] EWHC 328 (Admin) [our report]. Part of the first instance reasoning in Smith was "it was an offence under s137 of the Highways Act 1980 to obstruct the highway, and those acts which were required to prove adverse possession, were it otherwise legally possible, would inevitably amount to an offence of obstruction. Adverse possession could not be founded on illegal acts, which no landowner or highway authority could licence" (see para 14 of Smith). Mr B argued that this meant that adverse possession could not extinguish the right to use the highway, which would indeed be unlawful even by the paper owner, but did not mean that adverse possession per se would be affected, absent the highway rights.

The Admin Court considered *Bakewell Management Ltd v Brandwood* [2004] UKHL 14 as a foundation of Smith. On prescriptive rights, the House of Lords found that "a prescriptive right, or a right under the lost modern grant fiction, can be obtained by long use that throughout was illegal in the sense of bring tortious. That is how prescription operates. Public policy does not prevent conduct illegal in that sense from leading to the acquisition of property rights" [para 46].

The Admin Court found:

I accept that Parliament must be taken to have been aware by 2011 of the decision in Smith. But a Court of Appeal decision solely based on the effect of the existence of public rights of way over the land, and not endorsing or rejecting what HHJ Pelling said about the effect of the trespass by highway obstruction being an offence, should not be taken as showing that Parliament must have realised that the past and future effect of criminalising trespass was that title by adverse possession could not then be obtained.

Smith however does hold that criminal trespass cannot found an adverse possession claim. Mr Karas is right that I have to disagree with that limb of HHJ Pelling's decision, at least as a proposition applicable to adverse possession, if Mr Rainey is to succeed. But I do disagree with it. I have had the benefit of fuller argument. I am dealing with s144 and not the
Highways Act 1980, which throws the issue of what the position was before the 2012 Act into sharper focus. The position of public highways is protected by the first limb of HHJ Pelling's decision and by the basis upon which the Court of Appeal upheld it. What is perhaps more instructive, but not over weighty, is that the Court of Appeal did not regard the criminal limb of his judgment as the obvious answer or as obviously right.

The issue is I think more complex than the simple application of one fundamental principle of public policy. I do not think that the simple principle that where the act of possession is an offence, no adverse possession can arise, is correct. It ignores the countervailing public interest, and misses the point of what is, to my mind, by far the strongest authority: Bakewell. And on parliamentary intention, it followed that:

[83] Those restrictions, which as I have said could have random and arbitrary effects on adverse possession claims, do not appear to have received any Parliamentary consideration or provisions, notwithstanding their effect, if Mr Karas is right, on the operation of the 2002 Act, and on title to unregistered land. However, they make good sense if the Act criminalises trespass without affecting the operation of adverse possession to registered and unregistered land. They mean that the criminal law has a restricted scope, tackling a need for house owners to receive a swifter remedy and more forceful help than hitherto in dealing with what were distressing and pressing circumstances, in which the law appeared to give considerable protection to those who did not merit it. [...] [86] Parliament should be taken to have thought that the public policy advantages of adverse possession at common law meant that the mere fact that the adverse possession was based on criminal trespass did not and should not preclude a successful claim to adverse possession. Before any claim could arise in reliance on adverse possession, ten or twelve years of adverse possession would have had to pass without effective action by owner or by an enforcement authority, whether in civil or criminal proceedings.

In short, the very unthought-through aspects of s.144 ('residential property' only, living in property, not simply occupying' etc.) here are read as a parliamentary intention not to exclude adverse possession.

On other issues, did 'possession' for the purposes of LRA 2002 mean 'living in' for the purposes of LASPO s.144? The Court broadly accepted the approach put forward by the Chief Registrar:

activities which were part and parcel of living in a building or were incidental to it were part of "living in" the building, and could not give rise to non-criminal adverse possession of the building. If squatting in the garden were not criminalised by the 2012 Act, but in any given case was incidental to "living in" the house, it could not be relied on separately from the criminal "living in" the house. The issue did not arise in this case of someone who only "lived in" the curtilage and not in the house, and whether that could lead to a split in the title. If an application were made in respect of the curtilage alone, it would have to be considered, but no such application has been made. No offence would be committed by someone who did not live in the house but possessed it through acts of repair, maintenance and exclusion but intending to use it for tenants. So that form of adverse possession could suffice for an application under Schedule 6.

However this was not decided, "I do not regard it as right or necessary to decide what acts, if done other than incidentally to "living in", would constitute lawful acts of possession".

On the Art 8 and A1 P1 ground, there was no incompatibility and reading down did not arise.

In any event, the Claimant never had possession in the sense protected by the ECHR: he had to have possession sufficiently established to amount to a legitimate expectation of obtaining effective enjoyment of a property right. But the system of registration of title precluded any
such legitimate expectation arising simply through the passage of time; he had no right to title even after its expiry. The relevant period was the ten years before the application. Until that had passed without possession being a criminal offence, he could have no more than a hope that he would complete ten years tortious but not illegal possession. After that, he had the right to make an application, but no right to succeed. Nor did he have any right to prevent Parliament changing the conditions required for registration of title to land he did not own, but which someone else did.

It is worth noting the chutzpah of the submissions by Counsel for the Secretary of State for Justice:

Mr Forsdick, for the Secretary of State for Justice, submitted that the purpose of s144 was clear. It had been to remove the problems and delays associated with s7 of the Criminal Law Act 1977, which had criminalised squatting by a person who entered as a trespasser and failed to leave on being required to do so by or on behalf of the displaced residential occupier or a protected intending occupier. [...] No formal requirement to leave was required. It was no longer a defence for the squatter to show reasonable cause for believing that the request was not made by someone entitled to make it. The police could intervene without the need for some other offence such as criminal damage or burglary. Squatting had a serious impact on the owner and lawful occupier of property, and could prevent houses becoming available for those in need.

It is fair to say that this supposed rationale - the delays occasioned by s.7 CLA - was not exactly (or indeed loosely) addressed in the consultation or Parliamentary debate, apart from Mike Weatherley MP blethering on about 'Magistrate's Orders' in letters to the papers.

The decision of the Chief Land registrar was quashed and Mr B's application proceeded to the next stage under Schedule 6 LRA.

Tweets from rented rooms

Thu, 15 May 2014 21:36:03 +0000

NL

A series of tweets gathered under the hashtag #LDNlandlord today (Thursday 15 May) offered an insight (if one were needed) into the state of the London private rental market. For the housing lawyer, it was also a opportunity to play claim/offence bingo.

So, under disrepair...

#ldnlandlord refused to fix roof leak which caused serious, illness-causing mould problem, then charged us £250 for end-of-lease cleaning...

— Jo (@jostimpson) May 15, 2014

#ldnlandlord ... upon requesting receipt for said £250 cleaning, they admitted the cleaning never happened and new tenants already moved in.

— Jo (@jostimpson) May 15, 2014

Pipes in our wall flooded downstairs, Agent blamed us for overfilling bath, put sealant round
SINK PEDESTAL to fix it, nice one #LDNlandlord

— MsAnthropia (@MsAnthropia) May 15, 2014

@Londonist our ceilings leaked during a storm & our #ldnlandlord told us to expect that during heavy rain. Apparently it’s perfectly normal

— Sim Rollison (@iamSim) May 15, 2014

@Londonist severe damp and mould with rotting/rotted windows - "Just paint over it & shut the curtains!" #ldnlandlord

— Emma Pentland (@emmapentland) May 15, 2014

Our ceiling collapsed after leaking for over a year. Landlord still refused to fix faulty plumbing. Yes, it happened again... #ldnlandlord

— Hannah Roberson (@hroberson61) May 15, 2014

#ldnlandlord Pal's had no hot water/heating for 3months, landlord lives in S.Africa. They've stopped paying rent to get his attn. Still no!

— Laura Green (@LauraMagsGreen) May 15, 2014

@Londonist told that problems with damp were caused by us cooking without lids on saucepans #ldnlandlord

— Jimmy Grimm (@RoyaleMacDuff) May 15, 2014

@jenerator @Londonist Try 6 weeks over Dec-Jan including a flooded bedroom x2 as a result of DIY attempt to fix the boiler #ldnlandlord

— Kat Lloyd (@katlloyd8) May 15, 2014

@Londonist Storms blew window out of the casement leaving a hole in the wall. Still not been fixed, but rent going up anyway #ldnlandlord

— John Brazier (@brazier_john) May 15, 2014

Or perhaps deposit problems?

@Londonist One #ldnlandlord of mine withheld our deposit as he inspected the flat 3 weeks after we left and found dust...

— Allie (@alliesolskjaer) May 15, 2014

@Londonist Same landlord then offered to mow lawn at tenancy end, tramped grass thru house then charged us for it from deposit #ldnlandlord

— M G Spencer (@wisemikes) May 15, 2014

@Londonist Landlady outraged when asked to insure our deposit, claiming we should trust her bc "she's a born-again Christian!!" #ldnlandlord

— Caro G (@C_A_R_O_car0) May 15, 2014
@Londonist Our #ldnlandlord accused of us trapping a dog in a room so we'd have to pay for new carpets. We didn't have a dog.

— Becky Mumby-Croft (@B_Mumbles) May 15, 2014

#ldnlandlord Paid rent on time, yet received letters advising unpaid mortgage, repossession due. Lost deposit & digs in 2 weeks flat.


@Londonist Letting agents released our deposit w/o our agreement to landlady, who spent it. #ldnlandlord

— Siobhan (@wigglymittens) May 15, 2014

Breach of quiet enjoyment?

@Londonist Landlord said I wasn't allowed guests of any kind, but his daughter would use the house when she liked #random #Ldnlandlord


@Londonist Our landlord would turn up unannounced & let himself in. A houseguest once woke to a strange man standing over him! #Ldnlandlord

— btgolder (@btgolder) May 15, 2014

My #ldnlandlord wouldn't accept DD, insisted on checks. She came by monthly to collect from cupboard in flat. No notice, until I demanded 24h!

— Nick Kocharhook (@k9) May 15, 2014

Agent would let themselves in unannounced constantly, twice while I was in the shower, once while vomiting with food poisoning #LDNlandlord

— MsAnthropia (@MsAnthropia) May 15, 2014

We've now seen two separate tenants whose landlords or family expect to use the flat whenever they're in town. #ldnlandlord

— Londonist (@Londonist) May 15, 2014

@Londonist was also prone to showing up unexpectedly and 'hanging out'. not helpful when working at home. #ldnlandlord

— Catriona Boyle (@catrionahelen) May 15, 2014

Derogation from grant? Or even unlawful eviction?

#ldnlandlord sold the flat we were living in, and didn't tell us until a week before the new buyers were moving in.


@viviciela aaaand one time they turned up unannounced with ppl to view the flat BEFORE telling us it was being sold! #LDNlandlord
As a small sample, from a midday on twitter, that is worrying, if unsurprising... Everyone should have a housing lawyer with them at all times.

**Approximate grounds**

Sun, 18 May 2014 11:09:41 +0000

NL

Masih, R (on the application of) v Yousaf [2014] EWCA Civ 234

When a notice is served under Section 8 Housing Act 1988, how precise does the wording of the ground(s) under which possession will be sought have to be?

In this case, reaching the Court of Appeal via a slightly convoluted route as an appeal of an order refusing permission to appeal out of time, the issue was the wording used in the s.8 notice setting out Ground 8.

Ms M was the assured shorthold tenant of Mr Y. There were rent arrears, a shortfall between the LHA payable and the rent. Mr Y served a notice under s.8 giving ground 8 as the ground on which possession was sought.

A possession order was indeed made after a hearing which Ms M attended. Ms M then sought to have the order set aside and also to appeal out of time on the basis that the Notice was defective as it "did not comply with section 8.2 of the Housing Act 1988 in that it did not properly specify the ground relied on".

The Notice said

"Your landlord intends to seek possession on ground(s) 8 in schedule 2 to the Housing Act 1988 as amended by the Housing Act 1996, which read(s): that the tenant owed at least two months' rent both when the landlord served notice that he wanted possession and still owes two months' rent at the date of the court hearing."

And, in the part of the notice where a full explanation of the ground relied on is required, Mr Y put:

"The tenant owes £1,680 which represents three months' rent."

The relevant part of Ground 8 (Schedule 2 Housing Act 1988) reads:

"Both at the date of service of the notice under section 8 of this Act relating to the proceedings for possession and at the date of the hearing -- (b) If rent is payable monthly, at least two months' rent is unpaid. And for the purposes of this ground 'rent' means rent lawfully due from the tenant."

Ms M's main argument was that the Notice did not include the words "rent means rent lawfully due from the tenant".

Mountain v Hastings 35 HLR 7 had held that there was no requirement for the words in a s.8 notice to be the same as the statutory wording of the ground, so long at the words used were:
In *Mountain v Hastings*, the wording used was inadequate as the notice did not include the "requirement that the rent was unpaid at both the date of the service of the notice and the date of the hearing and that "rent" meant rent lawfully due". That notice referred to 'rent unpaid'.

Mr Y's notice did set out the rent unpaid at date of service and date of hearing part, so the only issue was whether it was a requirement for the notice to specify 'rent lawfully due' rather than 'rent owed' as per the notice.

The Court of Appeal took the view that 'rent unpaid' in *Mountain* was clearly different to 'rent lawfully due'. "The party served with a notice stating that rent is unpaid would not appreciate that it would be open for him to say that although the rent is indeed unpaid, it was not lawfully due". But the meaning of 'rent owed' was a different issue. Did the statutory wording of 'rent lawfully due' add anything to the effect of 'rent owed'?

Ms M argued that 'rent lawfully due' did have additional meaning:

A notice merely stating that rent is owed is not sufficient to alert a tenant to the fact that she may have, for example, a counter claim based on the cost of repairs which the landlord should have carried out, which she might claim to set off against the rent. He also pointed out a further example where the landlord had failed to comply with the statutory duty to give the tenant particulars of his address, see section 48 of the Landlord and Tenant Act 1987, which prevents a landlord from recovering rent where he has failed to supply an address in England and Wales at which notices may be served on the landlord by the tenant.

However, the Court of Appeal was unimpressed, finding that 'owed' and 'lawfully due' had the same effect in alerting the tenant.

In contrast to a statement that rent is unpaid, a statement in a section 8 notice that the rent was owed in my judgment is sufficient notice to enable a recipient to appreciate that it would be an answer to the claim to show that the rent was not lawfully due, thus the recipient of a notice using the word "owe" is aware that he or she must find some basis for showing that the rent is not owed. Thus Miss Masih's defence of waiver is a defence that the rent is not owed. Miss Masih's desire to counter claim for repairs is, if she is right that she is able to set it off against the rent, equally a claim that the rent is not owed. Of course if she is wrong about the set-off then it is not an answer whether the notice is phrased with the word "owed" or "lawfully due". The same can be said of Mr Carrott's [for Ms M] example based on section 48 of the Landlord and Tenant Act 1987. Although section 48(2) says that rent otherwise "due" shall be treated as not being due, the effect of it not being due is also that it is not owed.

In order for this submission to succeed, it would be necessary to find an example of a case where rent is owed but is not lawfully due. For my part I am unable to think of any such case and none has been suggested to us in argument.

The appeal therefore failed.

But before anyone gets too excited about there being leeway in the wording of s.8 notices, they should note how small the difference in wording was that enabled Mr Y's notice to be valid - 'rent owed' rather than 'rent unpaid'. It would be all too easy for a form of wording used to fall foul of the requirement set out in *Mountain* that it fulfil the legislative purpose.
In view of this, and as the Court of Appeal quotes approvingly from *Mountain v Hastings*:

"It is difficult to think of any good reason why a person given the task of settling a form of notice should choose to use words differently from those in which the Crown has stated in the schedule."

Quite.

**Succession and Sharia**

*Sun, 01 Jun 2014 22:24:56 +0000*

*SJM*

A quick note on a recent Court of Appeal decision: *Northumberland & Durham Property Trust Ltd v Ouaha*.

From 1/8/1980 until his death on 19/11/2010, Mr Al-Faisal held a protected Rent Act tenancy of Flat 15, 1 Royal Avenue House, London, SW3. In 1987, Ms Al-Faisal married the Appellant, Ms Ouaha, in an Islamic marriage ceremony in London and the couple had two children in 1991 and 1994. Importantly for the purposes of this case, there was no civil ceremony.

The parties separated in either 2002 or 2003 but continued living under the same roof. After Mr Al-Faisal's death, the Respondent landlord commenced possession proceedings and HHJ Baucher in Central London County Court made a possession order on 7/11/12. The judge held that Ms O, as a potential successor, failed to satisfy paragraph 2 of Schedule 1 to the 1977 Act:

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.

(1) The surviving spouse or surviving civil partner (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) 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 and

(b) a person who was living with the original tenant as if they were civil partners shall be treated as the civil partner 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 fulfills 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 for the purposes of this paragraph be treated as according to whether that one of them is of the opposite sex to or as the same sex as the original tenant the surviving spouse or the surviving civil partner.

The question for the Court was whether Ms O could be treated as a 'surviving spouse' for the purposes of para 2(1). Vos LJ held (para 19) that the term 'surviving spouse' necessarily involved a greater degree of formality than the wording used in para 2(2)(a) ('living together as husband or wife') and that it required that the party 'became legally the wife or husband in the country in which the ceremony took place' (para.22).

As Ms O did not meet this requirement, she could not benefit from para. 2(1) and she therefore had no right to succeed to the tenancy. The Court also held for good measure that there was no discrimination issue. There was never any impediment to Ms O formalising her marriage to Mr Al-Faisal and of course, para.2(2) is intended to accommodate those who have never had a valid marriage ceremony, whether on religious grounds or otherwise.

The Appeal was therefore dismissed.

They think it's all over....

Sun, 22 Jun 2014 19:18:59 +0000

SJM

We covered the case of Beech v Birmingham CC in the High Court here. The appeal to the Court of Appeal was heard on 11/6/2014 and judgement was given on 17/6/2014.

I will not repeat the facts here except to say that the appeal was narrowed down to only two grounds of challenge: namely that the notice to quit was procured from the late Mrs Warren under undue influence from the housing officer, Mr Pumphrey, and that it had been given when no formal mental capacity assessment had been carried out, in breach of the Code of Practice issued under s.42(1)(a) of the Mental Capacity Act 2005 (the 'public law defence').

The Appellant argued that the relationship between Mr Pumphrey (a professional housing officer) and her mother (a frail and elderly resident of a care home) gave rise to a presumption of undue influence. With no evidence from the council that the NTQ was given with her mother's fully informed will and consent, the Appellant argued that the NTQ ought to have been set aside.

The Chancellor of the High Court (giving the lead judgement) found that the trial judge's decision that there was no undue influence bordered 'on the unarguable'. There was no sense in which Mrs Warren placed trust and confidence in Mr Pumphrey (who had visited her at home only once before) and the relationship was merely a contractual and proprietary relationship between landlord's agent and tenant (para.65). Despite Mrs Warren's advanced years, the psychiatric and social work evidence available to the council indicated that she did not lack capacity when she signed the NTQ. The evidence suggested that Mrs Warren had a settled understanding that she no longer had any security over the property and that the
Appellant's rights of occupation would end once she signed the NTQ. The Appellant never invited her mother to withdraw the NTQ and had she done so, this would have given the council the opportunity to issue a NTQ of its own. In short, there was nothing about the transaction which called for an explanation and therefore no requirement to rebut any presumption.

The public law defence was described as hopeless. Apart from the fact that the Claimant's witnesses were not cross-examined at trial on the content of the Code of Guidance, there was no evidence that even if a formal capacity assessment had been carried out on Mrs Warren at the time the NTQ was served, it would have revealed a lack of capacity. There was nothing for the Court to take into account under s.42(5) MCA 2005 and overall, it was proportionate for the council to recover possession of the property following service of the NTQ.

The appeal was therefore dismissed.

**Make do and mend: Undoing Superstrike on deposits**

*Mon, 23 Jun 2014 18:35:54 +0000*

*NL*

The Govt has published the text of the Government amendment to the Deregulation Bill that is proposed to deal with tenancy deposits and specifically the Superstrike position of a new tenancy (and requirement to re-protect the deposit and re-serve the prescribed information) arising when a fixed term ends and a statutory period tenancy begins.

The text of the amendment - a new S.215A to S.215D to the Housing Act 2004 - is at page 10012 onwards in that link and below.

Briefly, the effects appear to be:

- Where a deposit taken on a fixed term tenancy after April 2007, and protected and Prescribed Info served, this is treated as if they had been complied with for any subsequent statutory periodic tenancy. Once it is in force, there will be no need to re-protect the deposit or re-serve the prescribed information. Where a deposit taken on a fixed term tenancy after April 2007, and protected and Prescribed Info served, this is treated as if they had been complied with for any subsequent 'renewal' tenancy for a further fixed term tenancy, or contractual periodic tenancy, provided that landlord, tenant and property remain the same. Once it is in force, there will be no need to re-protect the deposit or re-serve the prescribed information.

- Where a deposit was taken for a fixed term prior to April 2007, the landlord or agent has 90 days from commencement to protect the deposit. Or, if earlier, before a court determines a s.214 claim, or decides on a s.21 based possession order (or appeal of such an order). If the deposit is protected and prescribed information served within the 90 days, or before the court's determination on an order, it is as if the landlord/agent had protected initially.

- Transitional provisions. Any s.214 claim or s.21 possession claim which is settled or finally determined before the commencement date is not affected and will be as per Superstrike. Any s.214
claim or s.21 possession claim issued prior to commencement but settled or finally determined after
commencement will be decided on the basis of the amendment. However, the court must not order
the tenant to pay the landlord's costs in these cases, so far as they relate to the s.21 possession claim
or s.214 deposit claim. The same applies to extant appeals.

Note that 'finally determined' means after appeal determined or time period for appeal has passed.

Those advising both landlords and tenants should look at all of this very carefully. There will no doubt be
various pressures to speed up proceedings or to slow them down, depending on parties and the types of
proceedings. For landlords a section 21 notice can be retrospectively validated by the commencement of
the amendment, but may still fail on Superstrike principles up until that date. For tenants, a s.214 claim
based on Superstrike is still valid if settled or finally determined prior to commencement.

The clock is ticking on Superstrike defences to possession, and s.214 claims. But I suspect that, as with
the Localism Act amends in 2012 and the requirement for all post April 2007 deposits to be protected
within one month, there will be a lot of landlords and indeed agents who get caught out by the 90 day
provision here. There may not be that many pre-2007 deposits around, but the numbers are not
insignificant.

Text of the Amendment

“Tenancy deposits In Chapter 4 of Part 6 of the Housing Act 2004 (Tenancy Deposit
Schemes), after section 215 insert—

“215A Statutory periodic tenancies: deposit received before 6 April 2007 (1) This section
applies where— (a) before 6 April 2007, a tenancy deposit has been received by a landlord in
connection with a fixed term shorthold tenancy, and (b) on or after that date, a periodic
shorthold tenancy is deemed to arise under section 5 of the Housing Act 1988 on the coming
to an end of the fixed term tenancy. (2) If, on the commencement date— (a) the periodic
tenancy is in existence, and (b) all or part of the deposit paid in connection with the fixed
term tenancy continues to be held in connection with the periodic tenancy, section 213 applies
in respect of the deposit that continues to be held in connection with the periodic tenancy, and
any additional deposit held in connection with that tenancy, with the modifications set out in
subsection (3). (3) The modifications are that, instead of the things referred to in
section 213(3) and (5) being required to be done within the time periods set out in section
213(3) and (6)(b), those things are required to be done— (a) before the end of the period of
90 days beginning with the commencement date, or (b) (if earlier) before the first day after
the commencement date on which a court does any of the following in respect of the
periodic tenancy— (i) determines an application under section 214 or decides an appeal
against a determination under that section; (ii) makes a determination as to whether to make
an order for possession in proceedings under section 21 of the Housing Act 1988 or decides
an appeal against such a determination. (4) If, on the commencement date— (a) the periodic
tenancy is no longer in existence, or (b) no deposit continues to be held in connection with
the periodic tenancy, the requirements of section 213(3), (5) and (6) are treated as if they
had been complied with by the landlord in respect of any deposit that was held in connection
with the periodic tenancy. (5) In this section and sections 215B to 215D “the commencement
date” means the date on which section (Tenancy deposits) of the Deregulation Act 2014 is
fully in force in England and Wales.

215B Statutory periodic tenancies: deposit received on or after 6 April 2007 (1) This section
applies where— (a) on or after 6 April 2007, a tenancy deposit has been received by a
landlord in connection with a fixed term shorthold tenancy, (b) the requirements of section
213(3), (5) and (6) have been complied with by the landlord in respect of the deposit held
in connection with the fixed term tenancy, (c) a periodic shorthold tenancy is deemed to arise
under section 5 of the Housing Act 1988 on the coming to an end of the fixed term tenancy,
and (d) when the periodic tenancy arises, the deposit paid in connection with the fixed term tenancy continues to be held— (i) in connection with the periodic tenancy, and (ii) in accordance with the same authorised scheme as when the requirements of section 213(3), (5) and (6) were last complied with in respect of it. (2) The requirements of section 213(3), (5) and (6) are treated as if they had been complied with by the landlord in respect of the deposit held in connection with the periodic tenancy.

215C Renewed fixed term or contractual periodic tenancies: deposit received on or after 6 April 2007 (1) This section applies where— (a) on or after 6 April 2007, a tenancy deposit has been received by a landlord in connection with a shorthold tenancy (“the original tenancy”), (b) the requirements of section 213(5) and (6) have been complied with by the landlord in respect of the deposit held in connection with the original tenancy, (c) a new fixed term or periodic shorthold tenancy (“the new tenancy”) comes into being on the coming to an end of the original tenancy or a tenancy that replaces the original tenancy, (d) the new tenancy is not one that is deemed to arise under section 5 of the Housing Act 1988, (e) the new tenancy replaces the original tenancy, and (f) when the new tenancy comes into being, the deposit paid in connection with the original tenancy continues to be held— (i) in connection with the new tenancy, and (ii) in accordance with the same authorised scheme as when the requirements of section 213(5) and (6) were last complied with in respect of it. (2) The requirements of section 213(5) and (6) are treated as if they had been complied with by the landlord in respect of the deposit held in connection with the new tenancy. (3) The condition in subsection (1)(a) may be met in respect of a tenancy even if— (a) it replaces an earlier tenancy, and (b) the tenancy deposit was first received in connection with the earlier tenancy (either before or after 6 April 2007). (4) For the purposes of this section, a tenancy replaces another tenancy if— (a) the landlord and tenant under the later tenancy are the same as under the earlier tenancy, and (b) the premises let under the later tenancy are the same or substantially the same as those let under the earlier tenancy.

215D Sections 215A to 215C: transitional provisions (1) Sections 215A to 215C are treated as having had effect since 6 April 2007, subject to the following provisions of this section. (2) Sections 215A to 215C do not have effect in relation to— (a) a claim under section 214 of this Act or section 21 of the Housing Act 1988 in respect of a tenancy which is settled before the commencement date (whether or not proceedings in relation to the claim have been instituted), or (b) proceedings under either of those sections in respect of a tenancy which have been finally determined before the commencement date. (3) Subsection (5) applies in respect of a tenancy if— (a) proceedings under section 214 in respect of the tenancy have been instituted before the commencement date but have not been settled or finally determined before that date, and (b) because of section 215A(4), 215B(2) or section 215C(2), the court decides— (i) not to make an order under section 214(4) in respect of the tenancy, or (ii) to allow an appeal by the landlord against such an order. (4) Subsection (5) also applies in respect of a tenancy if— (a) proceedings for possession under section 21 of the Housing Act 1988 in respect of the tenancy have been instituted before the commencement date but have not been settled or finally determined before that date, and (b) because of section 215A(4), 215B(2) or 215C(2), the court decides— (i) to make an order for possession under that section in respect of the tenancy, or (ii) to allow an appeal by the landlord against a refusal to make such an order. (5) Where this subsection applies, the court must not order the tenant or any relevant person (as defined by section 213(10)) to pay the landlord’s costs, to the extent that the court reasonably considers those costs are attributable to the proceedings under section 214 or (as the case may be) section 21 of the Housing Act 1988. (6) Proceedings have been “finally determined” for the purposes of this section if— (a) they have been determined by a court, and (b) there is no further right to appeal against the determination. (7) There is no further right to appeal against a court determination if there is no right to appeal against the determination, or there is such a right but— (a) the time limit for making an appeal has expired without an appeal being brought, or (b) an appeal brought
Ghopee. Hopeless.

Thu, 17 Jul 2014 22:53:10 +0000

NL

[Not on Bailii. Lawtel note of extempore judgment.]

Regular readers will know of our interest in Mr Dharam Ghopee (or Gopee), our very favourite unlawful money lender to vulnerable individuals at hugely extortionate if unenforceable rates. It appears that as well as skating on extremely thin ice with the Mercantile Court (to the point where all possession cases, by all his companies, are stayed, struck out or set aside), Mr Ghopee has been pursuing other litigation against relatively bona fide lenders (presumably over possession and charges) on behalf of his companies.

And just as in the joined Mercantile Court cases, the distinction between Mr Ghopee (or Gopee) and his many and various companies is crumbling.

In this case, it appears Mr G had brought a claim as Ghana Commercial Finance Ltd (and maybe other companies under Mr G's control). The claim had failed. In fact it had horribly failed, such that "the substantive proceedings had been hopeless on the merits and ought never to have been brought" and summary judgment for Defendant given. Dunfermline Building Society, the erstwhile defendant, brought proceedings for costs against Mr Ghopee (or Gopee) personally.

HHJ Mackie QC, (for yes this was heard in the Mercantile Court by HHJ Mackie QC, who by now knows Mr Ghopee's operations intimately), was not impressed by Mr G's arguments that he should not be personally liable as there was a clear distinction between him personally and the company (or companies), as the benefit of any litigation inured to the shareholders.

The Court held:

Ghopee was inextricably bound up with the claimant's fortunes; it was impossible to ignore that Ghopee was connected with a number of companies in all of which he had played much the same role. The substantive proceedings had been hopeless on the merits and ought never to have been brought. In reality there was no distinction between Ghopee and the Claimant and if there was any distinction, it was not sufficient to merit not making the order sought in all the circumstances.

So, Mr Ghopee was found personally liable for the costs of this case. And his room for manoeuvre gets ever smaller...
The Appellant tenant in Spencer v Taylor [2013] EWCA Civ 1600 (our note here) has had permission to appeal to the Supreme Court refused, on the grounds that it did not raise an arguable point of law.

This means that the Court of Appeal decision stands. Where an assured shorthold tenancy has had a fixed term and a statutory periodic tenancy has arisen, there is no requirement to use a s.21(4)(a) notice, or have a date of expiry at the end of a period of the tenancy. A section 21(1)(b) notice with two clear months notice is adequate.

Where a tenancy was periodic from the start, or where the tenancy provides for an initial fixed term, then a periodic tenancy thereafter (a contractual periodic) a s.21(4)(a) notice will still be required, I believe.

We should have a more detailed post on Spencer v Taylor coming along in a few days, as there was much about the Court of Appeal judgment that didn't make a great deal of sense on first reading, but does with background.

A post on a County Court case, one well worth looking at for the application of public law principles, the Equality Act and reasonableness. I'm working from a note of judgment, so any quotes should be taken as being from a note, rather than a transcript.

Peabody Trust v Steven Evison (By his litigation friend) Wandsworth County Court 17 July 2014.

Mr E was the assured tenant of Peabody. He had been since after 2000 (date not clear from the note), but had lived in the property since 1981, when his father took the tenancy from Peabody, so had lived there for 33 years.

In 2012, Mr E's rent account began to fall into arrears. In September 2012 he was visited by a Peabody officer (the only one to deal with Mr E's tenancy through this time). The officer noted that Mr E was hearing impaired, but said he could tell Mr E had understood him as 'he paid the rent after the visits in September and October 2012' up to January 2013. The rent payments stopped in January 2013.

As a consequence SL [Peabody's officer] referred the case to [Peabody]'s welfare benefits team. The referral said that [Mr E] had impaired hearing and found it difficult to communicate by telephone and had difficulty managing his affairs (I am paraphrasing) – but did not suggest any other problems. The welfare benefits team contacted (or attempted to contact) [mr E] but he did not engage. The next step was to issue possession proceedings which they did on 23 June 2013. That in fact was only four days after SL’s referral to [Peabody]'s welfare benefits team according to SL in his witness statement.
There was another referral to the welfare benefits team, in exactly the same terms, in January 2014, but by this time, there had already been a hearing in the possession claim. Mr E did not attend and an outright possession order had been made. Moreover, Mr E had been evicted and had turned up at his sister's home asking for shelter.

Fortunately, Mr E found a solicitor. The solicitor was concerned at the difficulty he had in taking instructions and promptly made an application to set aside the possession order on the basis of his concerns over Mr E's capacity to conduct litigation. By October 2013, there was report from a consultant psychiatrist which confirmed that Mr E did not have capacity to conduct litigation under the meaning of the Mental Capacity Act 2005 and that Mr E also had multiple disabilities - bilateral deafness & learning disabilities - and due to a lack of school support, had great difficulties in reading and writing, which impacted greatly on dealing with the benefit system.

This report was available at the end of October 2013, but Peabody's second referral to the welfare benefits unit of 4 January 2014 made no mention of these issues (or apparently that Mr E had been and then remained evicted). Mr E told the welfare team 'I have help from elsewhere', possibly meaning his solicitor, and the team did nothing.

The possession order was set raise on 6 January 2014. Peabody's reaction was to pursue the proceedings, seeking a possession order, up to this hearing. Apart from two brief contacts from the welfare benefits team, Mr E had received no other assistance from Peabody. Despite the set aside, the psychiatrist's report and the official solicitor acting for Mr E.

Peabody has a written policy on dealing with vulnerable tenants (as it must) and that policy is described in the judgment as 'a model of its kind'. Mr E, the Court found, would clearly fall under the definition of a vulnerable tenant.

He has learning difficulties, he has mental health needs, he has significant problems with financing and budget, he is at risk of losing his home and is illiterate.

Despite this:

SL admitted he did not follow or operate the policy. It was put to him that he did not follow paragraph 2.10, that having local knowledge he did not discuss the services of the tenant and family support team and did not make a referral to that team as appropriate. Nor is the tenant and family support promise (effective December 2013) in any shape of form fulfilled. The promise is that a case will be referred to a support worker who will keep in touch and will be the first person you speak to if you have problems. The promise indicates that [Peabody] will agree a support plan, etc. Of course it is not necessarily the case that had SL followed the policy and fulfilled the promise that the position in relation to arrears would be any different to that which it is now but I considered that it may well have been. It may well have been that given the support envisaged [Mr E] would have been given assistance to get HB and get a back date of HB to July 2014 [sic, presumably July 2013] and that would have resulted in arrears being half what they are now. Of course [Peabody]'s failure to follow its own policy does not mean that [Mr E] has a defence to the claim for possession but it is simply something I have to weigh in the balance when considering reasonableness. I consider it right to give it a considerable amount of weight. Especially given the clear evidence in Dr. Daly's report.

Barber v London Borough of Croydon [2010] EWCA Civ 51 (our report here) was referred to and followed in finding it was not reasonable of Peabody to have done nothing except the referrals to the welfare benefits team, as Peabody had failed to follow their own policy.

On the Equality Act 2010, Mr E alleged a breach. The Court found that the possession proceedings had arisen as a consequence of Mr E's disability, due to the rent arrears arising from his inability to sort out
benefits through his disabilities.

Given the prima facie discrimination, the court found

The pursuance of the possession proceedings is not proportionate or in pursuance of a legitimate aim – the aim is to preserve [Peabody]’s financial position and preserve housing stock. But in all the circumstances in this case the seeking of the possession order is not proportionate. Section 15(2) did not apply until January 2014, but from then [Peabody] could not say that they did not know that [Mr E] was disabled as from that time they had knowledge of D’s disability.

Further arguments under s.20 and s.35 Equality Act were not dealt with, given this finding.

On the arrears, the position was complicated by Mr E being subject to the bedroom tax, a deduction of £31 per week on rent of £150 per week. A friend of Mr E gave evidence that he would be moving in as a lodger and could afford to pay a share of the rent as he was employed. A further person might also be moving in as a lodger. This was enough to satisfy the court that rent could be paid in the future with payments of £10 per week to the arrears.

So

For the reasons given the making of the possession order is not reasonable. The question is what to do. Do I dismiss the claim or adjourn it generally or adjourn it on terms with a stop gap date. On balance I consider that litigation should be finite and having made this decision (which was clear cut) the matter should be put to rest and so I will dismiss the claim.

And Peabody to pay Mr E's costs.

Comment

What is the point in having a policy on vulnerable tenants if it isn't followed? It is simply inviting a public law/Equality Act defence of the kind run here. When the evidence is laid before you of someone's vulnerability and disability - as with the psychiatrist's report of October 2013 here, disclosed in the course of proceedings - wouldn't it make sense to actually act on it? Rather than steam on for an eviction (as the court put it, Peabody "has sailed onwards to seek to reinstate or obtain another possession order in place of the one set-aside on 6 January").

The worrying thing about this case (and it is far from untypical), is that even after solicitors had made it completely obvious to the landlord that the tenant was disabled and vulnerable, with an expert report, the landlord still failed to engage their policies. So, what are the prospects for a vulnerable, disabled tenant without legal representation (and determined representation at that)?

My grateful thanks to Mr E's solicitor Haroon Sarwar, and counsel, Faisel Sadiq for the note of judgment.

More on post possession order disrepair counterclaims
This is an issue we’ve looked at before, bringing a disrepair counterclaim after a possession order has been made. Now the Birmingham County Court has dealt with the issue on an appeal from the decision of a District Judge.

Midland Heart Ltd v Idawah [2014] EW Misc B48 (11 July 2014)

In this case, a possession order had been made in November 2002 (apparently an SPO). There had subsequently been some seven stays of warrant on terms, in 2005, 2008, 2011 and 2012. In February 2014, the Defendant made an application for a further stay of warrant and permission to bring a counterclaim for disrepair, supported by an expert’s report of an inspection in November 2012 (which had apparently been served on the Claimant in January 2013) and a reinspection report from January 2014. The first report found:

“(a) some missing, slipped and displaced roof tiles; (b) a safety warning at risk label on the central heating boiler; (c) some structural movement of the property with some cracking internally and externally and with some slopes to floors. The remedial works can be limited to making good cracks at this stage unless matters were to significantly deteriorate; and (d) various ad hoc defects including a damaged bedroom light switch, remnants of a light bulb within a bedroom light fitting, evidence of rat infestation within the rear garden boundary.”

The second report found:

“…some repairs to the roof and chimneys, repairing of some internal or external cracks and the replacement of the central heating system including the fitting of a replacement central heating boiler and radiators throughout. However … there are significant ongoing defects at the property including (a) a drip leak to the water pipe serving the WC cistern that is causing severe dampness within the WC compartment, the abutting bedroom and the living room below; (b) the gas fires in this the front and rear living rooms have been disconnected; and (c) some ad hoc defects as detailed within the body of the report including a damaged front external door.”

The District Judge granted the application and permission to bring a counterclaim. The Claimant appealed.

On appeal, the Claimant argued

- that the district judge should not have permitted the counterclaim to include a claim to set off - essentially because that amounted to a defence - and in so doing, circumvented any process of appeal and/or application to set aside;
- secondly, that it deprived the claimants of an accrued limitation defence; and
- thirdly, that he failed to have any or any sufficient regard to delay.

The Circuit Judge derived from Rahman v Sterling Credit Limited [2001] 1 WLR 496 and British Anzani (Felixstowe) Limited v International Marine Management (UK) [1980] QB 137 the following principles:

- where the tenant’s counterclaim for damages for breach of covenant to repair is an equitable set off then normal time limits do not apply where equitable relief is sought as section 36(2) of the Limitation Act 1980 applies.
- The real question is whether the action is at an end. Where, as in the present case the that means that the warrant for possession has not been executed, and thus the claimant has not obtained possession - then the court has a discretion whether or not to permit a counterclaim to be made in the proceedings.
- Delay of itself is not a reason to refuse such permission (Rahman)

The Claimant argued
three possible or potential outcomes to be considered. Firstly, if the tenant’s cross claim for damages for breach of the covenant to repair is, on its proper construction, being raised as an equitable set off then, so far as limitation is concerned, section 36 is engaged. The consequence of that is that there is in effect an unlimited limitation period, save, of course, for the consideration of laches or delay provided for in section 30(2). So far as the procedural aspect is concerned, a set off can only be raised as a defence (see CPR rule 16.6), and thus the defendant would have had to have applied to set aside the judgment and thus invoke the criteria of CPR rule 39.3, either directly or indirectly through the medium of CPR rule 3.1(2)(m): see in this regard the notes at paragraph 39.3.1 of the 2014 edition of ‘Civil Procedure’.

Secondly, if the tenant’s cross claim is a stand-alone cross claim proceeding as a counterclaim then, so far as limitation is concerned, section 35 is engaged, and that would involve a consideration of matters up to six years before the issue of these proceedings, i.e. before 2002 in this case. So far as the procedural aspect is concerned, that would involve the court in the exercise of discretion under CPR rule 20.4. I shall return to that point in a moment.

Thirdly, if the tenant’s cross claim was comprised within entirely separate proceedings then, so far as limitation is concerned, that would involve the consideration of matters which had occurred up to six years before the issue of such proceedings, which would, of course, be six years before 2014.

Further, there was a long and unexplained delay in bringing the counterclaim, this was a factor for consideration in the discretion exercised by the District Judge under CPR 20.4 and the District Judge had not given that factor due weight.

The Claimant also argued that the District Judge had not given due weight to the cost effectiveness of giving permission, arguing that there was insufficient procedural convenience in having this matter proceed as a counterclaim. However, the Circuit Judge considered that this was at best a secondary issue, following on from a decision as to whether the counterclaim was appropriately formulated.

The Claimant had some problems with its argument on limitation as these had not been raised in the permission hearing. The Circuit Judge declined to consider them on the appeal for that reason, save as background to the Claimant’s attack on the exercise of discretion.

Against these points, the Defendant argued for the flexible approach to social housing matters taken by the courts in cases often dealing with periods of many years (eg the rent arrears schedule in the Claimant’s case), and that the Court had the power to rescind [or indeed discharge] a possession order, so a strict approach to a set aside was not required. Further, the Defendant:

pointed to the artificiality of the situation which obtains here. He submitted that what the tenant is seeking to do is to set off against the claim for unpaid rent (which, of course, founds the claim for possession) her cross claim for damages for breach of the covenant to keep the premises in good repair. In practical terms, it would be difficult, if not impossible, for a tenant in the position of this tenant to do that through the medium of a defence, because such tenant would not be able to satisfy the criteria set out in CPR rule 39.3.

The Circuit Judge found on the grounds of appeal as follows:

Ground 1 is that the district judge erred in permitting the respondent to submit a counterclaim which raised a set off. In subparagraph (2) the appellant states that: “By allowing a set off to be raised, the court has permitted the respondent to defend the original claim some 11 years after judgment was entered.” However, in my judgment, that is what in effect will be the position whether the tenant’s cross claim proceeds by way of a counterclaim in these proceedings or by way of separate proceedings. Either way the tenant will be seeking to set off against the claim for unpaid rent her cross claim for damages for breach of the covenant to
repair. To my mind, the second principle identified by Mummery LJ in British Anzani is as relevant to the filing and service of a defence as it is to a counterclaim, when the real question is whether the action is at an end, which question necessarily involves consideration of the matters that are and/or remain in issue between the parties. Perhaps that analysis explains what is behind the reasoning that the provisions of CPR rule 39.3 are not in cases such as this strictly engaged. Instead the court is able to deploy its much wider powers under CPR rule 3.1(2)(m), and indeed generally, in considering an application such as this.

The District Judge had not erred in permitting the counterclaim.

So far as ground 2 is concerned - namely, that the learned judge failed to take any or any proper account of the fact that, by allowing a counterclaim, the appellant was deprived of an approved limitation defence - as I have already indicated, it is accepted that that point was not raised before the district judge and I therefore reject that ground of appeal.

And on ground 3

that the learned judge failed to take any or any adequate account of the delay in bringing the counterclaim - here while it is right that, in paragraph 6 of his short judgment, the district judge held as follows that “Having granted an adjournment, it would be most cost effective to grant the tenant permission to make the counterclaim within these current proceedings rather than issuing a separate set of proceedings”, it is clear from the transcript that, in paragraph 4 of his judgment, the district judge did have regard to the issue of delay. In those circumstances, I do not regard this as a matter to which the district judge failed to have any or any sufficient regard in the exercise of his discretion.

Appeal dismissed.

Comment

There are some interesting points floating around in this case about the status of a counterclaim in these circumstances. I think it is probably right that it cannot be permitted as a Defence per se, when there has been a possession order made and no set aside is (or can realistically be) sought. However, as an equitable set off against the arrears, it will in practice function as a Defence, at least if there is a full set off, as at that point the possession order could and should be discharged by the Court. I’m not sure that the Circuit Judge’s view that Rahman might well equally apply to the filing and serving of a Defence is right. This will perhaps remain to be tested further.

Equally, it is slightly disappointing that the limitation point wasn’t dealt with in detail. The landlords’ arguments on limitation in this and in other cases I know of, essentially boils down to ‘it’s not fair’. But given that the lack of limitation will only be an issue if there has been sustained breach of the landlord’s repairing covenant, with notice to the landlord, for over 6 years, ‘fairness’ is a bit of a tricky ground to rely on. Arguably, the landlord is not only in breach of the covenant for all that time, but demanded rent and brought possession proceedings despite regardless of its own failings.

I am sure that limitation will crop up again as an issue, given that section 36(2) of the Limitation Act 1980 would apply to any disrepair counterclaim, at least if pleaded solely as an equitable set off. The interplay with Section 35 on a straight counterclaim and the Court’s discretion under CPR 20 will have to await the right case.

Article 8 and the Private Sector-the Court of
In *McDonald v McDonald & Anor [2014] EWCA Civ 1049*, the Defendant held an assured shorthold tenancy of a property in Witney, Oxfordshire. The tenancy was granted by Ms McD's parents in breach of the terms and conditions of a mortgage agreement with Capital Homes Ltd (they had not sought the company's permission to let the property to a family member and they were prohibited under the agreement from letting to a social security claimant). The landlords fell behind with their mortgage instalments and receivers were appointed to manage the property. The receivers served a s.21 notice on Ms McD and accelerated possession proceedings were brought in the name of the landlords. A possession order was made in Oxford CC on 23/4/2013.

Ms McD appealed to the CoA on the grounds that the making of a possession order was an unlawful interference with the right to respect for her home under Art.8 ECHR and that the receivers had no power to serve a s.21 notice.

The issue under the first ground was whether a tenant could raise an Art.8 defence against a private landlord. The CoA was invited to conclude that there was a clear line of ECHR case law (listed at paras 27-32 of the judgement) establishing the principle that an Art.8 defence could be raised against a private party. Giving the lead judgement, Arden LJ concluded that this principle was not established by that case law. She noted that there was a 'public' character to the landlords in each case. The case of *Di Palma v UK* prevented parties from invoking Convention rights to defeat a freely negotiated contract and the separate opinion of Judge Gaetano in *Buckland v UK* confirmed that the law was not settled. It is not clear from the judgement but it would appear that Arden LJ viewed the Judge's words "when the landlord is a private individual the tenant's right should in principle be limited to challenging whether the occupation – tenancy, lease, encroachment concession, et cetera – has in fact come to an end according to law" as aspirational rather than declaratory of the law (see our earlier discussion of this opinion here). It was therefore significant for Arden LJ that there was no Grand Chamber judgement on this issue.

The Court also considered itself bound by the decision in *Poplar HARCA v Donoghue [2002] QB 48*, where the CoA found that s.21 of the 1988 Act did not contravene the Convention.

In any event, Arden LJ found that the making of a possession order would have been proportionate. Despite Ms McD's acute mental health problems, settling into a new home could be achieved with appropriate treatment and the mortgage company was entitled to realise its security.

As for the point about the s.21 notice, the Court held that the receivers were entitled to serve the notice in furtherance of their powers to enforce their security under the mortgage agreement.

The appeal was therefore dismissed.

**Comment**

Even if the outcome in this case may have been predictable, there is much about the Court's reasoning that I find problematic.

Firstly, the idea that the ECtHR's case law on Art.8 and private landlords is not decisive because there was no argument in the relevant cases (para.42) misses the point about the Court's admissibility criteria. Even if parties do not object to the Court's competence *ratione personae*, the ECtHR is required to examine the issue of its own initiative (*Sejdic and Finci v Bosnia and Herzegovina* at para.27). Furthermore, in the one ECtHR case not mentioned in the CoA's judgement, *Pelipenko v Russia* (our note here), the Court found
that the complaint was not inadmissible because of the character of the parties to the dispute (para.48).

Secondly, the judgement in Donoghue was reviewed by Lord Scott in **LB Harrow v Qazi** (at para.141), whose view was that s.21 was in accordance with the law for the purposes of Art.8(2) and that Donoghue was correctly decided but for the wrong reasons. Since then of course, we have had Pinnock and Powell, which has established the principle that the Court must have the power to assess the proportionality of making a possession order under Art.8.

Finally, the CoA heard the appeal shortly before the decision of the High Court in **Manchester Ship Canal Developments v Persons Unknown [2014] EWHC 645 (Ch)** (our note [here](#)), where HHJ Pelling QC clearly considered himself bound by the CoA's decision in Malik v Fassenfelt to conclude that Art.8 was capable of being engaged in relation to land owned by a private landowner. Arden LJ refers to the Malik decision at para.57 but leaves us with the curious possibility that Art.8 may now be relied on in a defence to private possession claims other than through the accelerated possession procedure.

This is a decision that has left us with a number of unsatisfactory loose ends and it seems that it will be up to a higher court to pull them together.

[post updated 14/8/2014: a certain member of 'a higher court', namely Lord Neuberger, has since had something to say on this point. In his address to the Supreme Court of Victoria, Melbourne on the Role of Judges in Human Rights Jurisprudence on 8/8/2014, he makes the following comment (at para 28 of this [link](#)):

> Also in contrast with the Charter as I understand it, the HRA expressly states that the courts are public authorities for all purposes. This raises a difficult point on which we have yet to rule. It is best illustrated by reference to a point I have already alluded to, namely the position of a residential tenant whose right of occupation under domestic law has ceased. If his landlord is a public authority then the landlord is bound to take into account the article 8 rights of the tenant, and so the court must take them into account when asked to make an eviction order. On the face of it, however, that would not apply when the landlord is a private company or individual. However, in order to evict a tenant, a private landlord must go to court and obtain an order for possession. So the question is: must the court, as a public authority take into account the tenant’s article 8 rights when considering whether to make an order for possession. We have yet to hear such a case. This means that the room for the Convention to have horizontal effect in the UK may well be potentially significantly greater than for the Charter in Victoria.

So it is clear that the Supreme Court is now alive to the issue and the invitation is open for a suitable case...]

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**Spencer v Taylor- Some Analysis**
We have already reported briefly on the Supreme Court decision to refuse permission to appeal to the tenant in the case of a Spencer v Taylor on the grounds that no new points of law were raised.

As the solicitor acting for the landlord in the Supreme Court I have had the chance to see rather more of the papers and so a more detailed discussion of some of the points that came out of this would be interesting.

Some Background The original section 21(4)(a) notice served by the landlord’s original solicitors contained a date that was incorrect. The notice also contained a saving provision of the type approved in Lower Street Properties v Jones. The tenant argued in seeking permission to appeal to the Court of Appeal that the presence of the date and the saving provision meant that the notice was defective because it effectively gave the tenant two possible dates by which they had to leave and so it did not “make clear” the date that possession was sought. The Court of Appeal had already refused permission to appeal on this point some time ago in the case of Elias v Spencer (no relation!). However, in this case a key distinction was drawn. In Elias v Spencer the saving provision started with the phrase “or if different” whereas in this case the saving provision merely commenced “or”. The distinction drawn therefore, which led to the appeal being permitted at the CA, was that in Elias the saving provision was written in such a way as to make clear that it overruled the date if there was a discrepancy. In Spencer no such hierarchy existed and the notice was therefore unclear.

The Court of Appeal This same argument was made by the tenant at the CA and formed the bulk of the submissions for both sides. As most readers will know (and you can read up on it in our report here) the CA went in a totally different and unanticipated direction and held that the original notice was valid under s21(1)(b) and not under s21(4)(a). As a backstop Lewison LJ also dealt with the substantive arguments made to him and held that the notice was still clear even though the date and saving provision could be seen as proposing two alternative dates.

The Supreme Court The argument in the Supreme Court largely became one over policy and the parliamentary intent. The tenant was arguing that the decision of the CA could not be what parliament had intended. Parliament created two notice mechanisms under s21. The (1)(b) mechanism and the (4)(a) mechanism. At the time of creation the Housing Act 1988 required that an AST be for 6 months and so the intention of the s21(4)(a) was not to deal with tenancies that were periodic from the start but specifically to deal with tenancies that had become periodic before service of the s21 notice. This was undoubtedly correct up to a point. However it is a bit more complex than this. S21(4)(a) is actually something of an error. The original version of the Housing Act 1988 contained just one notice under s21, the 1(b) notice. The (4)(a) notice was introduced at Commons committee stage largely because the government of the day did not really understand their own legislation. The belief was that a notice given during the periodic tenancy would need in some manner to comply with the common law provisions applicable to notice to quit given in periodic tenancies. Notices to quit had already been ruled as of being no effect in s5 of the new Act and so some method was perceived as necessary to avoid this issue. Hence the introduction of s21(4)(a) which was intended to mimic the notice to quit process so that it would satisfy the common law issues and also to fit within the s21 process. The reason that Parliament was wrong was set out in the case of MacDonald v Fernandez where no less a personage than Hale LJ (as she then was) held that an s21 notice was not a notice to quit and hence that the s21 regime fell outside the common law notice to quit regime.

Common Law or Statutory Much of this problem is due to the real inconsistency that operates when considering Housing Act 1988 tenancies. Are they statutory or common law but with a statutory overlay? Parliament clearly must have felt that they were common law but with a statutory overlay as they felt there was a need to have a section 21 process that also complied with the common law notice to quit process. They are also treated this way in Scotland where a section 33 notice (the s21 equivalent there)
must be supplemented with a common law notice to quit to prevent the operation of the common law process of tacit relocation. However, the Courts have been less certain. MacDonald v Fernandez appeared to treat s21 as entirely divorced from the notice to quit process and so assumed that there was no common law component. Likewise the Court of Appeal in Aylward v Fawaz treated a notice under s21 as also terminating the contractual component of a tenancy by implicitly operating the contractual break clause therein. Resolving this conundrum once and for all would have been an attractive reason for the Supreme Court to hear this matter. However they did not agree.

Time The tenant also suggested that the s21(4)(a) process allowed tenants in a periodic tenancy a little more time to find alternative accommodation. I am not sure that this was their best argument but it does not seem to be supported by the Parliamentary debates. The issue of time was raised in the Lords where a “use it or lose it” element was suggested so that if a landlord did not use the s21 notice promptly they would have to serve a fresh one, in a similar manner to a s8 notice. This was rejected and it was stated by the government that a tenant who had been presented with an s21 notice would have had their two months notice and would therefore be aware of the precariousness of their position. This approach is clearly what was intended by Parliament and this was very damaging to the tenant’s argument but it is a very hardened approach to take.

Further Appeals The Supreme Court is clearly not convinced of the need to consider s21 further. The tenant sought to suggest that they should as it had not been considered but to no avail. There is no opportunity to take this further that I can see as there is no aspect of the tenants human rights that is sufficiently engaged to justify a further appeal. There have been no human rights arguments made so far and so making one now would require a fresh approach to the whole issue. Given the very wide latitude afforded to Parliament and that the Court of Appeal decision does appear to fit into the Parliamentary intent I am not sure that it would succeed.

Where We Are The short position then is that an s21(1)(b) notice is a valid notice for any AST where then a pre-existing fixed term tenancy. This will mean a far more rapid turnover of eviction in periodic tenancies I suspect as some of the technical errors that landlords used to find themselves making have gone. It also means that cases such as Lower Street Properties v Jones, Church Commissioners v Meya, and MacDonald v Fernandez will become much less relevant in a lot of cases. There are still some cases where s21(4)(a) has relevance. Periodic tenancies that have never had a fixed term component and fixed term tenancies that have become periodic by way of a contractual provision rather than the provisions of s5. Some social landlords create tenancies that are periodic from the outset and some private landlords use contractual periodic tenancies to allow for rent increase clauses to function in the periodic tenancy and to ameliorate the complex deposit effects of Superstrike v Rodrigues (at least until the Deregulation Bill come in). Where an s21(4)(a) is used it is worth noting that the second part of the Court of Appeal decision is in fact obiter and so a saving provision that does not show a degree of hierarchy may not be valid. However, it would be a brave argument to run.

Arguably Serious - Aster Communities Ltd v Akerman-Livingstone

Tue, 05 Aug 2014 17:14:14 +0000

SS

Aster Communities Ltd (formerly Flourish homes Ltd) v Akerman-Livingstone [2014] EWCA Civ 1081 (30 July 2014) is an extraordinary decision that will – if allowed to stand – have a significant impact on
the day-to-day management of possession claims in the county court.

The Court of Appeal's finding that Equality Act 2010 cases should, like Article 8 cases, be summarily assessed on the "seriously arguable" test must have come as a shock to those acting in the case. It certainly appears to have come as a shock to the Supreme Court, which granted permission to appeal the very next day.

Facts

Mr Akerman-Livingstone had a severe prolonged duress stress disorder ("PDSD") and was described as a "very sick man" (paragraph 2). In 2010, Mendip District Council accepted a full homeless duty and secured him temporary accommodation with what later became Aster Communities Ltd, a housing association.

Mendip offered Mr Akerman-Livingstone permanent accommodation but he appears to have been unable to cope with what was involved. Eventually Mendip discharged their duty, a decision that, unhelpfully, was not the subject of a review or appeal. Mendip required Aster to bring proceedings to evict Mr Akerman-Livingstone but in defence, he raised the issue of disability discrimination and contended that the decision to seek possession was a breach of section 15 of the Equality Act 2010.

HHJ Denyer, sitting in the Bristol County Court held that, in the light of Aster's aims in getting back possession of the property to comply with Mendip's direction, Mr Akerman-Livingstone did not have a "seriously arguable" case that Aster had breached the Equality Act 2010 and granted an immediate possession order. Cranston J dismissed the appeal against that order and it was against this order that Mr Akerman-Livingstone appealed to the Court of Appeal.

Court of Appeal

The Court of Appeal (Arden, Black, Briggs LJJ) dismissed the appeal, finding that the approach to proportionality under the Equality Act 2010 was the same as that under Article 8 in Manchester City Council v Pinnock [2011] 2 AC 104 and Hounslow London Borough Council v Powell [2011] 2 AC 186:

27 In my judgment, the approach to proportionality under Article 8 in Pinnock and Powell is in fact the same approach as section 15 of the EA 2010 requires. The proportionality exercise is generally divided into three (or even four) steps but it does not require every step in the exercise to be carried out: the steps are cumulative and if the court finds that any one step is not met there is no need to go to the other steps. That is what in my judgment happened in Pinnock and Powell: the court went straight to the balancing exercise because the weight to be attached to the twin aims was almost overwhelming: it would outweigh any consideration based on Article 8 save in exceptional circumstances. The twin aims are equally valid in EA 2010 cases.

28 Section 136 of the EA 2010 [reversal of burden of proof] does not prevent this conclusion. Nor does it produce any different result from that under Article 8. Section 136 requires the applicant to show certain threshold matters, but this is no different from a tenant who relies on Article 8 having to show that the property is his home. These matters do not include the question of justification (see section 15(1)(b)), which is a proportionality exercise. Moreover, there is nothing in sections 15 or 136 of the EA 2010 to prevent the court from attaching weight to the fact that the housing authority has formed a view about how it should carry out its statutory duties and applying a less intense scrutiny to its decisions than it would apply in other contexts. Mr Luba submits that in Pinnock the Supreme Court laid down a "given" that,
when seeking possession, a social landlord would not need to adduce evidence that it was performing its functions in relation to the allocation and management of its housing stock. He further submits that that "given" would not apply in a disability discrimination case. However, to say that there is no "given" in discrimination cases is simply to pre-empt the issue on this appeal.

29. Furthermore, there is no rational basis for saying that the weight to be given to the social landlord's interest is somehow diminished where the tenant is relying on disability discrimination than where the tenant relies on Article 8. In both types of cases, the social landlord is pursuing proceedings in order to recover property that might be used to provide accommodation for other homeless people. Such properties are likely to be in short supply.

The Court further found that CPR r 55.8 permitted the summary disposal of possession proceedings as at the first possession hearing the judge could decide whether there should be a trial and so could perform the same role as it would do if it was hearing an application for summary judgment under CPR Pt 24.

There was no distinction, found the Court, between the LHA and a social landlord which is a housing association, and Aster could rely on Mendip’s functions to “outweigh” Mr Akerman-Livingstone’s interests.

Comment

The hasty grant of permission by the Supreme Court is a big red hand pointing to the flaws in this judgment and a sign that alarm bells are ringing as to its effects. (Flashbacks to Malcolm v Lewisham [2008] 1 A.C. 1399.)

One of the stated ambitions of the Equality Act 2010 was to “harmonise” the law across different practice areas (see Explanatory Note) and to “de-clutter” the discrepancies that existed between, say, education and housing (see White Paper). To this end a single definition was given of each type of discrimination applying across housing, employment, education, public services and so on. The parachuting in of a housing law test from another context entirely to the summary assessment of discrimination claims is completely at odds with that intention.

And it is not as though this is an issue untroubled by authority. The House of Lords in Anyanwu v South Bank Students Union [2001] 1 W.L.R. 638 was clear that discrimination cases should not, except in exceptional circumstances, be struck out:

Lord Steyn paragraph 24

“… such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.”

Lord Hope para 37

“I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than
In the employment context, the authorities are clear that where a ‘crucial core’ of facts is in dispute, it is an error of law, except in an “exceptional case” to strike out a discrimination claim: Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1126, CA.

The problem with the Court of Appeal’s finding is that it treats the facts of the case as being largely unimportant beyond the personal circumstances of the tenant and proceeds on the basis that proportionality is merely an exercise in weighing up the differing priorities against one another; hence the Court of Appeal’s finding that “a social landlord's countervailing interest generally outweighs that of the tenant” and the conclusion that “for a tenant to succeed on his disability discrimination case he will have to show some considerable hardship which he cannot fairly be asked to bear” (paragraph 37). Damned with a faint concession Arden LJ finds that “the possibility exists that in rare cases, the discrimination defence may succeed” (paragraph 38).

However, as Anyanwu suggests, and as was argued on Mr Akerman-Livingstone’s behalf (in what was called the "target point"), disability discrimination claims focus on what the other party has done or not done, and it is that which is contended to be unlawful. It is aimed at ensuring that those made responsible under the Act (employers, landlords, those who run businesses and so on) act in ways that promote equality of opportunity. Accordingly, in a disability discrimination case, the support offered to a tenant, or not offered, the steps short of possession that were or were not considered are of crucial relevance.

Thus, in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 para 165 provides that in discrimination cases there should be a structured approach to the question of justification: “First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?” This is a test which emerges out of the European law directives that the Equality Act brings into effect and the European Court of Justice has found that justification will not be established under the directives if the same objective could be achieved by less discriminatory means: Kutz-Bauer v Freie und Hansestadt Hamburg (C-187/00) [2003] E.C.R. I-2741.

This third issue will always be fact sensitive including consideration of what support might have been provided, whether the duty to make reasonable adjustments has been complied with and whether the public sector equality duty has been properly explored. Indeed, in R (E) v JFS [2010] 2 A.C. 728 the Supreme Court got tantalisingly close to suggesting that where, as part of the public sector equality duty less discriminatory measures were not considered, a finding that measures were proportionate would not be made: Lord Hope at [212]:

“There is no evidence that the governing body gave thought to the question whether less discriminatory means could be adopted which would not undermine the religious ethos of the school. Consideration might have been given, for example, to the possibility of admitting children recognised as Jewish by any of the branches of Judaism, including those who were Masorti, Reform or Liberal. … There may perhaps be reasons, as Lord Brown JSC indicates (see para 258), why solutions of that kind might give rise to difficulty. But, as JFS have not addressed them, it is not entitled to a finding that the means that it adopted were proportionate.”

Finally...

The Court of Appeal refused a stay pending an application to the Supreme Court on the basis that the head lessor had given notice to Aster; it was said that if they did not give up possession, the head lessor would be unable to sell, possible resulting in possession proceedings by the head lessor’s mortgagee and
financial loss to the head lessor. Scant comfort was offered by the observation that if Mr Akerman-Livingstone was evicted, Mendip would owe him a duty under section 190 HA 1996.

The Supreme Court did however grant a stay pending determination of the appeal – the very next day no less. No doubt the Supreme Court recognised that Mr Akerman-Livingstone’s appeal would be of little benefit if he – a “very sick man” – was on the streets by the time the hearing came around.

Odds and Sods

Sun, 24 Aug 2014 15:35:25 +0000

NL

A few bits and pieces, none of which are worth their own post, including a couple of updates on old 'friends'.

First, as you have probably noticed, the blog has had a redesign (yes, another one). There are a couple of reasons for this: partly for a more contemporary, cleaner look, which should hopefully be more pleasant to read; and partly to make the site 'responsive', so that it deals with a wide variety of screen sizes. Rather than a separate version for mobiles, the same site is used, with a shortened menu bar. The sidebar and footer elements are below the main text on the mobile screen size.

Other new bits - search is accessed via the magnifying glass logo in the top menu. When scrolling down the page, a floating 'back to the top' link appears at the bottom right. The only other real change is that the feeds for Supreme Court, Court of Appeal and Admin Court decisions in the footer have been combined into one (a decision that was forced upon me). And we have a whole new colour scheme, based on the brick header image. Everything else is pretty much where it was (though the side bar has switched sides).

There is a bit of an update in the saga of our favourite unlawful money lender, Mr Gopee (or Ghoepe). HHJ Mackie QC has set out a summary of developments in the multiple cases, many of them applications to set aside possession orders and appeal the alleged debts to Gopee, joined together in the Mercantile Court. It seems they are all to be transferred to the Central London County Court. It also turns out that "In one case this month a lender Dunfermline Building Society sought and obtained in an action against Ghana Commercial Finance Limited an order that Mr Gopee personally pay the costs of an application." Oh dear...

Another interesting set up we have previously spent a little time on is Charles Henry & Co AKA Legal Action and the individual apparently at their head, Kevin Gregory.

I have received a transcript of a hearing in Gregory v City of London University and Others, dated 31 July 2014, which can be found here. It makes interesting reading, concerning as it does possible general civil restraint orders against Kevin Gregory, Charles Henry, Legal Action and maybe Augustine Housing Trust (another charity of which Kevin Gregory is a trustee, and a party in some of the cases we have previously noted). The only attendees at this hearing were Counsel for the SRA and someone apparently from Charles Henry/Legal Action/Augustine Housing Trust's insurers on a watching brief. Gregory did not attend, nor did anyone for Charles Henry/Legal Action/Augustine Housing Trust. From the transcript there is clearly quite a back story to this hearing.

It appears that the SRA is investigating (not before time, one might think). It is also worth noting that of
the three solicitors listed by the Law Society as 'employed' by Legal Action (and one previously listed), one is a part-time locum, Mr Perotti told the SRA he knew nothing of Charles Henry/Legal Action and hadn't worked for them, Dr Eiland is in the USA (and no longer listed on the Law Society site), and Mr McCarthy told the SRA he 'only attends when he is asked to, and he doesn't know when he'll be attending again'.

I haven't seen a Judgment in this case yet. It may well prove to be very interesting.

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Eviction: "Sexual, athletic and squeaking noises"

Sun, 24 Aug 2014 20:08:43 +0000

NL

In a case that recalls the unnatural noises emanating from Concord, Tyne and Wear, a German Court was faced with a tricky decision in a claim for possession.

The ground given was that the tenant had installed a 'very old' sex swing in 2012. And, despite a clause in the tenancy agreement requiring him to be quiet between 10pm and 7am, the tenant had apparently been determined to make the most of his second-hand purchase. (Or maybe third hand. Yes, I know, it doesn't bear thinking about.)

The landlord had received multiple complaints from neighbours of "sexual, athletic and squeaking noises" late into the night, and decided to evict.

The Court upheld the eviction, stating that late night squeaky sex swinging "would no longer correspond to normal rental use, and must therefore not be tolerated as socially acceptable".
Ground 12? Ground 14? In any event, the obvious lesson is to keep your swing well oiled. And if the squeaking isn’t actually the swing, plead Article 8, and the right to private, if a bit worn out, swinging.

My thanks to Jan Luba QC for the link.
[tweet https://twitter.com/janlubaqc/status/50362439565956224]

Ch ch ch ch changes

Mon, 08 Sep 2014 22:41:20 +0000

NL

When is a Secure Tenancy Agreement not a Secure Tenancy Agreement?

News has reached us of an interesting case in Bow County Court involving the right to succeed to a secure tenancy and the operation of s.103 of the Housing Act 1985: London Borough of Waltham Forest v Mahmood.

S.103 may be an unfamiliar provision to some so this is what it says:

(1) the terms of a secure tenancy which is a periodic tenancy may be varied by the landlord by a notice of variation served on the tenant

(2) before serving a notice of variation on the tenant the landlord shall serve on him a preliminary notice—

(a) informing the tenant of the landlord’s intention to serve a notice of variation,

(b) specifying the proposed variation and its effect, and

(c) inviting the tenant to comment on the proposed variation within such time, specified in the notice, as the landlord considers reasonable;

and the landlord shall consider any comments made by the tenant within the specified time

(3) Subsection (2) does not apply to a variation of the rent, or of payments in respect of service or facilities provided by the landlord or of payments in respect of rates

(4) The notice of variation shall specify—

(a) the variation effected by it, and

(b) the date on which it takes effect;

and the period between the date on which it is served and the date on which it takes effect must be at least four weeks or the rental period, whichever is the longer.

(5) The notice of variation, when served, shall be accompanied by such information as the landlord
Mr M was the son of the late Mrs M, who held a secure tenancy of a 3 bedroom flat with LBWF from 1982 until her death in September 2011. Towards the end of her life, Mrs M became increasingly infirm and dependent on a Social Services care package and family support.

At some point in the months prior to her death, Mr M moved in with his family to assist with this support and upon her death, he applied to succeed to the tenancy. The local authority refused his application on the grounds that he could not show 12 months continuous residence prior to his mother's death. Notices to quit were served on the property and on the public trustee and possession proceedings began.

This is where it becomes interesting because Mrs M's 1982 agreement allowed for a 6 month qualifying period for family members. Over the course of 2008 and 2009, LBWF planned to alter its terms and conditions (including bringing the succession provision into line with s.87 of the 1985 Act) and this process culminated in fresh T&Cs, which were intended to take effect from May 2009.

Mr M argued that the 1982 agreement was the effective agreement and that he was entitled to succeed to the tenancy by virtue of 6 months continuous residence. This required LBWF to prove that the preliminary notice and notice of variation were duly served on Mrs M. Over the course of the proceedings, it became apparent that LBWF were encountering some difficulty in locating those notices. Nothing could be found in connection with Mrs M and there was no trace of the specimen notice of variation. LBWF gave evidence that, following completion of the exercise in 2009, the documents had been placed in storage and an office move in 2013 was delaying discovery of the notices.

The case was effectively put on ice for approximately 12 months until it was heard by DJ Dixon at the beginning of September this year. The council did not produce any further evidence and they argued that the court could conclude on the balance of probabilities that a diligent exercise had been completed in a diligent manner and that the notices had been served on Mrs M (applying the principles in Entrust Pension Ltd v Prospect Hospice Ltd [2012] EWHC 3640 at paras 39-40).

DJ Dixon disagreed. It was a matter of concern that the notices of variation had disappeared en masse and the only inference the court could reasonably draw from the fruitless search of the files was that the notices had never been served on Mrs M. The 1982 agreement therefore applied and, having found Mr M to have resided at the property from December 2010, the possession claim was dismissed.

Comment

This is clearly a case with significant ramifications not only for LBWF's secure tenancies pre-dating May 2009 (of which there were roughly 13,000) but also for those other local authorities who may need to carry out due diligence into their variation procedures. It has perhaps been taken for granted during litigation that secure tenancies have been properly varied, particularly when following the correct procedure is not as critical to the outcome of a case as it was in this case. However, unless variation documents have been properly catalogued and recorded, councils will have to think twice before pleading that their tenants' T&Cs have been successfully varied.

A Thursday stuffed with housing stuff

Thu, 11 Sep 2014 20:47:56 +0000
A busy Thursday for housing law, not yet law, housing benefits and housing misc.

Item one. A Scottish Upper Tribunal is to hear a room size appeal on 18 September. This is one of the first Fife decisions. It is not the lead case in the English Upper Tribunal and may well be the first Upper tribunal decision on room size.

Item two. A new Wirral FTT bedroom decision, A wheelchair user and Consultant Planning Inspector who had always used the second bedroom as a home office, with the landlord's knowledge from the start, had the FTT declared that the 'second bedroom' was not a bedroom.

Item three. Some serious research results from Sheffield Hallam University on the impact of LHA changes since 2010 - caps, reductions in percentile etc. What look like headlines. Rents didn't go down. Tenants cut back on essentials to meet shortfall and landlord stopped doing repairs and renovations. Also Central London empties to the outer boroughs in (temporary) search of affordability.

Item four. Following our post on Barnet's proposed allocation changes, picked up by the local paper, there is now a petition, launched by a Barnet Councillor, on retaining risk of violence as a priority banding category.

Item five. And the winner of non-sequitur of the week! The DCLG announces that the government is going to support Sarah Teather MP's private member's bill on retaliatory eviction (on which we will have a proper post very shortly, honest, because this is an important thing). This will likely involve a ban on service of a section 21 for a specified period after a reported and confirmed instance of lack of repair (e.g. Council issued hazard warning or improvement notice).

The RLA promptly issued a press release shrieking 'Ministers make it easier for nightmare tenants' adding 'Ministers are handing nightmare tenants who bring misery to the lives of their neighbours and landlords alike, another weapon to prevent their removal'. Oddly enough, the RLA press release doesn't actually address the 'landlord not doing repairs despite it being confirmed by the council that repairs are needed' bit of the bill at all.

Retaliatory Eviction and Law Reform

Thu, 11 Sep 2014 22:56:53 +0000

SJM

The government (through its Minister for Communities and Local Government, Stephen Williams) today announced its backing to Sarah Teather's private members bill, whose aim is to prevent landlords from evicting tenants who have complained about disrepair in their home or where health and safety hazards are found to exist at the premises, using the accelerated possession procedure. Statistics provided by Shelter show that 200,000 tenants faced possession proceedings in the last 12 months in response to complaints about the condition of their home.

The bill in its current form has the following objectives:

1. to prevent a landlord from serving a s.21 notice on a tenant within 6 months of service of an
2. to prevent a landlord from serving a s.21 notice within 6 months of 'a relevant complaint.' A 'relevant complaint' means notification in writing of any defect which would give rise to the repairing duty under s.11 of the LTA 1985; or that the premises are prejudicial to health (except where that prejudice is a result of tenant neglect); or that a Cat 1 or Cat 2 hazard exists at the premises (for which a local authority environmental health officer's certificate would suffice)

3. to prevent a landlord from serving a s.21 notice in the absence of a current gas safety or energy performance certificate

4. it will be a defence to a claim for possession if a tenant can show that the s.21 notice was served within the relevant period

5. except where a gas safety or energy performance certificate is absent, a landlord may still recover possession where they have entered into a binding contract for sale of the premises before the court hearing

The bill is due to undergo a second reading in the Commons on 28th November 2014

Comment

The protection of tenants from the acts of unscrupulous landlords is a principle which is to be welcomed wholeheartedly but the bill raises a host of issues in its current form. A tenant would not appear to be required to engage the disrepair pre-action protocol to rely on the present s.(2)(2)(a) and neither would a landlord need to be yet in breach of the s.11 duty.

But would a 'relevant complaint' be valid if made to the landlord's agent rather than to the landlord directly? And what if there is a dispute about liability, or the landlord considers the defect de minimis, or the defect is better characterised as a nuisance rather than a breach of s.11? And are there any Equality Act issues which arise because of the requirement for a written complaint? The 6 month time limit is also interesting. On the hand, one can see how an eviction may cease to be retaliatory but on the other hand, what if a tenant has simply given up writing and has resorted to phoning or attending in person instead to get the work done? Would they be deprived of the benefit of this provision after 6 months has elapsed? It is difficult to see how a full blown trial could be avoided in these circumstances, which was probably not the intention of the drafters. It therefore seems that the involvement of the Environmental Health department is likely to be the more conclusive means of making out a defence to an accelerated possession claim.

It is clear that the bill will need some working out in order to overcome these (and doubtless numerous other) difficulties but it is an excellent proposal that we will continue to track closely.

A very unlawful eviction

Wed, 22 Oct 2014 22:45:28 +0000

NL

(Finally) AA v London Borough of Southwark [2014] EWHC 500 (QB)
This High Court judgment is remarkable in many ways, most of them worrying. It was the result of a six
day hearing, with Southwark putting Kelvin Rutledge QC up against Mr AA in person and ended with
findings against Southwark that were as bad as they could possibly be (and just perhaps even worse than
the available evidence would support).

Mr AA was Southwark's secure tenant. He had been evicted on 23 April 2013, immediately after a failed
stay application and while he was still at Court, and the entire contents of his flat had been removed by
Southwark and apparently immediately destroyed.

The case was Mr AA's claim for (as interpreted by the Court) "reinstatement and for substantial damages
for his unlawful eviction, unlawful homelessness and for the unlawful destruction of his possessions
based on the torts of conspiracy, interference with goods, negligence and misfeasance in public office,
breaches of the terms of his contractual tenancy and pursuant to the Human Rights Act under article 8 of
the ECHR".

The basic (although partly contested) facts were that Mr AA had had a secure tenancy from November
1989 and of the flat at issue since 2001. In November 2006, a possession order was made, ordering
possession by 27 November 2006. In February 2007, this was varied to an order that possession would be
postponed and that LBS was not entitled to make an application for the date for giving up possession and
the termination of the tenancy so long as AA paid the current rent and £2.90 per week towards the
judgment debt. Following a further application for a date for possession and warrant in June 2007, the
warrant was struck out and further order made that possession should be postponed (in the N28 form)
made in September 2007. A date for possession was again ordered on 1 July 2008, and thereafter, there
were stays of warrant in September 2008, April 2010 and September 2010. Mr AA's arrears varied from c.
£3000 to c. £1000 during this time.

On 22 February 2013, Southwark applied for a warrant - as an administrative issue of warrant. This was
issued by Lambeth County Court on 26 February 2014 with an execution date of 23 April 2013. It is
important that it was a request for an administrative issue of warrant, bear with me. At this point Mr AA's
total arrears were in the region of £2300 - though this was disputed and there appear to have been direct
deductions from benefit unaccounted for (see para 89). Mr AA applied for a stay, and that was heard on 22
April 2013. It was dismissed but Mr AA sought permission to appeal and an interim stay, which was heard
on 23 April. Mr AA was not successful, and immediately after the hearing, Southwark had the locks
changed on the flat (with no Southwark officer being in attendance). Southwark then, very soon
afterwards on about 25 April 2013, removed all of Mr AA's belongings which were still in the flat and
destroyed them.

Mr AA brought then issued various applications in various courts, from 25 April 2013 on, mostly for re-
entry and/or access to his belongings. There were orders that he should have access to retrieve his belongs
(which had, of course, already been destroyed, but the courts were not informed of this by Southwark). He
brought the present claim in Lambeth County Court, with a first hearing in May 2013. Southwark
admitted fairly quickly that it had unlawfully destroyed Mr AA's belongings when it should not have done
and that an internal investigation was underway. That was the extent of the admissions.

That is the bare history. But on examination things got... complicated.

**Issue 1. What was this hearing about?** Southwark maintained that previous directions meant that this
hearing was restricted to the assessment of quantum on Mr AA's claim for his destroyed belongings. They
also argued that the eviction had previously been found to be lawful and that Mr AA's pleaded case
disclosed nothing further. Unfortunately for Southwark, the Court spent some time with the previous
applications, pleadings and orders from Lambeth County Court and the High Court.

Scope of AA's pleaded case. AA's claim was a claim for special and general damages for a
tortious conspiracy whereby officers of LBS had conspired to unlawfully evict AA and to
evict him by unlawful means from his flat and had further conspired to remove unlawfully
all his possessions from his flat and to dispose of them unlawfully.

The unlawful means and unlawful ends relied on included failures to follow the LBS's Eviction and Goods Storage or Disposal Procedures, proceeding and securing AA's eviction for an ulterior purpose and in abuse of process, pursuing his eviction more than six years after the possession order had been obtained without first obtaining the permission of a judge to apply for a warrant of execution, covering up and failing to disclose the details of the unlawful actions and omissions that had occurred, failing to act fairly and reasonably with regard to AA's attempts to obtain re-entry and the restoration to him of his property and pursuing its defence to his seven applications in different courts for relief from the unlawful conduct that had deprived him of his tenancy and his possessions in a dishonest and abusive manner.

This extensive case is ascertained by a consideration of his claim form, statement of case, particulars and schedule of loss, the details of his applications related to this claim, particularly the interim applications heard on 1 May 2013 and 5 June 2013, the amended defence and the particulars and disclosure of the investigation conducted by Mr Matthews that were served pursuant to paragraph 7 of the amended defence and AA's witness statements that had been served in connection with these claims.

Cutting down by subsequent court orders. This extensive pleaded agenda for the trial was not cut down by subsequent court orders. The relevant parts of these orders that LBS now contends had the effect of confining the trial to a limited agenda were merely concerned with interim applications related to one specific claim – for special damages for the loss of AA's possessions quantified under the TIGA – whilst leaving open and for trial all other causes of action, loss and special and general damages for the loss of both his tenancy and his possessions.

Southwark's contention that the life issues in the case were restricted to quantum on the loss of belongings was wrong, and indeed Southwark's own pleadings addressed the broader case.

**Issue 2. Was the eviction unlawful?**

The key question here was whether Southwark could legitimately seek a warrant by administrative issue. CCR 26r5(1)(a) requires an application to a judge for a warrant, with witness statement or affidavit, where there has been a period of more than six years from the date of the underlying possession order. The original possession order was in November 2006, so the February 2013 application was over 6 years later.

Southwark argued that CCR 26r5(4) meant that the relevant date was July 2008, when a further order was made fixing the date for possession, as there had been intervening orders effectively in the form of Postponed Possession orders, with no date for possession until applied for. CCR 26r5(4) provided that:

"Paragraph 1 [i.e. CCR 26r5(1)(a)] is without prejudice to any enactment, rule or direction by virtue of which a person is required to obtain the permission of the court for the issue of a warrant or to proceed to execution or otherwise to the enforcement of a judgment or order."

Thus the subsequent variation of the original possession order, in the form of postponed possession orders with no fixed date for possession, meant that this was not a possession order under s.82 but a 'putting off' of the date of possession under s.85. Thus there was no possession order per se for the purposes of CCR 26r5(1)(a) until there had been an application to determine the date of possession.

This did not go well for Southwark:

CCR 26r5(1)(a) did not alter the requirement that LBS had to obtain the permission of the
court before applying for the issue of a warrant in February 2013. What rule 5(4) did was to make it clear that the requirement that the permission of the court was needed before a warrant could be issued was without prejudice to the further requirement that an application had to be made to fix the date for permission. In other words, the requirement of CCR 26r5(1) (a) as applied to the facts of this case was that both applications had to be made, albeit the second had to be made nearly 5 years after the first had been made.

And the supplemental submission from Southwark that the administrative application for a warrant had had retrospective judicial approval when the stay application was dismissed was also rejected.

So, the eviction was unlawful because Southwark had not sought and obtained the Court's permission for a warrant on a possession order over 6 years old.

**Issue 3. Disclosure**

Oh dear. This is where it all fell apart for Southwark. Sticking to their line that the only claim by AA was for loss of his possessions, and this had been admitted save for quantum, Southwark had disclosed nothing at all. This despite having stated in their Defence that "the precise circumstances of the disposal of [AA's] belongings are currently the subject of an internal investigation and further details will be given in evidence". This internal report had in fact been completed by 22 August 2013, but had not been disclosed. The internal 'Matthews' report, technically solely into the destruction of Mr AA's belongings, concluded:

that management failings that were alleged against two income officers and one resident officer had amounted to gross misconduct and against a further income officer had amounted to misconduct and that there had been management failures by two managers in the Residential Team in failing rapidly to establish the gross misconduct of the three officers responsible for that gross misconduct.

Nor had Southwark disclosed the tenancy file, the 'iWorld' records (income officer, repair and related records) or 'EDMS' records (residential team records).

This all came apart quite drastically when Counsel for Southwark in the course of opening statements waved about some letters purportedly from housing officers to AA which had not been disclosed, were not in the trial bundle, and were indeed later found to have been faked, or at least not sent. Not the best opening.

On the second day of trial, Southwark were ordered to disclose the internal report (the Matthews report) and the tenancy file. Despite this the EDMS record was never disclosed, and the tenancy file turned out to be missing any entries at all after November 2010, despite the obvious subsequent activity.

Thus far, we have an unlawful eviction, and a destruction of Mr AA's belongings which was both unlawful and in breach of Southwark's own policies and procedures. Could it get worse? Why, yes it could.

**Issue 4. Conspiracy, misfeasance in public office, negligence, breach of quiet enjoyment and article 8 breach.**

This is so heavily based on the disclosed evidence, most particularly the Matthews Report, that I can't even begin to summarise it. The evidence of what occurred is set out at paras 92 to 205 of the judgment. A few selected items would be that:

the 'Subsequent Eviction Request form' that had to be completed internally to request an eviction had apparently been prepared by the income officer and authorised by the area manager was nowhere to be found, giving rise to a clear suspicion that it had not correctly recorded the date of the possession order as being over 6 years before.
The Income officer had delayed writing to or visiting Mr AA until a few days before the eviction date (and it appeared that a letter of 15 April 2013 had not been sent at the time.

The usual process for a residential officer to be present at the eviction was ignored or circumvented. There was no Southwark officer present at the time of the eviction.

The keys were passed straight to voids, rather than to the residential officer as was standard practice.

The residential officer sent several emails stating falsely that the property was void and the contents could be disposed of as the tenant had removed what he wanted. The residential officer had wholly failed to follow Southwark's procedures on belonging left in evictee's flats.

On the day of the eviction there were a number of telephone calls between income officers, and their manager that were completely unexplained in their accounts to the Matthews internal investigation, despite those calls being put to them in the course of the investigation.

There were a number of subsequent emails from officers, in response to inquiries caused by Mr AA's efforts to gain re-entry and return of his belongings, that were false and intended to mislead. For example, from the resident officer, who knew Mr AA had not been able to access the property after attending court:

"Voids just confirm (sic) to me that they have the keys and whatever was left in the property has been disposed of. There are pictures from Voids re the state of the property i.e. the occupier took what was needed and the rest was left in a real mess."

To this can be added various other misleading statements, or silences in response to inquiries and indeed the Matthews internal investigation.

Findings

What the Court found was evidence of concerted actions by Southwark officers. The details are set out at 266 to 278 of the judgment. In cumulation:

When the series of stages is considered in the round and in sequence, it can be seen that there was a central purpose of the concerted action, albeit that that purpose slowly transformed itself. The concerted action lasted from 27 December 2012 until 31 May 2013. Its initial purpose was to ensure that AA was evicted and that his chances of avoiding eviction by obtaining a further stay should be reduced or eliminated. Those involved turned a blind eye to AA's possessions and showed, at best, a wilful disregard for them and, at worst, were completely indifferent as to whether they were retained or destroyed and gave no thought to them at all. However, as soon as the eviction was completed, the concerted action turned its attention to covering up the fact that those concerned with the eviction had acted in a flagrantly unlawful manner thereby ensuring that AA lost his possessions and the opportunity of obtaining re-entry.

Had the unlawful steps leading to AA's eviction not occurred, it is highly likely that AA would have save his tenancy and kept his possessions. Had the cover-up not occurred, AA would have gained re-entry and would have succeeded in paying off his arrears and he would have been able to retrieve his possessions from the flat or from the storage facility to which they would have been taken.

And the upshot? The conclusions run from 281 to 298 of the judgment. And for Southwark they are as bad as they could possibly have been. They have to be quoted at length.

The unlawful actions that occurred
Ulterior motive. Mr Davis and Ms Okwara were determined to obtain AA's eviction whether it was lawfully obtained or not. Their motive in acting as they did was demonstrated to be an "eviction at all costs" motive. There is no other explanation for Ms Okwara's delay in attempting to notify AA of the date of the eviction, in only half-heartedly attempting to carry out a home visit, in apparently hiding the relevant documentation from the Housing File and in making no attempt to obtain the permission of a judge to apply for a warrant. Equally, there is no other explanation for the series of lies that they told Mr Matthews about the telephone calls they made during the eviction and in deliberately engineering an eviction at which neither the income nor the resident officer were present and in making no effort to identify AA's possessions, prepare an inventory of them and then remove them safely to storage.

It has to be remembered that AA had good prospects of persuading a judge not to approve an application for permission to issue a warrant, of obtaining a postponed possession order with no fixed date or a stay or suspension of the order or of a warrant. This was because AA had virtually eliminated his arrears of rental shortfall two years before the eviction attempt was started and LBS had acquiesced in the subsequent non-payment of the shortfall arrears for two years before Ms Okwara became AA's income officer. AA proved subsequently that he could raise the necessary funds to pay off the totality of the arrears and the extent of the arrears was unsatisfactory but not excessive. It follows that Ms Okwara would have been pessimistic in her consideration of whether there were good prospects of evicting AA straight off.

It follows that both Mr Davis and Ms Okwara had an ulterior motive in seeking AA's eviction. They had limited prospects of evicting him lawfully and they therefore appear to have embarked on an eviction with the intention of evicting AA even though this could not be done lawfully.

Non-compliance with the EP - eviction. LBS's EP was the expression by a public body of the policy it wished to adopt with regard to the way its evictions were carried out. AA and all other tenants had a legitimate expectation that that policy would be complied with. Any significant departure from that policy by LBS would therefore be unlawful. The many departures, particularly the absence of both AA's income and resident officers, gave rise to a significantly unlawful eviction.

Failure to obtain a judge's consent to an application for a warrant. The judgment has already determined that the eviction was unlawful and an abuse of process in being undertaken pursuant to a warrant which had not been proceeded by a successful application to a judge for permission to issue it. The relevant possession order was more than six years old when the warrant was applied for and, as has already been demonstrated, a court is usually unwilling to authorise a warrant in such circumstances. The eviction was also an abuse of process.

Abuse of process in the eviction proceedings. In addition to the abuse of process arising from the way that the warrant was issued without the prior permission of a judge, LBS also conducted its defence to AA's applications in the district judge's court on 22 April 2013 and the circuit judge's court on 23 April 2013. Ms Okwara was conducting a DIY eviction on behalf of LBS and she had rights of audience for that purpose. That required her to assist the court, to provide the court with accurate and full information about the tenancy, the tenant and the breaches founding the application for possession and to make a full note of the judge's reasons for his decision. In fact, she provided no detail or documents, failed to inform the judge about the strengths of AA's case for a stay, was not prepared to enter into any dialogue with him about the arrears and had failed to comply with the EP. In short, the conduct of the proceedings associated with the application for a warrant was an abuse of process.
Unlawful eviction. The eviction was unlawful in a number of different respects. The warrant was issued without first obtaining the permission of a judge. The eviction policy of LBS was infringed in a number of significant respects. The bailiff did not surrender possession to LBS but to a carpenter employed by an independent contractor who had no authority to sign the warrant. Finally, the tenant's application to stay or suspend the warrant was defended in an abusive and unfair manner.

Interference with right to quiet enjoyment. The eviction and the way that it was carried out gave rise to breaches of the tenancy agreement by LBS. These breaches gave rise to a gross interference with AA's right to quiet enjoyment.

Non-compliance with EP – possessions. The non-compliance with the EP with respect to AA's possessions coupled with the removal and destruction of those possessions was unlawful.

Breaches of duty as income and resident officers. The income and resident officers owed duties of fair dealing, candour and non-discriminatory conduct to LBS. In breach of those duties, Mr Davis, Ms Okwara and Ms Ashley failed to reveal to LBS that the eviction had been carried out in breach of the EP, that AA's possessions were at risk of being destroyed and that their conduct had been unfair, lacking in candour and actually or potentially discriminatory.

Abuse of process – subsequent proceedings. The five applications made by AA after he had been evicted were defended with similar abusive practices as the earlier proceedings had been. In particular, Ms Okwara and Ms Ashley played no part in them and failed to bring to the attention of the court or LBS's legal representatives the details of their unlawful conduct. Subsequently, LBS attempted to conduct the proceedings as if all claims save for a limited Torts (Interference with Goods) claim had been excised from the proceedings when no such limitation had been imposed. This conduct flowed from the coercive and collusive conduct of LBS officers and was also an abuse of process.

Breaches of article 8. LBS's unlawful conduct in seeking and obtaining possession of the flat and in removing and destroying AA's possessions was unlawful and failed to show due respect to AA's private life. It was therefore unlawful.

(5) Conclusion - Conspiracy It follows that the various officers of LBS conspired to evict AA by unlawful means, to seize and destroy his possessions by unlawful means and to cause him harm and loss by evicting him and dispossessing him of his possessions.

(6) Other causes of action

Misfeasance in public office. Mr Davis, Ms Okwara and Ms Ashley exercised their powers as public officers in relation to a local authority secure tenancy for an improper motive. They each acted with the intention of harming AA be evicting him when there were no reasonable grounds for evicting him and by arranging for his possessions to be seized and destroyed unlawfully. Each is, in consequence liable for misfeasance in public office and LBS is vicariously liable for the commission of that tort.

Negligence. LBS is, in respect of the destruction of AA's possessions liable in negligence to AA. It was unreasonable and a breach of the duty of care owed to AA in respect of his possessions to allow them to be destroyed and to fail to act to prevent that occurring although it was known to its servants that the possessions were at risk of being destroyed yet nothing was done to prevent that occurring.

Breach of the covenant of quiet enjoyment. LBS is liable in contract for acting in a way that
has significantly breached AA's entitlement to quiet enjoyment of his tenancy.

Article 8 of the HRA. LBS has breached AA's entitlement to respect for his private life.

TIGA. The unlawful seizing and subsequent unlawful destruction of AA's possessions was both negligent, a conversion of those goods and amounted to tortious conduct. It therefore gives rise to an entitlement to recover the loss that thereby resulted pursuant to the TIGA.

The matter was listed for a further quantum hearing, but Southwark settled with Mr AA in the interim.

**Comment**

This is a devastating, awful judgment. The behaviour of Southwark's officers was appalling. The circumventing of policy and procedure appears to have been unconstrained and not picked up at all by Southwark until Mr AA pushed his case, or indeed at all.

As I'll come on to, there is much else of concern besides. But before I go into that, I need to register a worry about the judgment.

The High Court makes very definite and very serious findings against some named Southwark officers. Those officers were not brought as witnesses by Southwark (perhaps unsurprisingly given the Matthew Report and apparently ongoing disciplinary actions). But this means that the Court makes findings on the actions and intentions of these individuals without them having the ability to give evidence and be cross-examined, or otherwise respond to the accusations. While the Matthews Report was before the court (though not us! If anyone has a copy...) this apparently only deals with the events leading up to and around the disposal of Mr AA's belongings.

While the evidence recorded in the judgment seems strong on the after the event coverup, and on a conspiracy around the destruction of Mr AA's belongings, and also on procedural failings deliberately entered into, or at the very least unquestioned by anyone involved, around the actual eviction, I am less convinced that the evidence set out in the judgment supports a finding of conspiracy to evict (unlawfully). The evidence on that, mostly around the failure to apply for permission, could potentially well be cock up rather than conspiracy. However, the mysterious absence of documentary evidence from the tenancy file on that did not help.

Qualms about the full extent of the judgment aside, what can be taken from this?

First, I suppose, is that the usual response to a tenant saying 'my housing officer is out to get me' from the tenant's advisor - being 'they treat everyone this badly, it isn't a conspiracy' - may actually have to be considered on each case. Because just perhaps it is a conspiracy. (I'll stick with my view that usually it isn't, it is rather just a standard level of rude incompetence, but that cannot be a default response any longer).

Second, housing officers' documentary evidence needs to be up front and provided in full in possession and eviction proceedings. If it isn't, that needs to be challenged - maybe an adjournment for disclosure. And exactly what that disclosure should extend to is clearly an issue. From Southwark's limited disclosure in this case, just asking for 'the tenancy file' is not enough.

Third. The County Courts need to be alive to the issue of the date of possession order, and court admin staff should be appropriately trained. Administrative issue of warrants is only an administrative matter if the underlying possession order was made inside a 6 year period.

Fourth. Disclosure, again. Once this matter had got into the hands of Southwark Legal, it appears that they were stonewalled by their clients on relevant documents and information. It also appears that they failed to disclose material which was to hand and relevant and even, in the case of the Matthews report,
Even after the High Court judge had weighed in and demanded disclosure during the trial, the disclosure was at best partial, with EDMS records not disclosed. I'm sorry to have to say that the obvious conclusion is that the extent of Southwark's disclosure in any given matter has now to be doubtful, because this case demonstrated an inability to adhere to the basic rules of disclosure.

It is no answer for Southwark to say this case was against a litigant in person, or that they decided a document that they had referenced in pleadings turned out to be sensitive, or that they had misjudged the extent of the claim against them.

Fifth. Disclosure again. Documents are 'missing'. As with the 'missing' tenancy file after November 2010 here. Disclosure requires a full statement of relevant documents that were under the party's control but no longer are, and the reason why they are no longer available. 'Missing' by itself is not an answer and should not be taken as such. 3 years of missing tenancy file invites conclusions, as in this case.

And there is another lesson, perhaps a humbling one for those of us who act for tenants. Mr AA appears to have been content to act for himself, though had representation in one of his possession hearings. But what would we have heard if he had called as new client enquiry? What case would we have assumed? Unlawful eviction, perhaps. Destruction of belongings certainly. But beyond that? I think it is doubtful, though that may just be my confession.