Claim No: QB/2012/0183

Neutral Citation Number: [2012] EWHC 3361 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand,
London WC2A 2LL

Thursday, 18 October 2012

BEFORE:

MR JUSTICE CRANSTON

- - - - - -

BETWEEN:

SOUTHEND-ON-SEA BOROUGH COUNCIL
Claimant/Appellant

- v -

ARMOUR
Defendant/Respondent

- - - - - -

MR N GRUNDY (instructed by Clarke Willmott) appeared on behalf of the Claimant/Appellant.

MR J LUBA QC (instructed by Law Hurst Taylor) appeared on behalf of the Defendant/Respondent.

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Approved Judgment

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J U D G M E N T

MR JUSTICE CRANSTON:

Introduction

1. This is an appeal by Southend-on-Sea Borough Council ("the Council") against the dismissal of the claim it brought as landlord for the possession of residential premises, in fact social housing, occupied by Mr Robert Armour, its tenant. The appeal is concerned with whether the court considering the matter applied correctly the growing body of jurisprudence concerning the purchase which Article 8 of the European Convention on Human Rights has in possession proceedings.

Background.

2. The property in question is a 2-bedroom council flat in Southend-on-Sea managed by an agent, South Essex Homes Limited. Mr Armour signed the tenancy agreement on 31 January 2011, although he moved into the flat shortly before that. He was accompanied by his daughter, then aged 14. Almost immediately, the agent received a complaint from another resident that Mr Armour had verbally abused and threatened her. The agent spoke to Mr Armour about her complaint. In early March Mr Armour spoke aggressively to a member of the agent's staff, Miss Saatchi. The agent wrote to Mr Armour about that incident. There was a third complaint later that month. Electrical contractors had been working at the property and said that Mr Armour had been abusive and bullying. Moreover, they alleged that he had switched the electric supply back on while they were still working, causing one of them to receive a shock. Again the agent wrote to Mr Armour. This time the letter enclosed a statutory notice of possession proceedings.

3. Mr Armour's sister telephoned the agent the same day the statutory notice was issued. She explained that the contractors had themselves turned the power back on and that, on speaking to them, they had denied that anyone had received an electric shock. Five days later Mr Armour completed a review request form in which he denied switching on the power, asserted that no one had suffered an electric shock, and sought a chance to explain the other incidents. The agent made arrangements to convene a panel to undertake the review. It obtained witness statements from the electrical contractors and from Miss Saatchi. It prepared a schedule of contact between itself and Mr Armour and presented a report to the review panel. It recommended that the review panel uphold the decision to seek possession, because of the seriousness of the incident involving the contractors and the danger that Mr Armour posed to contractors through his actions.

4. There was a review panel hearing on 21 April. Mr Armour attended and was represented by the chairwoman of the local resident's association. She produced two supporting letters written by his immediate neighbours. She accepted on his behalf that he had anger management issues, but submitted that the aggression towards Miss Saatchi had stemmed from frustration about a boiler repair. In its

decision, the review panel recorded that it was unclear how the electricity to the socket had become live, but it was clear that the contractors had been abused:

> "Bearing in mind the tenant had been warned only 3 weeks before the Panel found this abuse to be proven and therefore decided on option 2 – dismiss the appeal."

5. The Council decided to proceed with the possession claim, which it issued on 9 June. The matter should have been resolved in July or August, but there were four interlocutory hearings and the case was not listed for 9 months. The explanation is that, firstly, the proceedings were adjourned so that Mr Armour could obtain legal representation. Subsequently the case was adjourned so that his legal representative could obtain further advice in the light of the decision in Manchester City Council v Pinnock [2011] UKSC 6, [2011] 2 AC 104. Eventually the matter was heard by Mrs Recorder Davis on 2 March. She heard evidence from the Council's tenancy services officer and from Mr Armour's previous partner, a Miss Ward. Both sides were represented.

The Recorder's judgment.

6. In her judgment the Recorder began by noting that the property was let as an introductory tenancy, governed by sections 124-129 of the Housing Act 1996. She referred to the review procedure applying where a landlord of an introductory tenancy serves a notice of possession. She quoted Circular 2/97, that introductory tenancies are designed to help in the fight against anti-social behaviour by making it easier for landlords to evict tenants who persistently engage in anti-social behaviour before they achieve security of tenure.

7. The Recorder then turned to the Supreme Court jurisprudence, which confirmed, she said, that Article 8 ECHR applies to proceedings for possession of an introductory tenancy so that consequent interference with private and family life has to be necessary and proportionate. In particular, she referred to Manchester City Council v Pinnock [2011] UKSC 6, [2011] 2 AC 104, which involved a demoted tenancy. On the authority of that case she noted that both the tenant and landlord could rely on events which occurred after the possession notice had been served. The Recorder also took into account Hounslow London Borough Council v Powell [2011] UKSC 8, [2011] 2 AC 186, a case involving at least one introductory tenancy. In particular, she referred to a passage in the judgment that the proportionality issue had to be raised by the tenant and had to cross the high threshold of being seriously arguable. She also noted the passage in the judgment that the court needed to address the circumstances and any factual objections raised, and whether making the order for possession would be lawful and proportionate in the circumstances. The court's power of review, she added, could in appropriate cases extend to reconsidering the facts found by the landlord, or could involve a consideration of facts "which had arisen since the issue of proceedings by hearing evidence and forming its own view".

8. The Recorder then set out the facts. She outlined Mr Armour's appalling criminal

record and domestic violence, but also that the Probation Service and Connexions had written supportively in July 2011. I interpolate to note that in his letter the Connexions youth worker, after recording that he had known Mr Armour for nearly 20 years, opined that he now had become aware of how much his daughter valued living with him and that at this stage in her life that relationship was important. Mr Armour was concerned with the prospect of losing his home and the adverse effect it would have on himself and his daughter. The probation officer's letter similarly recorded that the writer had had a long association with Mr Armour and that he was extremely concerned for Mr Armour's wellbeing if he received an eviction order, since this was the first time in 17 years that he had been able to secure permanent accommodation. The writer said that there was a risk of serious harm to the general public if Mr Armour lost his home, and he had made excellent progress.

9. To return to the Recorder's judgment, she then referred to the daughter, who at that point was studying for her GCSEs, to Mr Armour's ex-partner, and to his sister. She also considered the medical evidence which had become available in early December 2011. (Again I interpolate to note that in the covering letter before the judge the doctor had expressed the view that eviction would be extremely detrimental to Mr Armour's mental and physical state.) The Recorder summarised the effect of the certificate issued by the doctor, that, because of his lifelong Asperger syndrome and because of his history of severe depression, he lacked capacity to conduct proceedings within the meaning of the Mental Capacity Act 2005.

10. The Recorder then recounted the facts summarised earlier in his judgment. In the course of doing that, she concluded that at the hearing his ex-partner, Miss Ward, had exaggerated Mr Armour's inability to read and write, and that he was able to send text messages. Whatever Mr Armour's condition at the time the GP saw him and issued the certificate, he had been capable in the earlier part of 2011 of taking a full part in the review proceedings and had a full understanding of what was at issue. Albeit that he denied it, he knew that complaints had been made against him on the first and second occasions.

11. The Recorder then said that, at the time the claim for possession was filed, there was, in reality, no defence to the claim, so that the only live question was whether there were any personal circumstances that meant the decision that she had to make was disproportionate or unnecessary. She noted that Mr Armour's capacity to conduct litigation had come to light since the review panel decision. She recalled the favourable letters from the Connexions youth worker and the probation officer, which had been written in July 2011 and which noted that Mr Armour's behaviour had changed significantly for the better in recent times. She was satisfied that those letters were as helpful as the analysis from the doctor. The doctor's diagnosis did not assist in explaining Mr Armour's conduct. As for the daughter, she accepted that the daughter would find it difficult to return to her mother's home, but that she did not find that to be such an important factor indicating that it would be disproportionate to grant a possession order.

12. The Recorder then said this:

> "32. I have to take into account when I am deciding if a possession order is a proportionate order to make I have to balance the duty and the obligations of the claimant towards its tenants, its prospective tenants and to the community it serves.
>
> 33. These factors lead to the conclusion at that stage that the Local Authority's decision was appropriate. The one factor that has caused me difficulty in deciding whether or not a possession order is now proportionate is that since 31 March 2011 there has been no further trouble. I am now giving judgment on 12 March 2012, 11½ months later. It appears that notwithstanding his mental capacity issues the defendant has managed to comply with the terms of his tenancy for almost a year."

The Recorder noted that, if she refused to make the possession order, the introductory tenancy would be transformed into a formal tenancy on the same terms. Again she referred to the wishes of the probation officer, the Connexions youth worker, the sister, his former partner and the GP.

13. After recalling the Supreme Court jurisprudence, the Recorder said that she had concluded that, although the decision to seek possession was appropriate, proportionate and lawful, because the defendant had in fact managed to comply fully with all the terms of the tenancy for just short of 12 months she had come to the conclusion that, as at the date of the judgment, it was no longer proportionate for the possession order to be made. Mr Armour's anti-social behaviour had ceased as soon as he was served with the notice of possession. She then warned the supporters of Mr Armour that they would need to ensure that he complied fully with his obligations as a tenant.

The law

14. As described already, the tenancy is an introductory tenancy governed by the provisions of Part 5 Chapter 1 of the Housing Act 1996. Under the statutory provisions, provided that the landlord of an introductory tenant has served the requisite statutory notice, it is ordinarily entitled to an order for possession which determines the tenancy. A reference was made to Circular 2/97 in the Recorder's judgment. There is no need for me to repeat it at this point.

15. The Supreme Court jurisprudence on the application of Article 8 to possession proceedings, in broad terms, establishes that the court must determine whether eviction is a proportionate means of achieving a legitimate aim where the premises are the tenant's home and a serious arguable point is taken by the tenant that it would be disproportionate to order possession. This process entails a weighing up of the various considerations including, on the one hand, the strong public interest in favour of granting possession to a local authority landlord with scarce housing resources and, on the other hand, the personal circumstances of the tenant. The approach is applicable in a claim for possession brought against an introductory tenant.

16. The judgment of the nine judges in the seminal case of Manchester City Council v Pinnock [2011] UKSC 45, [2011] 2 AC 104 was given by Lord Neuberger. He noted that:

> "Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality. So, too, is the right – indeed the obligation – of a local authority to decide who should occupy its residential property": [54]

He continued:

> "…in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way": [54]

Lord Neuberger explained that the court's obligation under Article 8(2) to consider proportionality where a possession order was sought represented a "new obstacle to the making of an order for possession" and that the implications of that obligation had to be worked out. He said: "As in many situations, that is best left to the good sense and experience of judges sitting in the County Court": [57] One factor identified by Lord Neuberger in considering proportionality was any special vulnerability of the occupants of the premises: [64] It would be unsafe and unhelpful to invoke exceptionality as a guide (paragraph 51) and the question was always whether the eviction was a proportionate means of achieving a legitimate aim (paragraph 52). In the course of his judgment, Lord Neuberger said that it would be appropriate to take into account a marked change in circumstances following a panel's decision to approve possession proceedings (paragraph 72), a point to which he returned later in the judgment (paragraphs 124-125).

17. Two substantive judgments were given in the subsequent Supreme Court case of Hounslow London Borough Council v Powell [2011] UKSC 8, [2011] 2 AC 186. In the course of his judgment, Lord Hope noted that Parliament had excluded certain types of tenancy from the statutory scheme applying to secure tenancies for good reasons, in that there were problems inherent in the allocation of social housing. Parliament had tried to strike a balance between the rights of occupiers and the rights and responsibilities of public authorities. Lord Hope said under the heading of homelessness:

> "The court need be concerned only with the occupier's personal circumstances and any factual objections she may raise and (in the light only of what view it takes of them) with the question whether making the order for possession would be lawful and proportionate. If it decides to entertain the point because it is seriously arguable, it must give a reasoned decision as to whether or not a fair balance would be struck

by making the order that is being sought by the local authority": [37]

Later Lord Hope underlined that the question for the court would always be whether the making of the order for possession would be lawful and proportionate: [39] The court had to weigh up any factual objections which may have been raised by a defendant and what that defendant has to say about her personal circumstances: [41] Lord Hope continued that the analysis applied equally to introductory tenancies, and that the question for the court would always be whether the making of an order for possession in that case too would be lawful and proportionate: [44]. He added:

> "The court has to weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances. It is only if a defence has been put forward that is seriously arguable that it will be necessary for the judge to adjourn the case for further consideration…": [45]

At paragraph 53 Lord Hope said:

> "In Pinnock it was held that it is open to a tenant under a demoted tenancy to challenge the landlord's decision to bring possession proceedings on the ground that it would be disproportionate and therefore contrary to his Article 8 Convention rights: para 73. This finding applies just as much in the case of introductory tenancies, so it must be concluded that, wherever possible, the traditional review powers of the court should be expanded to permit it to carry out that exercise in their case too. The court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering the facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view: Pinnock, para 74."

18. Lord Phillips in his judgment summarised Lord Hope's analysis and indicated his agreement with it (paragraphs 87 and 88). He added:

> "It is possible to envisage a proportionality challenge before the judge being based on exceptional personal circumstances which have nothing to do with the reasons for seeking the possession order. Normally, however, any attack on the proportionality of dispossession is likely to amount to an attack on the reasons given to the tenant for seeking the possession order. Either the tenant will argue that the facts relied upon by the authority to justify seeking the order do not do so, or he will contend that those facts were not accurate": [99]

19. In the course of the argument before me, two Court of Appeal authorities were cited: Corby Borough Council v Scott [2012] EWCA Civ 276, and Birmingham City Council v Lloyd [2012] EWCA 969. Scott involved appeals in relation to two tenants. The first, Miss Scott, had been granted an introductory tenancy, had fallen

into arrears, and had been the subject of complaints about noise. The local authority issued possession proceedings and her family paid off the arrears the day before the hearing. The judge decided that the local authority was entitled to possession. She contended that an important personal circumstance in her case was not only that the arrears had been paid off, but also that she had been the victim of a murderous attack. She had the support of her mother and grandmother. The second tenant in the case, Haycraft, had been granted an assured shorthold tenancy shortly after a vulnerable neighbour had made an allegation that Haycraft had indecently exposed himself. There were further allegations of abuse. The housing association sought possession proceedings. The hearing panel concluded that Haycraft had been responsible for indecent exposure. The judge made the possession order.

20. The Court of Appeal held that it had not been disproportionate for the possession order to be made against Scott. In giving judgment, Lord Neuberger MR, with which Richards LJ and Davis LJ agreed, said that he found it difficult to think of circumstances where the fact that a tenant had paid off arrears at the last moment could carry significant weight in the Article 8 proportionality argument: [25] In the absence of extraordinary facts, it was fanciful to suggest that if someone had paid money which she owed that could be a significant factor, which enabled her to cross the high threshold which Pinnock and Powell had identified. As far as the Haycraft appeal was concerned, Lord Neuberger said that it was true that, with the exception of an unsubstantiated quartet of complaints of nuisance during the summer of 2009, there had been no further complaints for something like 19 months, and that could be said to be a mitigating factor, but it was no more than that: [29]

21. In Birmingham City Council v Lloyd, Mr Lloyd had entered into occupation of the council flat after his brother had died. He held a council tenancy himself where he had substantial rent arrears. Therefore, he was a trespasser in relation to his brother's flat. The Recorder held that a possession order in his case would be disproportionate. The Court of Appeal allowed the appeal. Again Lord Neuberger MR gave the judgment, with which Longmore LJ and Gross LJ agreed. Lord Neuberger MR said:

> "With all respect to the Recorder, it seems to me that even if Mr Lloyd had been a tenant whose tenancy had come to an end, and who, as an ex tenant, had no right to remain in occupation under domestic law, it does not seem to me that he would have had a strong enough case to justify the refusal of an order for possession": [19]

Lord Neuberger MR added:

> "Finally, there is the point that he has not caused a nuisance, or done anything criminal, and has got on with his neighbours. To my mind that is not a reason which begins to help him establish an Article 8 argument; all it does is to say that a factor undermining his Article 8 argument, such as existed in Pinnock, does not exist in his case": [24]

22. To my mind, Lloyd is an exceptional case and certainly not relevant in the consideration of Mr Armour's case. It was not a case of an introductory tenancy. It was a case of a trespasser who had taken unlawful and unauthorised occupation of a council flat without the council's knowledge. Mr Lloyd had a tenancy elsewhere, albeit that he had rent arrears. It is not surprising that in the passage I have quoted Lord Neuberger concluded that his positive conduct was immaterial to his occupation of the flat.

The appeal

23. In his cogent written submissions and orally before me today Mr Grundy contends, on behalf of the Council, that the Recorder erred in law in various ways. Firstly, she was in error in finding that Mr Armour's compliance with the terms of the tenancy agreement after March 2011 was a relevant consideration to the proportionality of making a possession order. To put it another way, having previously breached the terms of his tenancy in a way in which it was therefore lawful for the Council to initiate the possession proceedings, that Mr Armour had complied with the terms of his tenancy after the Council had commenced those proceedings was an irrelevant factor to a finding that he had an Article 8 defence. Mr Grundy contended that the only factor that the Recorder had found as giving rise to an Article 8 defence was the good behaviour following the three initial complaints. In his submission, the approach of the Court of Appeal in Corby Borough Council v Scott led to the conclusion that Mr Armour's compliance with the terms of his tenancy was not sufficient to give rise to a defence under Article 8. In a strong submission Mr Grundy contended that good behaviour was never a factor in support of an Article 8 defence, although bad behaviour might undermine an argument advanced on behalf of a tenant that Article 8 thwarted a possession order. Mr Grundy bolstered his legal submission with the truism that compliance with the terms of one's tenancy was what was to be expected of a tenant.

24. Secondly, Mr Grundy contended that, if Mr Armour's subsequent good behaviour was a factor to be taken into account in assessing the proportionality of making a possession order, it was insufficient in this case to give rise to an Article 8 defence. On any reading of the Recorder's judgment, it was clear that that was the only relevant consideration which for the Recorder had moved the balance in favour of Mr Armour. That, in Mr Grundy's contention, could not be right, given the very high threshold established by the authorities. Exceptionality, he accepted, was not the test, but it was only in exceptional cases that possession could be thwarted by an Article 8 claim. In the balance, he submitted, the public policy factors to which I have referred weigh so heavily in the balance in favour of possession that subsequent good behaviour after the initial complaint until the time of hearing could certainly not result in Article 8 having the effect that Mr Armour suggested. Mr Grundy contended that the Scott case, in particular, meant that it was not possible to rely on good behaviour subsequent to the initial complaints without something more. In the present case, inasmuch as the Recorder had referred to other factors such as the medical circumstances of Mr Armour, she was simply recounting the evidence before her and was not placing that in the balance in reaching her conclusion.

25. Finally, Mr Grundy contended that the Recorder was in error in failing to approach her decision on the basis that the Council's claim should have been dealt with at an initial hearing on a summary basis. She had found that, at the date of issue, there was no defence to the claim. The hearing had been much delayed as a result of adjournments sought by Mr Armour. In Mr Grundy's submission, the task of the Recorder should have been to assess whether there was a real prospect of an Article 8 defence succeeding on the basis that the facts asserted in the defence were true. It was not for some time after that Mr Armour raised the Article 8 defence. Mr Grundy again invoked public policy: if the Recorder was right in taking into account the subsequent good behaviour of a tenant such as Mr Armour, it would mean that delay in the hearing of a case, at the instigation of the tenant herself, could mean that the tenant acquired a security of tenure which had not been granted in the first place. The fact that Mr Armour was able to advance good behaviour over a substantial period was only because of his conduct, and the conduct of his legal representatives, which led to the delay in the hearing.

Discussion

26. However cogently Mr Grundy has put the arguments for the Council, I have concluded that they must be rejected. The first contention, that good behaviour subsequent to the initial complaint cannot be a relevant consideration, falls at the first hurdle. The authorities I have quoted are clear that it is possible for a court to take this into account. The overriding principle is that the consideration by the court is dependent on the facts of a particular case, as was underlined in Corby at paragraph 34. The Court of Appeal in Corby also highlighted that a court must be rigorous in ensuring that only relevant matters are taken into account in relation to proportionality. However, it is clear from the passages that I have quoted from Pinnock (paras [57], [124] and [125]) and from Powell (para [53]) that subsequent behaviour, even good behaviour, may be a relevant consideration.

27. I reject the second submission which Mr Grundy has advanced on behalf of the Council. In my view, a careful examination of the Recorder's decision demonstrates that she approached the issue correctly. Indeed, I would go as far as saying that her judgment is a model of what is expected of a judge considering an Article 8 issue. In particular, I recall that Lord Neuberger in Pinnock said that a judicial determination on particular facts is "best left to the good sense and experience" of County Court judges, who must weigh up the various factual objections with, of course, on the other side of the balance, the public policy factors in favour of a council obtaining possession, and on the other side the tenant's circumstances.

28. In this case, the judge carefully identified the law and stated the correct test, that she had to balance the duties and obligations of the claimant towards its tenants on the one hand and, on the other hand, the personal circumstances of Mr Armour. She mentioned the delay in the case and then set out her assessment of the evidence. She referred to a number of factors: the medical condition of Mr Armour, which had been crystallised by the doctor's report in early December; the letters from the probation officer and the Connexions youth worker; the position of the daughter, albeit that she heavily discounted that; and the other support

mechanisms which operated in Mr Armour's case. Her conclusion was that, taking all these factors into account, given Mr Armour's circumstances, his needs, his support mechanisms, and so on, including his good behaviour in the 11 months after the initial complaints, it would be disproportionate to grant the possession order. I cannot find that the Recorder was in error in any way in her approach or in her conclusion.

29. Finally, there is Mr Grundy's contention that the Recorder was in error in failing to approach the decision on the basis that the Council's claim should have been dealt with at an initial hearing on a summary basis. That point, as I indicated earlier, was underlined by the very important policy point made by Mr Grundy that it cannot be right for a defendant, by delaying matters, to reap an advantage. The difficulty, however, is that the Recorder had to deal with the situation as it was when she heard the case in March 2012. The law is clear that, where a proportionality review takes place, it has to be conducted by the court on the material available at the time of the hearing. The judge did precisely that. Whether the Council could have thwarted the application for an adjournment by Mr Armour in this case, I do not know. There was the difficulty that Pinnock had only recently been decided, but I am not sure that that is a full explanation for the application to adjourn. In any event, the matter is not for me. As I have said, the Recorder had to deal with the situation as it was when she heard the matter in March 2012. That she did.

30. I therefore dismiss the appeal.

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