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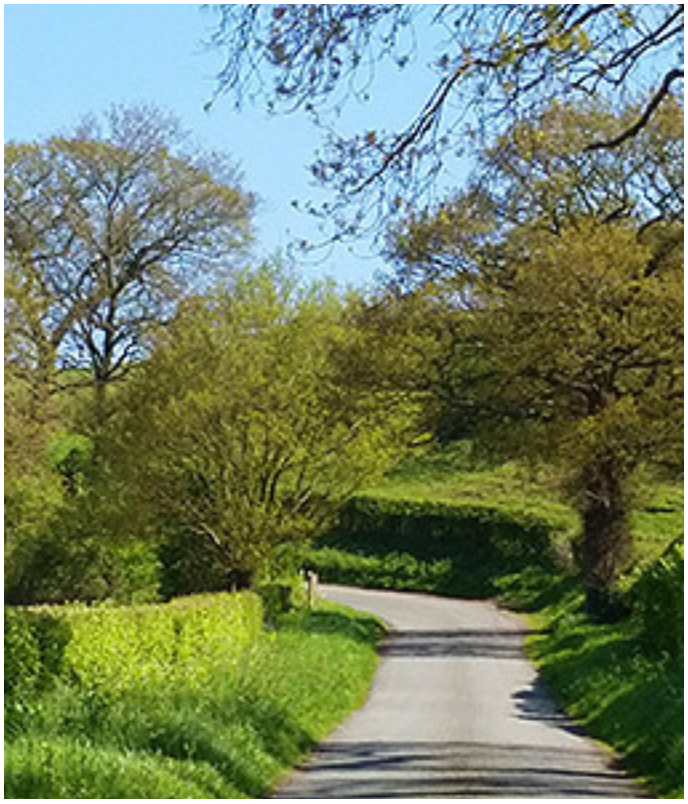

Topics this month

- **Easements:** Rights of light - release of right
- **Mortgages:** Mortgage lending - Regulated activities - consent order
- **Property Litigation:** Breach of Restrictive Covenants - injunction or damages in lieu
- **Public Access:** Town or Village Green
- **Residential Tenancies:** Secure Tenancies - Only or Principal Home; Possession Claims - Reasonableness - Disability Discrimination

Boundaries and adverse possession

The editor of this section is Samantha Jackson of 1 Chancery Lane, London (*www.1chancerylane.com*)

No report this month.

Business lease renewal

The editor of this section is Sarah Thompson-Copsey, solicitor and freelance property law trainer (*sarah@thompsoncopsey.com*)

No report this month.

Co-ownership

The editor of this section is Samantha Jackson of 1 Chancery Lane, London (*www.1chancerylane.com*)

No report this month.

Easements

The editor of this section is Emma Humphreys, solicitor, partner in Charles Russell LLP (www.*charlesrussellspeechlys.com)*

Right to light

Release

Metropolitan Housing Trust Limited v RMC FH Co Ltd [2017] EWHC 2609 (Ch)

Summary

The court declined a tenant's application for a declaration that it was entitled to enter into an agreement with a neighbouring developer to release its right of light enjoyed as headlessee. In the court's view, permitting an actionable interference with the right by the developer would be a breach of the tenant's covenant not to allow encroachments upon or against the demised premises.

Facts

RMC was the freehold owner of a property in London ("the property") of which Metropolitan owned a head-lease. The building had been built by Metropolitan shortly after the grant of its head-lease in 1987. Under Clause 3(12) of the head-lease, Metropolitan had covenanted not to allow any encroachment to be made… "*upon or against" the demised premises so as to cause "damage, annoyance or inconvenience of the landlord".*

The windows in the building had enjoyed light passing over a neighbouring property for more than twenty years and so, at face value, had acquired a prescriptive right to light under s.3 Prescription Act 1832. The neighbouring property was in the process of being developed and it was common ground that the redeveloped property would infringe any rights to light enjoyed in respect of the property. Metropolitan sought a declaration from the court that it was entitled to enter into an agreement with the developer to release its right of light enjoyed as headlessee.

Issues

- Whether permitting the developer to interfere with Metropolitan's right of light would be an encroachment in breach of Clause 3(12);
- Whether RMC could require Metropolitan to take action to prevent any such encroachment;
- Whether any release by Metropolitan of its rights to light would amount to a permission to create new windows in the new development and would also constitute permitting an encroachment (on the basis that the new owners and occupiers of the new building could eventually acquire rights to light over the property)?

Decision

The judge declined to make the order that Metropolitan had requested.

The court found that the right to light was appurtenant to the freehold of the building and therefore formed part of the premises that were demised to Metropolitan. Since the demised premises included any right of light, any actionable interference with the right by the developer would be an encroachment upon or against the demised premises within the meaning of Clause 3(12).

Any release of the right by Metropolitan would permit such an interference and would therefore be a breach of Clause 3(12) if the infringement of the right caused damage, annoyance or inconvenience to RMC. The court found that any encroachment in these circumstances would cause damage to RMC because it would result in either the right being extinguished or would remove RMC's ability to obtain an injunction requiring the removal of the new building.

On the question of whether RMC could require Metropolitan to take action to prevent the encroachment, the judge noted that no such request

Easements (continued)

had been made by RMC as yet. He was therefore not in a position to decide the point but observed that the position would depend on what was "reasonably required or deemed proper" at the time of any request made by RMC, in accordance with the terms of the head-lease.

The judge suggested that the answer to the question might depend upon what RMC really wanted to achieve at the relevant time, i.e. whether there was a genuine desire to prevent an infringement of the right to light or whether it wished to have tactical proceedings on foot to improve its negotiating position with the developer.

The judge held that any release by Metropolitan of its rights of light did not necessarily mean that there would be a resulting permission for the new windows in the developer's building; a deed of release could be drafted so as to avoid this. He also observed that any grant of consent to the developer's new windows would prevent the acquisition by prescription of an easement of light by the developer over the property, and so the opening of the windows might not be or grow to the damage of the freeholder.

Landlord and tenant (general)

The editor of this section is Sarah Thompson-Copsey, solicitor and freelance property law trainer (*sarah@thompsoncopsey.com*)

No report this month.

Long leases

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No report this month.

Mobile Homes

The editor of this section is Tim Selley, solicitor and partner with Crosse + Crosse Solicitors LLP (*www.crosse.co.uk*)

No report this month.

Mortgages

The editor of this section is Nigel Clayton of Kings Chambers, Leeds and Manchester (*www.kingschambers.com*). Nigel also maintains the specialist website dealing with mortgages at *www.legalmortgage.co.uk*.

Mortgage lending

Regulated activities – consent order
Fortwell Finance Ltd v Halstead
[2018] EWCA Civ 676

Summary

- A consent order in mortgage possession proceedings compromised any issue that the mortgage was unenforceable as having been entered into in contravention of the general prohibition in Section 19 FSMA 2000.
- Neither was the consent order itself a regulated activity which had been entered into in breach of the general prohibition.

Facts

On 19 Aug 2013 FF granted H a 12-month loan of £2.36M secured by a first legal charge on residential property which comprised three flats in the course of conversion to a single residence. On the loan application form, H gave an overseas address. FF was not an 'authorised person' and regarded this as an unregulated loan for the purposes of the FSMA 2000 (Regulated Activities) Order 2001. A special condition of the loan was that the borrower shall not occupy the property as a dwelling.

Following default in repayment after 12 months, FF appointed receivers, and subsequently issued proceedings for possession which were initially compromised by a consent order for possession in 28 days. Following further default, FF obtained a warrant for possession. H applied to set aside the consent order and to suspend the warrant. A deputy district judge initially refused the stay, and an appeal against his decision was refused by a circuit judge. FF contracted to sell the property.

The court subsequently listed the application to set aside the consent order, and refused that too, and the circuit judge refused permission to appeal. An appeal to the high court judge was also refused. H was subsequently granted permission to appeal (following a renewed application before Gloster LJ). In the meantime, FF completed the sale of the property.

The high court judge had concluded that since the property comprised flats, only one of which was being occupied by H as a dwelling, it did not exceed the 40% requirement. The judge also attached weight to the special condition in which H agreed he

Mortgages (continued)

would not occupy the property as a dwelling which he accepted operated as an estoppel. Further the judge concluded that there were no grounds to set aside the consent order on the ground of mistake.

On appeal H took a new point, that the consent order itself infringes the 'general prohibition' in S19 FSMA. This assumed that the loan agreement and legal charge themselves amounted to a regulated mortgage contract and depended on whether the consent order involved 'administering' a mortgage contract, which included "taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower".

Issues

The main issue on appeal was that the loan agreement was unenforceable as having been made by an unauthorised person in contravention of the general prohibition in s 19 FSMA 2000. This largely turned on whether it involved a regulated activity and in particular whether it involved entering into a regulated mortgage contract as defined in Art 61 of the Regulated Activities Order 2001 (at least 40% used as or in connection with a dwelling by the borrower).

Decision on appeal

It was not suggested that the consent order was not a true settlement of the proceedings.

Even assuming that the mortgage transaction itself amounted to a regulated mortgage contract, the consent order did not involve 'administering' a regulated mortgage contract. The making of a compromise of proceedings did not amount to a 'necessary step'. It is never necessary to compromise proceedings – a litigant can always proceed to trial.

Further, the taking of legal proceedings is expressly taken out of the ambit of Art 61(3)(b)(ii) by the words:

> "a person is not to be treated as administering a regulated mortgage contract merely because he…exercises a right to take action for the purposes of enforcing the contract…".

Apart from the obvious public interest in enabling the compromise of legal proceedings, it seems unlikely that Parliament intended such a compromise to be a criminal offence under s 23 FSMA. If H's arguments were correct, it would in some cases be effectively impossible for parties to compromise a bona fide dispute, in a way which would make the agreement enforceable by the lender and without the lender committing an offence.

Following *Dickinson v UK Acorn Finance Ltd [2015] EWCA Civ 1194*, the FSMA 2000 was not a trump card and could not dictate the conclusion as to the exercise of the court's discretion in the present case. The present point had not been taken in the courts below. It cannot therefore have been wrong for either judge to refuse to set aside the consent order.

H's case had the additional unattractive feature that it depended on his representations at the time of the transaction as to his intention having been knowingly untrue. The suggestion that FF knew the representations were false was tenuous in the extreme.

The court also declined to direct a trial of the issue whether the entry into the mortgage or the consent order were regulated activities caught by FSMA 2000.

Comment

This is an important decision which will come as a relief to unregulated mortgage lenders who rely on special conditions or declarations to avoid entering into regulated mortgage contracts. It also confirms that taking enforcement proceedings, and compromising those proceedings, does not involve administering a mortgage contract which would otherwise be a regulated activity.

Nuisance and trespass

The editor of this section is Samantha Jackson of 1 Chancery Lane, London (*www.1chancerylane.com*)

No report this month.

Property litigation

The editors of this section are Richard Alford, Katie Gray, Diane Doliveau, Will Beetson, James Castle and Chloe Sheridan, barristers of Tanfield Chambers, London (www.tanfieldchambers.co.uk)

Rogers v Humphrey

[2017] EWHC 3681 (QB)

Summary

Slade J held that the judge at first instance had not erred in his approach when deciding whether to grant an injunction to restrain a breach of covenant or damages in lieu.

Property litigation (continued)

Facts

The claimants purchased a rural house and surrounding land from the defendants in 2011 who retained significant land around the purchased property. As part of the transfer the defendants contracted to:

> "not erect or cause to be erected on the retained land any building or development without the consent of the transferee, save for the conversion and rebuilding of the cottage and a conversion of one of the barns to a second dwelling with the remaining farm buildings being removed and the land being returned to gardens and paddock surrounding the two houses."

In (an apparently blatant) breach of the covenant, in 2012 the defendants erected a new agricultural barn on the retained land. The parties entered into negotiations in the effort to agree revised restricted covenants, but no agreement was forthcoming. Then in 2015, in further breach of covenant (to which the they admitted before trial), the defendants began to convert the new barn into 3 new residential dwellings. The claimants commenced injunction proceedings. As the breach was eventually admitted before trial, the sole issue for the Judge was whether to grant an injunction or damages in lieu. An injunction was granted.

First Instance

The Judge had awarded the Claimants their injunction, concluding that:

> "Standing back and taking all the circumstances into consideration, I conclude that this is an exceptional case in this sense: that the case for granting injunctive relief is exceptionally clear and there are no factors of sufficient weight to persuade me to a contrary conclusion."

Chief amongst the factors leading to the grant on the injunction were the deliberate nature of the Defendants' actions and the evidence of the Claimants, accepted by the Court, that they had moved to the countryside for a quiet life as far away from human contact as possible and the loss of this benefit could not be adequately compensated by damages.

Issues

The basis of the appeal was:

- The Court applied the wrong test – namely that the Judge had based his decision on the test identified by the Court of Appeal in the case of *Shelfer v City of London Electric Lighting Co.* [1895] 1 Ch. 287, despite such an approach having been strongly criticised obiter by the Supreme Court in *Lawrence v Fen Tigers Ltd* [2014] AC 822.
- The Judge erred by taking the wealth of the Claimants into account as a factor
- The Judge had erred by finding that a sum of damages for the breach could not be computed, but then assessing a sum of damages as a contingency, should he be wrong on the primary question.
- Generally, the Judge had exceeded his discretion by awarding an injunction in all the circumstances of the case, particularly as *"both parties would be better off"* if damages in lieu had been awarded.

Decision on appeal

On appeal, Mrs Justice Slade upheld the decision of the Judge. By analysis of the judgment it was clear that the Judge had directed himself properly and had not slavishly followed the Shefler test, but also weighed in the balance the relevant comments of the justices of the Supreme Court in *Fen Tigers*. The question of wealth had not in reality been a factor in his decision – considering his comments in context, he was merely pointing out that the aim of the Claimants had been to acquire a rural property and that they had secured the restrictive covenant not to extract money from the defendants, but in order to enjoy a quiet life.

Generally, the Judge had weighed the potential detriment to the Defendants in the balance and it could not be said that his discretion had exceeded the generous ambit within which reasonable disagreement was possible. The Judge had not erred in finding a figure for damages in the alternative.

Comments

The appeal judgment makes clear that judges are expected to pay significant regard to the extensive comments of the Supreme Court in *Fen Tigers* when approaching the Shefler criteria in order to decide whether to grant an injunction or damages in lieu.

Any judge who confines themselves to the Shefler test (which in summary is:

- If the injury to the plaintiff's legal rights is small, and
- is one which is capable of being estimated in money, and
- and is one which can be adequately compensated by a small money payment, and
- the case is one in which it would be oppressive to the defendant to grant an injunction then damages in substitution for an injunction may be given [and often will be given bar in exceptional cases])

Property litigation (continued)

is likely to be appealed.

Following *Fen Tigers* the Judge will need to consider all the factual finding and circumstances of the case in order to do justice between the parties. 'Unneighbourly conduct' had been one particular example of a relevant factor identified by Lord Neuberger in *Fen Tigers*, but a court may take a wide range of factors into account.

Property transactions

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No report this month.

Public access

The editor of this section is William Batstone of Guildhall Chambers, Bristol (*www.guildhallchambers.co.uk*)

There are two conjoined cases this month:

R (Lancashire County Council) v (1) Secretary of State for Environment, Food and Rural Affairs (2) Janine Bebbington;

R (NHS Property Services Limited) (1), Surrey County Council (2) v Timothy Jones

[2018] EWCA Civ 721

Summary

- The Court of Appeal unanimously dismissed an appeal from the decision of Ouseley J not to quash the registration of land adjoining a primary school in Lancaster as a Town or Village Green (TVG); and
- Allowed an appeal from the decision of Gilbart J to quash the registration of land adjoining Leatherhead Hospital as a TVG.

There were others but the issue common to both appeals was whether the concept of statutory incompatibility defeated an application to register land as a TVG under s15 of the Commons Act 2006.

Public access (continued)

Facts

In the Lancaster case an application was made to Lancaster County Council, as registration authority, for 32 acres of land adjoining a Primary School to be registered as a TVG under s15 of the 2006 Act on the grounds that:

> "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality", have "indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years".

An inspector appointed under a pilot scheme decided that 4 out of 5 areas should be registered as a TVG. The Council, as owner of the land, claimed judicial review of the decision because registration as a TVG was incompatible with its statutory duty as local education authority. On 27 May 2016 ([2016] EWHC 1238 (Admin)) Ouseley J dismissed the Council's claim for judicial review.

In the *Leatherhead* case the defendant supported an application to Surrey County Council to have 7 acres of land adjoining Leatherhead Hospital registered as a TVG under s15 of the 2006 Act. The Council, rejecting an inspector's recommendation, granted the application but the owner, NHS Property Services Ltd, successfully judicially reviewed the decision before Gilbart J ([2016] EWHC 1715 (Admin)) on the grounds that registration as a TVG was incompatible with the discharge of the owner's statutory duty as a health care provider.

Issues

The issue common to both appeals was how the decision of the Supreme Court in *R (Newhaven Port and Properties Limited) v East Sussex County Council* [2015] UKSC 7 should be applied to the facts of the two cases.

In the Newhaven case the Supreme Court held that the general provisions of s15 of the 2006 Act should yield to the particular provisions of s49 of the Newhaven Harbour and Ouse Lower Navigation Act 1847, which required the trustees to "maintain and support the said harbour of Newhaven" and s33 of the Harbours, Docks and Piers Clauses Act 1847 which provided that "the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods."

At [93] Lords Neuberger and Hodge said:

> "The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of

Public access (continued)

> acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."

Decision [on appeal]

In the Lancaster case the Council relied on the Education Acts 1944, 1996 and 2012 and, in particular, the duty imposed on it as local education authority to secure that sufficient schools are available for providing primary and secondary education and that they should be sufficient in number, character and equipment to provide for all pupils the opportunity of appropriate education and, by regulations, to ensure that suitable outdoor space must be provided; for physical education to be provided for pupils; and for pupils to be able to play outside.

Ouseley J was not persuaded that the concept of statutory incompatibility was engaged. Some educational functions, e.g. open-air classes and organised recreation, would not be prevented by public rights of access, with appropriate give and take. But the key question for Ouseley J was: "*Can Lancashire County Council carry out its educational functions if the public has the right to use [the registered part of Moorside Fields] for recreational purposes?" and his answer to that was "yes and it would still be yes, even if it could make no educational use of the land at all."*

In the Newhaven case the answer to the equivalent question was no, because the particular piece of land had to be maintained at all times as a working harbour. The Court of Appeal upheld Ouseley J's approach. At [41] Lindblom LJ said:

> "There was no statutory duty to provide a school on the land, or to carry out any particular educational activity on it. There were no proposals to develop it for a new school. The fact that the county council, as owner of the land, had statutory powers to develop it was not sufficient to create a "statutory incompatibility" … Nor was the fact of its having been acquired and held for such purposes – if, indeed, it was. The relevant statutory purposes were capable of fulfilment through the county council's ownership, development and management of its property assets as a local education authority without recourse to the land in question – notwithstanding that, on its own contention, it had owned that land for "educational purposes" for many years. The registration of the land as a town or village green would not be at odds with those statutory purposes."

In the Leatherhead case the statutory functions relied on by NHS Property Services Ltd and the purposes underlying them were equally general in character and content and included the duty to arrange for the provision of hospital accommodation, as well as various other healthcare services and facilities, under s3(1) of the National Health Service Act 2006.

Gilbart J considered himself to be taking the same approach as Ouseley J had done in the Lancaster case in accepting that statutory incompatibility was established. The Court of Appeal disagreed, Lindblom LJ saying at [46]:

> "As in the Lancaster case, therefore, the circumstances did not correspond to those of Newhaven Port and Properties. The land was not being used for any "defined statutory purposes" with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a "statutory incompatibility". The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land."

Residential tenancies

The editors of this section are Richard Alford, Katie Gray, Diane Doliveau, Will Beetson, James Castle and Chloe Sheridan, barristers of Tanfield Chambers, London (www.tanfieldchambers.co.uk)

There are two cases this month:

- Whether, when a secure tenant has use

Residential tenancies (continued)

of more than one property, motivation or intention is a relevant factor in determining which is the only or principal home

- Whether there is a distinction between 'relevant breaches' and 'irrelevant breaches' when determining whether statutory grounds 12 and 14 of Schedule 2 of the Housing Act 1988 are made out

Secure Tenancies

Only or Principal Home

Southwark LBC v Ibidun

[2017] EWHC 2775 (QB)

Summary

When considering whether a secure tenant occupies a property as their only or principal home, the motivation for their intention to return during a period of absence is not a relevant consideration. The burden of proof to show that the property continues to be the sole or principal home will only switch to the tenant when it has been shown that there has been a sustained period of absence. Further, for a property to be sub-let for the purpose of bringing a secure tenancy to an end the tenant must have granted exclusive possession to the sub-lessee - the receipt of rent during periods of absence was not enough.

Facts

The Claimant Local Authority sought a possession order against the Defendant on the basis that her tenancy of a studio flat ("the Flat") was no longer secure because she did not occupy the flat as her only or principal home. D admitted having another home in Kent, and that the flat was lived in by another person.

Issues

- Whether in finding that the flat remained the defendant's principal home because she wanted to use it as a springboard to move to larger accommodation, the judge had adopted an approach to social housing which was contrary to public policy;
- Whether the judge's finding that the flat had not been sublet was wrong as the other occupier had paid the defendant for living in the flat;
- Whether the burden should have been on the Defendant to prove that she continued to reside in at the Property.

First Instance

HHJ John Mitchell QC found that the Flat continued to be the Defendant's principal home on the basis that:

- She continued to use it for most of her formal correspondence;
- She did not intend to remain in her other home in Kent as she had a baby son and needed support from her mother in London (where the subject flat was); and
- Although she did not intend to return to the Flat on a permanent basis, she wanted to keep the flat as her home "so she could use it as a springboard to move to larger accommodation when she was offered it."

The Judge rejected a submission from the Claimant that Defendant was under an evidential burden to rebut a presumption that she had ceased to reside at the Flat because on the facts of the case. The Defendant continued the visit the property regularly and stayed there at weekends meaning that it continued to be occupied by her as a home.

He also found that the Defendant, though receiving money for the use of the Flat, was not subletting it, because she returned to share the Flat with the alleged sub-lessee at weekends and there was therefore no exclusive possession.

There was various evidence that the flat had been sublet, but the Judge found against the Claimant on the facts. The Claimant also appealed on various grounds attacking the Judge's approach to the evidence.

Decision on appeal

The grounds of appeal relating to the Judge's approach to the evidence were all dismissed. Mostyn J held that:

- The Defendant's motivation for intending to return to the flat and to continue to retain it as her principal home was not relevant to the factual enquiry that the court was called upon to the determine. The key point was that the trial judge had found as a fact that the Defendant continued to occupy the flat as her principal home. Public policy or motive did not form part of the test [22].
- The trial judge had been correct, having found as fact that the Defendant continued to occupy the flat as her home, to hold that there was no inference or presumption arising that the Defendant had ceased to occupy. The facts of the case were therefore not on all fours with *London Borough of Islington v Boyle* [2011] EWCA Civ

Residential tenancies (continued)

450, where such a presumption was said to arise, and the burden was placed on the tenant to prove that the flat continued to be her only or principal home [24] - [25].

- Without a grant of exclusive possession, there simply could not be a sublet of the Property [26].

Comments

This case provides further guidance on the application of the relevant test as to whether a secure tenant has ceased to occupy a property as their only or principal home. Although in this case the tenant had two homes, the Judge made a finding that she returned regularly to stay at the subject property. On this basis, the Judge held that this was not a case where the tenant's absence from the property was sufficiently prolonged for the evidence burden to switch to the tenant to show that she still resided at the property, and that such residency was as her sole or principal home (as in *Islington v Boyle* [2011] EWCA Civ 1450).

The decision also confirms that the test is purely one of fact, and the tenant's motivations for continuing to maintain the property has her principle home are irrelevant, even if they are arguable ulterior, or could be construed as taking advantage of the system.

Residential Tenancies

Possession Claims, Reasonableness, Disability Discrimination

Teign Housing v Lane

[2018] EWHC 40 (QB)

Summary

There is no distinction between 'relevant breaches' and 'irrelevant breaches' when determining whether statutory grounds 12 and 14 of Schedule 2 of the Housing Act 1988 are made out.

Facts

Claimant is a social housing provider and the Defendant is a vulnerable person who had suffered from anti-social behaviour at the hands of a neighbour at his previous home. D suffered from a paranoid personality disorder and was disabled within the meaning of the Equality Act 2010. It was alleged that D, in breach of his tenancy agreement, had:

- removed fixtures and fittings in the kitchen without consent;
- removed a gas flue without consent;
- excluded contractors from the flat;
- installed CCTV without permission, which unsettled his neighbours;
- played loud music;
- behaved aggressively to neighbours;
- threatened a member of the claimant's staff in a telephone call; and
- left an untaxed car blocking access to the communal car park.

D sought possession relying on grounds 12 (breach of tenancy agreement) and 14 (nuisance or annoyance to neighbours, visitors or contractors) of Schedule 2 of the Housing Act 1988.

Issues

- Was the trial judge correct to decide whether certain breaches of a tenancy agreement by a tenant were not 'relevant breaches' for the purposes of making out statutory grounds for possession?

Residential tenancies (continued)

- Would making a possession order in circumstances where the breaches had arisen from the tenant's paranoid personality disorder be reasonable in the circumstances? Did the Judge give sufficient weight to the question of whether D would comply with his tenancy agreement in future and the impact of his behaviour upon other residents?
- Would making possession order amount to disability discrimination contrary to section 15 of the Equality Act 2010?

First Instance

HH Judge Simon Carr sitting at Truro County Court found that the claimant had not given the defendant permission to carry out any of the works but that the defendant believed that permission had been given because that was what he wanted to hear. The judge rejected the evidence of noise nuisance as exaggerated but concluded that the other allegations made against the defendant were made out.

He held, however, that most of these actions were not "*relevant breaches"* of the tenancy agreement. Ultimately, he found that it was not reasonable to make a possession order.

The Judge gave the view that even if he was wrong about whether the statutory grounds were made out, it would still not be *"reasonable, proportionate or fair*" in all the circumstances of the case to grant a possession order. The Judge also said that had it been necessary, he would have also found that a possession order would have amounted to disability discrimination.

Decision on appeal

Dingemans J allowed the appeal and remitted the case for a retrial. He rejected the concept of a 'relevant breach' and held that the trial judge should have found, on the evidence , further breaches of the tenancy agreement (in relation to CCTV and dog fouling) and should have considered further whether other behaviour that he found that the tenant had committed amounted to other breaches.

In the circumstances, the judge's conclusion that a possession order would not be reasonable was unsafe as he had not had a fair opportunity to reflect on all the breaches of tenancy that were proved before making his decision as the reasonableness of the order. Dingemans J also rejected the Respondent's submission that the trial judge's conclusion that the possession order would be a breach of the Equality Act should be upheld This was because there was a real prospect of the Claimant being able to show that, given the breaches that have been established and the further breaches that might be established, it was reasonable to order possession and that such an order would not amount to disability discrimination.

Comments

The decision of Dingemans J emphasised the established principles by which a judge must decide whether it is reasonable to grant a possession order: the discretion granted is wide, and all the circumstances must be considered. Here, the trial judge's conclusion as to whether it would be reasonable to grant a possession order was fatally undermined by his erroneous analysis of what breaches of the tenancy agreement had been made out. A judge must have an opportunity to consider the reasonableness of the possession order in the light of all his or her (proper) findings on the alleged breaches and the circumstances of the case. Here, the judge had denied himself that opportunity by a flawed analysis of the evidence before him as to several of the alleged breaches.

The appeal judgment criticised the landlord for not setting out in its claim precisely which terms of the tenancy agreement were said to be breached by the particular allegations of misconduct. Dingemans J considered that this had contributed to the errors made by the judge at first instance and the inability of the appeal court to deal with the issues without remission. Practitioners acting for landlords seeking possession would be wise to provide a proper breakdown of which acts are said to breach each relevant term of the tenancy agreement.

Dingemans J took the opportunity to set out the key principles relating to reasonableness:

- The judge must take into account all relevant circumstances as they exist at the date of the hearing in a broad common-sense way, giving weight to the various factors in the situation (*Cumming v Danson* [1942] 2 All ER 65).
- Reasonableness involves a consideration of the position of both parties and neighbouring tenants are entitled to live free from the anxiety of a recurrence.
- Serious breaches of the tenancy agreement need to be emphasised (*West Kent Housing Association v Davies* (1999) 31 H.L.R. 415).
- Personal fault of the tenant (or the Act being deliberate) is not necessary (*Kensington and Chelsea v Simmonds* (1997) 29 HLR 507).
- That treatment may improve the position of the tenant was a relevant factor (*Croydon LBC v Moody* (1998) 31 H.L.R. 738).
- The appeal court may only interfere with the decision of the trial judge when the judge *"has so plainly gone wrong in law that the court should interfere…"* (*Cresswell v Hodgson* [1951] 1 All E.R. 710).
- When considering whether to give a suspended order the court must assess the prospects that the impugned behaviour will cease. If it is inevitable that a tenant will

Residential tenancies (continued)

breach the conditions, the court should not make such an order (*Lincoln City Council v Bird* [2015] EWHC 843 (QB)).

In relation to discrimination arising from disability under section 15 of the Equality Act, the Judge helpfully restated the additional test that would need to be satisfied, following *Aster v Akerman-Livingstone* [2015] UKSC 15. When the tenant can show that he or she is a disabled person within the Act and that there was a sufficient causal link between his disability and the relevant conduct, the landlord would have to show that there was no less drastic means of solving the problem the problem than ordering possession.

The court should take a structured approach and consider the following in turn:

- Whether the tenant can show that he has a disability;
- Whether the tenant can show that there was a sufficient causal link between the mental disability and the conduct on which the decision to evict is based; and
- If so, whether the landlord can show that evicting the tenant is a proportionate means of achieving a legitimate aim. When considering whether evicting the tenant would be a proportionate means of achieving a legitimate aim it is necessary for the landlord to show that there was no less drastic means of achieving its aims and that the effect of eviction on the tenant would be outweighed by the benefits to the landlord.

For Dingemans J, any possession order that amounts disability discrimination can never be reasonable for the purposes of the 1988 Act.

Restrictive covenant

The editor of this section is Emma Humphreys, solicitor, partner in Charles Russell LLP (www.charlesrussellspeechlys.com)

No report this month.

These updates are edited by Gary Webber. The deputy editor is David Keighley.

This update with links to cases and other material is also to be found on the site. If you have any information that you think would be useful to other users please send it to gw@propertylawuk.net.

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