

Housing Team Legal Bulletin

Issue 21. July 2009



Public law defences to possession claims: latest developments

Central Bedfordshire DC v Taylor (2009) EWCA Civ 613 > [judgment](#)

The Court of Appeal has again been called upon to try to clarify some of the issues (following the decisions in *Kay v Lambeth LBC* [2006] 2 AC 465 and *Doherty v Birmingham CC* [2008] 3 WLR 636) that arise when occupiers seek to resist the making of a possession order by raising public law arguments.

Here the council was the owner of the land, but had leased it to Luton BC. Luton in turn granted some rights to the Housing Action Zone ('HAZ') which then let some individual occupiers into possession (whether under tenancies or licences is not clear from the judgment). The council terminated the head lease and sought possession. When proceedings started it did not know who, if anyone, was still on the land. A number of the occupiers then sought to defend the proceedings, on the basis that the council's decision to seek a possession order without first considering their personal circumstances was unreasonable and a breach of Article 8 ECHR.

The occupiers invited the trial judge to make various findings of fact on their personal circumstances. Some had lived in their homes for many years and it was contended that for much of the time the council had consented to their doing so; some would not have been owed the main housing duty under section 193 Housing Act 1996 if evicted; some had carried out refurbishment works to their homes. However, the trial judge refused to make such findings and made orders for possession.

In the Court of Appeal, Waller LJ gave the leading judgment and said that this was the first time the court had been able to consider how it ought to deal with facts like this (ie where, as in *Kay*, the occupiers had no contractual relationship with the landowner at all) post *Doherty*. The court proceeded on the footing that the occupiers would be able to make good the factual allegations described above, and considered whether the case ought to be remitted to the county court.

Importantly, it was accepted that the occupiers were not limited to arguing that it was the decision to issue proceedings which was unreasonable. Waller LJ distanced himself from the proposition of Toulson LJ in *Doran v Liverpool CC* (2009) EWCA Civ 146 that it was only that original decision to evict which could be scrutinised. Waller LJ pointed out that a landowner might only become apprised of the circumstances of an occupier at a much later stage than that – perhaps as a result of a letter from a solicitor setting out relevant factors, perhaps because of matters raised for the first time at trial. As, in the face of such further factual revelations a landowner could be said to have reached a 'fresh' decision to continue to press for a possession order, then he saw no problem in the occupier attacking that.

As to the scope of the court's jurisdiction, the Court found it was not open to the occupiers here to rely on a full blown Article 8 defence (as that was expressly not permitted by the majority in *Kay*). Waller LJ agreed that, after *Doherty*, the question of whether a decision of a public authority to seek possession is 'reasonable' goes further than whether it is 'rational'. Although the court must satisfy itself that the landowner is entitled to possession, it can also consider the occupier's personal circumstances known to it at the time; he did not accept that the council ought to have itself instigated an inquiry into the personal circumstances of the occupiers prior to taking proceedings.

However, he found that the council's obligation to take into account the occupiers' personal circumstances 'could never' make it unreasonable for them to seek possession. On the basis that the council could establish a right to immediate possession, the occupiers' personal circumstances could be taken account of by the court (presumably, though this was not stated) by it using the limited power to stay the effect of a possession order available under section 89 Housing Act 1980.

So, anyone without any contractual relationship at all with the landlord may face an uphill struggle in persuading a court that the decision to evict was unlawful. This kind of argument might be expected to be deployed by authorities against – for example – failed successors or others left in occupation after the tenant dies or terminates the tenancy.

But there are still many unanswered questions. First, how can the differences in view between the UK courts and Strasbourg (compare *McCann v UK (2008)* and *Cosic v Croatia (2009)* with *Kay* and *Doherty* on the question of the court considering Article 8) be reconciled? *Cosic* in particular – it post dated *Doherty* - does not appear to have been discussed at all by the Court in *Taylor*¹. Though Waller LJ seems to doubt that an Article 8 defence would be that different in nature to that he accepted was available to the occupiers in *Taylor*, there obviously is some difference between the two approaches, otherwise, why all the fuss in the first place? Surely the principal benefits to occupiers of taking the Strasbourg court's approach would be that (1) the court would be able to carry out a structured review of whether the decision to evict was proportionate or not, with the occupier's personal circumstances being central to that, and (2) the public authority landowner would have to demonstrate that it had carried out a review of whether its proposed decision to seek possession was going to be proportionate in the light of any occupiers' personal circumstances. However, these are matters which really only the House of Lords (soon to be the Supreme Court) can deal with.

More than that, it appears dangerous to suggest that a decision of a landowner like the council in *Taylor* to seek possession could never be 'unreasonable' as long as it went to court for an order. Imagine a relative of a deceased tenant who is unable to prove a right to succeed to the tenancy but who 'fits' within an authority's policy on those 'left in occupation' and is therefore entitled to be considered for a tenancy of the property. The authority then seeks possession without reference at all to that policy. Does the lack of contractual relationship between the parties mean that such an occupier could never make good an argument that the decision to evict was not a reasonable one? Surely not. Or imagine the case of a non tenant spouse, left in occupation after the departure of the sole tenant, and facing summary eviction. Would she be similarly constrained in the arguments available to her as were the occupants in *Kay* and *Taylor*?

On the other hand, it is arguable that the occupiers in these examples would not be so restrained - there

¹ *Cosic*, it should be said, was raised in *McGlynn v Welwyn and Hatfield BC (2009) CA* (although there the occupier succeeded on a conventional JR basis before the Court of Appeal) and is raised in the arguments of the occupiers in *Manchester CC v Pinnock* – a case arising out of proceedings brought against demoted tenants – which is to be heard by the Court of Appeal in July 2009.

being something more there than 'mere' occupation of the premises in each case.

On any view there appears to be little justification for the view that those who have at some point enjoyed a contractual relationship with the landowner are to be treated in a more favourable way than those who have not. Though the lack of any prior legal relationship might - in a given case - be of relevance, there is no sensible reason why such a clear divide should be drawn.

The clarification provided that there is a continuing obligation on an authority to reconsider the 'reasonableness' of its actions in seeking possession is certainly to be welcomed, and recognises the 'fluid' nature of decision making in this type of case.

Taylor may yet go further. Even if it does not, the new Supreme Court will have to look again at some of the issues it raises at some stage, if the continued tension between UK and Strasbourg authority is to be avoided.

RSL is “hybrid public authority” - meaning it is a public body under the Human Rights Act

**London & Quadrant Housing Trust v Weaver [2009]
EWCA Civ 587 (18 June 2009) > [judgment](#)**

By a majority of 2 to 1 the Court of Appeal have held that London & Quadrant Housing Trust (L&Q) is a hybrid public authority and the act of terminating a tenancy is not a 'private act' – as such they are subject to the provisions of the HRA 1998 and public law arguments generally.

This appeal was brought by L&Q following the decision of the Divisional Court (Richards LJ and Swift J) last year. L&Q sought to evict Mrs Weaver under the mandatory Ground 8 (rent arrears), which she defended on the basis that she had a legitimate expectation that they would use the discretionary Grounds 10 and 11 first, and that the eviction engaged Article 8 of the ECHR. The article 8 point depended on establishing that L&Q was a public authority within the meaning of s6(3)(b) Human Rights Act 1998 and that the act of termination of tenancy was not a private act within the meaning of s6(5). L&Q contended that it was exercising purely private functions and that the termination of the tenancy was a private act – it was therefore subject to neither human rights nor judicial review principles. Both limbs of Mrs Weaver's defence

fell at the High Court but there was a finding that L&Q was a hybrid public authority for the purposes of the HRA and was amenable to judicial review. L&Q appealed the finding of their status in public law.

Having analysed existing caselaw on the HRA (*Aston Cantlow v Wallbank* [2003] UKHL 37; *YL v Birmingham City Council* [2007] UKHL 27), the Court of Appeal (Elias LJ) identified two factors relevant to the analysis of whether the termination of a tenancy was a private act:

"I would draw these tentative propositions from this analysis. First, the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. Second, that will not be decisive, however, since the nature of the activities in issue in the proceedings is also important..." [41]

With regard to the first factor - L&Q itself had charitable status and acted in the public interest; received significant funding from Housing Corporation grants; about 10% of its stock was acquired from a stock transfer from the LA; provided subsidised housing; worked in close harmony with the LA; and was subject to intrusive regulation on allocation and management. Elias LJ found that the allocation and management of housing was of a public nature on the facts of this case.

With regard to the question of whether the act of terminating a tenancy (involving the exercise of a contractual power), is solely a private act – the support of this in *YL* and *Aston Cantlow* were noted. However Elias LJ concluded that the grant of a tenancy and its termination were decisions as to who should take advantage of a public benefit and clearly bound up with the provision of social housing – and as such was a public act.

On consideration of whether HRA protection should be given to all L&Q tenants or just those whose properties were acquired as a result of state grants, Elias LJ found it should be for all tenants save for those who are not in social housing and are paying market rents (para 81). Crucially however it is pointed out that this judgment does not mean that every RSL will be in the same position as L&Q, it being noted that it could possibly be argued that those RSL's who had no public subsidy at all were in a different position.

Lord Collins was in agreement with Elias LJ although pointed out that this decision may have little consequence for tenants in light of the decision in *Kay*.

Rix LJ dissented in his view, noting that the provision of housing is not a government function and recorded 10 reasons why the termination of Mrs Weaver's tenancy on rent arrears under Ground 8 was a private act arising out of contract, including reference to the jurisprudence of ECHR, domestic caselaw, and that concerns for the protection of those in need of social housing could be addressed in better ways than artificially classifying private functions as public. Rix LJ also noted that there was nothing in the nature of L&Q or the typical RSL to suggest that their everyday administration of tenancy agreements was of a public nature, noting that "the world of charity is essentially private" (para155)

This decision still leaves some room for individual RSLs to distinguish themselves from L&Q and argue that they are not carrying out public functions and, of course the decision in *YL* is still binding. The same 'public policy' arguments that have been considered by the courts when dealing with s6 HRA are likely to continue. On the other hand, if the same reasoning as was applied by the Court here to L&Q was applied to other RSLs, similar conclusions on the 'public authority' question may well be expected – opening up potentially wide avenues of challenge against a range of RSLs' decisions. At least for now...

Postscript: L&Q is to seek permission appeal to the HL/Supreme Court against this ruling as RSLs apparently fear the ruling could threaten their ability to borrow money outside the government's balance sheet, impacting on development programmes. Further, it has been reported in *Inside Housing* (29.6.09) that the G15 group of the largest RSLs in London is potentially backing them.

Ben McCormack and Laura Cawsey
6th July 2009

FORTHCOMING SEMINAR

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10th July 2009, Manchester (5CPD)

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