

Possession procedure: nuisance

[Brent LBC-v- Doughan \[2007\] EWCA Civ 135 judgment](#)

Following swiftly on the heels of the decision of the Court of Appeal in [Sheffield City Council –v- Shaw](#) discussed in [last month's newsletter](#) the Court of Appeal has again shown a reluctance to interfere with a decision of a county court judge. More strikingly however this was not just an instance of a postponed possession order being made rather than an outright order as in [Shaw](#) but a decision to make no order at all.

Mr Doughan, a secure tenant was alleged to have caused noise nuisance and sworn when drunk. The local authority obtained an interim ASBI in September 2004 with a power of arrest to expire at the end of October 2004. It was alleged that this was breached on two separate occasions by slamming a door, making excessive noise and shouting. In January 2005 he was made subject to a suspended order for committal to prison for four months, subject to conditions. An injunction was also granted subject to the same conditions which were not to cause a nuisance to any person residing at, visiting or engaging in a lawful activity at 91 & 93 Chichele Road, Willesden Green London.

He was alleged to have breached this injunction in September 2005 on two occasions involving slamming of the communal entrance door, and playing loud music in the early hours of the morning . This led to a further application to commit and possession proceedings commencing in October 2005. The injunction was then extended until trial or further order. Then he was alleged to have further breached and another injunction was made on the same terms, it was then alleged that Mr Doughan had abused verbally one of his neighbours at a railway station. Brent applied to commit and issued possession proceedings. This was complicated by the swearing leading to a public order arrest and proceedings for breach of an ASBO against swearing on the London underground network. This led to a yet further application to commit.

HHJ Bevington heard the application for possession and the two applications to commit. She dismissed them all and ordered the council to pay Mr Doughan's costs. The judge found that the premises were poorly insulated and that although one of his neighbours had been disturbed, another said she had never had any trouble from him. She construed the injunction narrowly as relating to persons at or in close proximity with the address named in the order. She found that both the neighbour and the Defendant suffered from an acute degree of sensitivity and mental health difficulties. She found that he had been noisy on the limited occasions alleged and that these had not been directed at the neighbour.

She refused to commit on the basis that even if she found that the acts had occurred on the civil standard she could not do so beyond reasonable doubt. She dismissed the claim for possession on the basis that she would not evict a man of his vulnerabilities for two incidents over that time, especially when she held that competent housing management could and should have foreseen that difficulties would arise by juxtaposing Mr Doughan, a man with a history of difficulty with neighbours, with this neighbour.

The Court of Appeal refused to interfere. It rejected a ground of appeal that the judge had failed to have regard to section 85A, as the judge had referred to the effect on the neighbour as a part of the balancing exercise. Moreover, the judge was entitled to take into account and did not treat as determinative in particular as far as housing management was concerned LJ May stated :

“This was an ingredient of the judge’s sensible view that the solution might not be to put Mr Doughan on the streets but to rehouse him in better insulated premises with less sensitive neighbours” .

The Court of Appeal also rejected a ground of appeal that the judge failed to consider making a suspended possession order on the basis that if the judge is satisfied it is not reasonable to make an order they should not fudge the issue by making a suspended order – as a matter of logic the only time suspension is to be considered is after an order has been held to be reasonable.

In his judgment LJ May also remarked that “**Eviction is likely to be a draconian step - because the spectre of intentional homelessness looms over it**”

The decision is a welcome reminder that courts are not always required to make orders for possession even where there have been proven acts of nuisance. Additionally, it properly reiterates two factors that some had tried to exclude from the ambit of relevant circumstances (a) the effects of eviction i.e. the likelihood of intentional homelessness can be taken into account, the court is only prohibited from seeking to make a decision on intentional homelessness and (b) the decision makes it plain that the suitability of the accommodation, including its construction and the foreseeable risk of placing two vulnerable neighbours together are relevant factors.

Ground 8 and exceptional circumstances

Guinness Trust –v- Lack & Howard 3 April 2007, HHJ Tetlow

GT commenced proceedings against the Defendants on a number of grounds including Ground 8 Schedule 2 Housing Act 1988. The arrears on the account arose solely due to the L/A treating the First Defendant’s 19 year old son as a non-dependent when in fact he was on income support and disability living allowance due to learning difficulties. The HB department issued instructions to amend the claim but this was not actioned for over two months, five days before the hearing. A day before the hearing GT were sent a schedule of payments to be made that week by BACS which included the backdated benefit by e-mail. The e-mail was not however opened until either after or contemporaneously with the court hearing on the following day. The rent account was updated later that day to show that the arrears were now well below eight weeks.

DJ Stockton was not aware that the payments were about to be made and made an order on Ground 8. The Defendants appealed. It had been thought that the payment instruction by BACS had been issued the day before the hearing and the Defendant argued that by analogy with a cheque that GT were to be treated as having received conditional payment that day see Day -v- Coltrane judgment. In the course of the appeal hearing however it became apparent that the BACS instruction had not been actioned until the day after the

hearing. Alternatively, Defendants argued that the fact of the imminent payment, together with the receipt of the payment details and the actions of GT when they opened the e-mail in treating the payments as made, were an exceptional circumstance within the meaning of Para 31 of the decision of the Court of Appeal in North British Housing Association – v- Matthews judgment

HHJ Tetlow held that the fresh evidence was admissible as it was neither party’s fault that it was not before the District Judge and it would have had an effect on his decision. Accordingly, he was entitled to place himself in the position of the District Judge on that day. HHJ Tetlow held that the imminence of the payment and the notification had they been known to the District Judge would have constituted exceptional circumstances and that the District Judge would have adjourned the claim. HHJ Tetlow set aside the possession order and the order for costs and gave directions for the hearing of the other grounds of possession.

This case is important for two reasons (i) it demonstrates that a Ground 8 order can be overturned for reasons not known to the district judge on the basis of new evidence and (ii) that the exceptional circumstances do not have to be known at the date of hearing but can come to light later.

Although the jurisdiction is limited, practitioners should beware against taking too pessimistic an approach to obtaining Ground 8 adjournments.

(James Stark appeared for Lack & Howard instructed by Gill Quine of Rochdale Law Centre)

Legal Training Seminar

6th June 2007 Homelessness – a full-day seminar on presented by Garden Court North Chambers housing team.

For more details please contact Helen Ray at chambers or visit our website.