Housing Team Legal Bulletin

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Lambeth LBC v Emeter [2010] EWCA Civ 527 (Renewed Permission Hearing)

Section 93(2) of the Housing Act 1985 provides that "[I]f the tenant under a secure tenancy parts with the possession of the dwelling-house or sublets the whole of it (or sublets first part of it and then the remainder), the tenancy ceases to be a secure tenancy and cannot subsequently become a secure tenancy". Therefore, once a tenant has sublet the whole of the property he cannot, provided that a valid notice to quit has been served, resist possession proceedings subsequently brought by his landlord even if he has evicted the subtenants and returned to the property.

So, for example, in *Lambeth LBC v Vandra* February 2006 *Legal Action* 29, where there was evidence that all the rooms in a property were occupied by persons other than the tenant and her family, the Court of Appeal found that the lower court was entitled to conclude that there had been an unlawful subletting of the whole property and the tenant was evicted on the basis that the secure tenancy had been lost.

Mr Emeter, perhaps aware that the prohibition was against subletting the whole of the property, thought he had found a clever way to sublet most the property without losing his security of tenure. This involved retaining a "locked room" at the property which he visited and used from time to time. The judge at first instance, HHJ Welchman, found:

…it may have been a useful postal address; he may have found it useful for a host of reasons at which I am not going to guess; but one can surmise possibilities for reasons of various kinds that he might have found it handy or convenient to keep the property. Indeed he may have wished to remain in control in that if you sub-let the whole of your property not only do you lose the security of tenure (if you were worried about that point) but you lose control, you are less able to influence, keep an eye on what is actually going on and ensure as far as you can that nothing comes to light which is going to bring an end to this quite satisfactory arrangement so far as he was concerned.

In different circumstances Mr Emeter may have been able to resist the possession claim, were it not for the fact that in this case the court found that notwithstanding the fact that he retained a room at the property he had not occupied the property as his only or principal home at the material time.

On appeal it was argued that that the judge had failed to pay enough attention to the locked room, but the Court of Appeal found you "do not have to have a subletting of the whole before you can conclude that the person who makes the subletting is not occupying the property as his only or principal home. The judge was well aware of the evidence about this and the locked room was not in any way conclusive".

Although Mr Emeter retained the locked room, that fact was not enough to persuade the court that he continued to occupy the property as his only or principal home and it was because he could not so persuade the court that he lost the case. However, unlike the prohibition on subletting the whole of the property, the requirement that a tenant occupy the property as his only or principal home can be remedied provided that it is done so before any notice to quit expires. Therefore, had Mr Emeter resumed possession of the property prior to the expiry of the notice to quit, he would have regained his security of tenure because, by retaining the locked room, he had not sublet the whole of the property.

His clever idea failed only because he was not occupying the property as his only or principal home at the time the notice to quit expired. Retaining a room is not necessarily enough to persuade the court that a tenant still occupies the property as his only or principal home, but is enough to prevent security from being lost forever.

Brookes v Secretary of State for Work and Pensions and the Child Maintenance and Enforcement Commission **[2010] EWCA Civ 420**

Article 8 of the European Convention on Human Rights is potentially engaged in many housing cases, including in particular possession proceedings. Although this case concerned a judicial review about child support, the Court of Appeal set out the correct approach to the proportionality test as follows:

"The test of proportionality is not identical to the question whether an action is Wednesbury *unreasonable, albeit that in many cases both tests may on the facts yield the same answer. Whereas the* Wednesbury *test involves asking whether the decision was within the range of those reasonably or rationally available to the decision maker, where proportionality is in question, the court must apply anxious scrutiny to ensure that the decision maker has struck the balance fairly between the conflicting interests of the claimant's right to respect for family life on the one hand and the public or competing interests within Article 8(2) on the other. In doing so, however, the court does not simply substitute its own decision. Its function is supervisory. It recognises and allows to the public body's decision maker a discretionary area of judgment. It will often be appropriate to adopt the two-stage process of asking first whether the intended objective can be achieved by means less interfering with the Article 8 right and second whether, if not, yet still the effect is excessive or disproportionate."*

There are of course a range of existing Court of Appeal decisions in possession claims in which the precise impact of Article 8 in such claims is analysed. In the context of "neighbour nuisance" allegations, and cases brought on discretionary grounds, see Castle Vale HT v Gallagher [2001] and Lambeth LBC v Howard [2001] by way of example. These cases confirm that it can be useful for a court to consider that eviction must be justified by reference to Article 8 as well as by reference to the domestic statute and that the "structured" approach set out above it preferred.

The burning issue at present is of course however the impact that this type of "proportionality" test can have on claims brought against those without any formal security of tenure. Present House of Lords authority restricts tenants' ability to rely on this kind of argument in this kind of case: Kay v Lambeth LBC [2006]; Doherty v Birmingham CC [2008]. On this point, the Supreme Court is to hear the appeal in Pinnock v Manchester City Council over four days in July.

Beedles v Guinness Northern Counties [2010] QBD Langstaff J

Mr Beedles brought a claim for a declaration and damages against his landlords on the basis that they had failed to make 'reasonable adjustments' to accommodate his disability. He complained that as an epileptic he had been unable to decorate his home for many years (he was unable get up ladders and carry out other tasks intrinsic to such work) and that as a result it was drab, shabby and depressing. He argued that GNC's refusal to do it for him was making it 'unreasonably difficult' for him to 'enjoy' his home and that this meant that the duty in section 24A(2) DDA 1995 (taken with either or both sections 24C and 24D of that Act) was breached. In short he argued that GNC ought to carry out the labour involved in decoration for him.

The case effectively turned on whether the word 'enjoy' meant simply 'use in accordance with the tenancy agreement' as GNC argued, or something more. GNC's point was that 'enjoy' in this context must mean 'enjoy' in the traditionally understood landlord and tenant context: see *Southwark v Tanner*. It was also argued that the recent CA decision of *Thomas Ashley v Drum HA* (2010) CA was binding on the court on this point. There it was said (at [28]) that "… the right to enjoy the premises is dictated by the terms of the lease itself. That right cannot exceed what the letting entitles the tenant do."

Mr Beedles argued that (1) para 24C(4) connoted enjoyment in the sense of 'gaining pleasure from' and not any narrower meaning; (2) this was supported by reference to some of the examples in the Code of Practice; (3) *Drum* was not in fact binding on the point anyway and arose in a context where the tenant as seeking to use the DDA to prevent eviction rather than as here Langstaff J dismissed any arguments that to find in favour of Mr Beedles would have left GNC open to many other similar claims (and thus to financial implications: see *Ross v Ryanair*). He also confirmed that – in respect of section 24D DDA a *Malcolm* style comparator ought not apply; rather the court ought to imagine the particular disabled person without his disability. However on the crucial issue of the meaning of 'enjoy' he agreed with GNC. He found that although it might be 'difficult' for Mr Beedles to enjoy his home, it was not unreasonably so, and thus no duty arose.

Full judgment likely to be on Bailii in the next couple of weeks.

(Ben McCormack of Garden Court North for Mr Beedles, instructed by Peasegoods).

Andrew Byles & Ben McCormack
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