November 2010 *Issue 8*

Housing Law E-bulletin

INTRODUCTION

Welcome to the latest issue of our regular Housing Law E-bulletin. We are delighted to continue to receive feedback from you. Please do send us your comments.

There have been a number of significant cases in housing law this quarter. We think the highlights include:

- *Manchester CC v Pinnock* - a landmark decision in a demoted tenancy case from the Supreme Court. Is the door now really ajar for a consideration of proportionality in possession claims?
- further consideration of s 193(5) HA 1996 by the Court of Appeal in *Vilvarasa v Harrow LBC*;
- the Court of Appeal deciding that s 49A of the DDA 1995 applies to local authorities' functions of inquiry under s 182 & 202 HA 1996 in *Pieretti v Enfield LBC*;
- the long awaited decision on tenancy deposit schemes: *Tiensia.*

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CONTENT

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CASE UPDATES

***Manchester City Council v Pinnock* [2010] UKSC 45**

In a landmark decision, the Supreme Court considered whether Article 8 afforded a defence to an occupier, under a demoted tenancy, who had no domestic law defence to a possession claim and, if so, whether the county court was permitted to examine and make findings of fact as to the proportionality of a public body's decision to evict such an occupier.

Originally, Mr Pinnock had been a secure tenant of the council and had occupied his home for over 20 years. Due to serious anti-social behaviour perpetrated by his partner and their children his tenancy had been reduced to a demoted tenancy. After serving a notice pursuant to s.143E HA 1996 and a subsequent review, the council issued fresh possession proceedings, seeking an outright order, on the basis of further alleged incidents of anti-social behaviour involving two of Mr Pinnock's sons. Before the county court judge (and, subsequently, the Court of Appeal) Mr Pinnock sought to challenge the factual basis on which the council had decided to seek possession and the review panel had decided to uphold that decision. He also sought to argue that the making of an order for possession would violate his rights under Article 8 ECHR.

Both tribunals refused to entertain Mr Pinnock's arguments on the basis of a lack of jurisdiction. The Court of Appeal held that s 143D HA 1996 limited the court's review to matters of procedure, and further held that the county court could not review the substance or rationality of a landlord's decision, or whether or not it was consistent with the occupier's rights under ECHR. Mr Pinnock appealed to the Supreme Court.

Held: (unanimously, dismissing the appeal)

(1) the Supreme Court was not bound to follow every decision of the ECtHR. However, where there was a clear and consistent line of European jurisprudence whose effect was not inconsistent with some fundamental substantive or procedural aspect of domestic law, it would be wrong for the Supreme Court not to follow that line. On this issue, the ECtHR's jurisprudence had not cut across domestic substantive or procedural law in some fundamental way;

(2) Article 8 need only be considered by the county court if it is raised in the proceedings by the residential occupier;

(3) where a domestic court is asked to make a possession order of a person's home pursuant to a claim brought by a public authority, the county court has the power to assess the proportionality of making a possession order and, in making that assessment, it also has the power to resolve any relevant dispute of fact;

(4) in cases where the county court is already bound to consider the reasonableness of making a possession order (ie for secure tenancies and for some cases involving assured tenancies), there is no real difference in practical terms between a consideration of proportionality and reasonableness. It is only in cases where the county court does not have to consider reasonableness that its obligation to consider proportionality "*does present a potential new*

obstacle to the making of a possession order";

(5) The demoted tenancy scheme was capable of being read so as to give effect to ECtHR's jurisprudence because s.143D allows the county court to be satisfied that the procedure laid down in s.143E or F has been complied with "*lawfully*" and lawfulness must be an inherent requirement of the procedure. It is open to the court to consider whether the procedure has been lawfully followed having regard to the defendant's Article 8 convention rights and section 6 of the HRA.

(6) on the facts, the Supreme Court was not convinced that Mr Pinnock had any real prospect of successfully relying on Article 8 proportionality, or indeed on his argument that the decisions of the council to issue and continue proceedings against him were unreasonable

Commentary:

Over the last few years, there has been a divergence of views between the House of Lords and the ECtHR over whether the domestic courts should be considering the proportionality of making a possession order: see cases such as *Kay, McCann* and *Doherty*. In September, the ECtHR in *Kay* held the applicants' Article 8 rights had been violated because they had been deprived, by the domestic courts, from arguing proportionality. *Pinnock* effectively sweeps away the majority view expressed in the House of Lords cases of *Kay* and *Doherty*; the minority view in *Qazi* and *Kay* now prevails.

It is important to note that the Court's decision on proportionality relates to possession proceedings brought by *public authorities*, ie local authorities or RSL's. It does not relate to private landlords. However, that does not preclude the possibility of similar arguments being made in private landlord cases, because the court determining the possession claim is itself a public authority. The Supreme Court expressed no view on this.

Other points to note are:

(1) the argument of whether or not particular premises are a person's "home" for the purposes of Article 8 is likely to re-emerge. Does very short term accommodation constitute a 'home'?

(2) the Court gave little real guidance on what might make a possession order disproportionate. Proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty;

(3) Article 8 need only be considered by the court if it is raised by the occupier. Then it should initially be considered by the court summarily. A public authority entitled to possession should, in absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties in relation to the distribution and management of housing stock, and this will be a strong factor in support of the proportionality of making a possession order. If there was a particular reason for wanting possession, for example, if the property is the only occupied part of a site intended for immediate development for community housing, the authority would have to plead it and adduce evidence in support.

(4) if an order is refused, it begs the question as to the status of the occupier who was otherwise lacking in any security of tenure. Do they occupy under licence? If so, how is it said the authority gave permission? Are they irremovable trespasser? This issue has yet to be tackled head on;

(5) *Pinnock* was a demoted tenancy case. However, it is not easy to see the Supreme Court adopting a different approach to other possession schemes. Those governing introductory tenancies and Part VII non-secure tenancies will come under the scrutiny of the Supreme Court at the end of the month in the conjoined appeals of *Salford City Council v Mullen [2010] EWCA Civ 336*, it's an opportunity for the Court to give further guidance. *(GSP & AD)*

Vilvarasa v Harrow LBC **[2010] EWCA Civ 1278**

The local authority accepted a "main" housing duty towards the Appellant under s.193 HA 1996. They then wrote to him stating that he was being offered unfurnished temporary accommodation, which would be let to him on an assured shorthold tenancy, and should be available shortly. That offer letter spelt out that if the appellant refused the offer, and the accommodation was held to be suitable, then the local authority's duty would be discharged. The Appellant was informed of the address of the accommodation by telephone approximately 4 weeks later. After viewing the property he refused the offer.

Harrow wrote to the Appellant stating that the accommodation was "suitable and reasonable for you and your family to accept", and gave him a further opportunity to accept the property. The Appellant refused, and the authority then wrote to him stating that its duty was discharged.

In a s.202 review decision letter the local authority again stated that the accommodation was considered to be "suitable and reasonable for you and your family to accept" and upheld the decision to discharge duty. The review decision was upheld on appeal by the county court Judge. On a second appeal to the Court of Appeal, the Appellant argued:

(i) s.193(5) required that the applicant must be informed of the consequences of refusal of the offer *at the same time as* the offer is made, and that was when he was informed of the address of the accommodation;

(ii) by stating that the accommodation was suitable "and reasonable to accept" the authority had applied the test under s.193(7F) as opposed to that under s.193(5), and accordingly the offer of an assured shorthold tenancy had to be treated as a qualifying offer within the meaning of s.193(7D), which the Appellant had been free to reject. Alternatively, the Council had conflated the tests in s.193(5) and 193(7F) and the decision should therefore be quashed.

HELD (dismissing the appeal):

(1) Harrow had complied with the requirements of s.193(5) when it made the offer of accommodation. The question of how long a local authority could continue to rely on a letter in the terms of Harrow's offer letter is a question of fact and degree. There is no requirement for the local authority to give the applicant the information required by s.193(5) at the time the offer is made.

(2) The question of whether the offer was a qualifying offer must be determined at the time it was made and the nature of the offer cannot be altered retrospectively by the test subsequently applied in the local authority's decision letters. The fact that the Council had superfluously found that the offer was reasonable to accept did not vitiate the decision that it was suitable. (*EG*)

Emma Godfrey appeared for the local authority

Pieretti v Enfield LBC **[2010] EWCA Civ 1104**

Mr Pieretti and his wife applied as homeless to the council, having been evicted from their previous assured shorthold accommodation pursuant to a s 21(1)(b) HA 1988 notice. However, their former landlady told the council that she would not have sought possession but for the applicants' non-payment and delayed payment of rent. Initially, the applicant and his wife both declared that they suffered from depression and other conditions but ticked the 'No' box in a form which asked them if they had a disability. However, in a subsequent form, they stated that they did have a disability. Their GP confirmed their medical conditions to the council. Approximately one year after the application, the council decided that the applicants were intentionally homeless due to non-payment of rent. The review decision was upheld on appeal by the county court judge. The applicants appealed.

HELD: (allowing the appeal)

1. the duty in s 49A(1) of the DDA 1995 (namely, in particular: "*every public authority shall in carrying out its functions have due regard to …*

(d) the need to take steps to take account of disabled persons' disabilities…") applies to local authorities in carrying out all of their functions when making decisions under s 184 and s 202 HA 1996;

2. In *Cramp v Hastings BC* [2005] EWCA Civ 1005, Brooke LJ had said that courts should be hesitant to criticise an decision-maker for failing to make inquiries "*if the appellant's ground of appeal relates to a matter which the reviewing officer was never invited to consider, and which was not an obvious matter he should have considered.*";

3. that dictum had been qualified by s 49A(1), which came into force in December 2006. In circumstances in which a decision-maker is not *invited* to consider an alleged disability, it would be wrong, because of the positive duty imposed by s 49A(1), to say that he should consider disability only if it is *obvious*;

4. in such circumstances, the decision-maker needs to have due regard to the need to take steps to take account of the disability. Precisely what steps are appropriate will depend on the circumstances of the case. However, the law does not require the decision-maker to take active steps to inquire into whether the person to be subject to the decision is disabled and, if so, is disabled in a way relevant to the decision;

5. in the present case, the review officer was in breach of the duty under s 49A(1) because she failed to make further inquiries into the applicants' disabilities to see if they were relevant to the decision under s 191 HA 1996, ie did they impinge on the questions of 'good faith' and 'deliberate act' .

Commentary:

It is unsurprising that the Court found s 49A(1) applies to local authorities' function under s 184 and 202 HA 1996. Perhaps more interesting, is that fact that the Court qualified the well-used dictum of Brook LJ in *Cramp* where s 49A(1) is applicable. (*AD*)

R (on the application of Khazai, Ibrahim, Azizi and Mirghani) v Birmingham City Council [2010] EWHC 2576 (Admin)

In conjoined appeals in judicial review proceedings, an allegation of misfeasance in public office was made against Birmingham. The basis of the allegation was a direction given by one of Birmingham's officers that *"…all single homeless presenting as homeless/roofless and domestic violence victims requiring refuge must be referred to the appropriate funded support service. We must not be completing a homeless application*".

Birmingham's response was that the direction had been withdrawn almost immediately. It was also said Birmingham was operating an unlawful "same day" approach to applications under s.184 HA 1996 and interim accommodation applications under s.188.

HELD:

(1) Although Birmingham's evidence as to when the direction had been withdrawn was unsatisfactory, there was no evidence of an "institutional" decision to ignore the Council's Part VII obligations on accepting homelessness applications. On the misfeasance claim, whatever was in the officer's mind at the time he issued the direction, it was not in the nature of bad faith or reckless indifference to the illegality of what he was putting forward, and these were necessary elements to found the tort of misfeasance in public office;

(2) A blanket "same day" policy requiring a decision on a homelessness application and, in consequence, an interim accommodation application would be unlawful. The evidence before the court did not disclose such a policy, but Birmingham should review its procedure with the benefit of high level legal advice.

Commentary:

Advisors for applicants continue to complain of "gatekeeping" by authorities in their attempt to reduce the number of applications. There can be no question that the resources available to authorities are under enormous pressure, and Birmingham is a case in point. However, "gatekeeping" is unlawful, and *Khazai et al* is a timely reminder of that. If there is cogent evidence of unlawful gatekeeping, advisors acting for applicants may wish to consider a request under the Freedom of Information Act to expose such practices. *Khazai* also reminds authorities not to adopt a "same day" approach". It is only in the most straightforward of cases that a decision can be reached on the same day as the application itself, and in the majority of cases some investigation will be called for, because staff will not have all of the necessary information and evidence. (*GSP*)

Tiensia v Vision Enterprises Ltd & Honeysuckle v Fletcher and others [2010] EWCA Civ 1224

This much anticipated decision concerned interpretation of sections 213 and 214 of the Housing Act 2004 which requires landlords of property let on assured shorthold tenancies who receive security deposits to protect the deposit with one of three authorised tenancy deposit schemes. Section 213 requires the landlord to comply with the initial requirements of the scheme used, to do so within 14 days of receipt of the deposit and to provide certain prescribed information about the scheme to the tenant. If a landlord fails to comply with the requirements of that section the paying party could by application seek certain sanctions set out in section 214 including an order for the return of the deposit and a payment of three times the value of the original deposit. The Court of Appeal considered whether the 14 day time limit was critical, leading to an inevitable imposition of the sanctions if the landlord delayed, or whether the landlord could comply late and so avoid the sanction.

Held (majority decision, Sedley LJ dissenting)

The sanctions set out in section 214 only applied if the landlord continued to fail to comply with one of the schemes at the date of the hearing of the tenant's application.

Rejecting the arguments that the sanction applied either if the landlord failed to protect the deposit within 14 days of receipt or if the landlord failed to protect the deposit at the date of issue of the tenant's application, Rimer LJ and Thorpe LJ considered that the wording of section 214 led to the conclusion that the court was being asked to decide the position at the time it came to be considered rather than whether there had been historical compliance. Furthermore, that the purpose of the legislation (to ensure the deposit was fairly dealt with and tenants were protected from unscrupulous landlords) was furthered by ensuring that the deposit was protected in a scheme whenever that might eventually happen. The Court also rejected the argument that, where the scheme used provided within its own rules a time limit for registering the deposit following receipt, a failure to comply with this time limit meant that the landlord had failed to comply with the "initial requirements" of the scheme within the meaning of section 213.

Noting the potential for injustice however the sections were interpreted, Rimer LJ stated that a tenant who issued proceedings prior to the landlord protecting the deposit ought to be protected in costs provided of course that they had complied with the spirit of the Civil Procedure Rules by sending the requisite letter before action rather than seeking to ambush the landlord.

Commentary

The Tenancy Deposit scheme has given rise to numerous potential issues, the time of compliance being but one. Remaining issues would appear to include:

(1) whether a tenant can bring an application after the termination of their tenancy (and whether a landlord can protect the deposit post termination);

(2) the extent to which the sections apply to deposits taken prior to the Tenancy Deposit scheme coming into force & the effect of a

renewal of the tenancy where the previous deposit is applied to the new tenancy or the effect of the recent substantial increase in the rental limit for assured shorthold tenancies;

(3) who can bring an application and against whom an application can be made (landlord or landlord's agent or both); and

(4) the position of LPA Receivers and Mortgagees in Possession. *(MB)*

Ravichandran v Lewisham LBC [2010] EWCA Civ 755

Having accepted a main housing duty to the applicant under s.193 HA 1996, the local authority made him an offer of permanent accommodation, which was a final offer within s.193(7A). The Council expressly stated that if the applicant refused the offer, it would discharge its duty under s.193(7). On a s.202 review of the decision that duty was discharged, the Council addressed the question of whether the accommodation offered had been suitable, but failed lawfully to consider whether the offer had been reasonable for the applicant to accept.

HELD: In circumstances where the local authority had expressly stated that the offer was being made under s.193(7), it was not open to it to seek to rely on s.193(5) as a fallback position. *Omar v Birmingham City Council* [2007] EWCA Civ 610 should be confined to its own facts. (*EG*)

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