Neutral Citation Number: [2011] EWCA Civ 442

Case No: A2/2010/1501

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
The Hon. Mr Justice Langstaff
HQ10X02893

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2011

Before:

LORD JUSTICE MAURICE KAY
LORD JUSTICE CARNWATH
and
LORD JUSTICE MOSES

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Between :

Michael Beedles	**Appellant**
- and -	
Guinness Northern Counties Limited	**Respondent**

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- -

Mr Ben McCormack (instructed by **Peasegoods**) for the **Appellant**
Mr John Crosfill (instructed by **Keoghs LLP**) for the **Respondent**
Ms Catherine Casserley (instructed by **the Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 2nd March 2011

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Judgment

Lord Justice Moses :

1. It appeared that this appeal turned on the meaning of the words "enjoy" and "enjoyment" in s.24C of the Disability Discrimination Act 1995. Mr Beedles, the appellant, is a tenant under an assured tenancy of Guinness Northern Counties Ltd (Northern Counties), landlord of the house in which he lives in Blackley in Manchester. Mr Beedles contended that the 1995 Act obliged the landlord to carry out repairs and decorating work in his house to a standard which would enable him to gain pleasure from his tenancy.

2. Langstaff J, in a judgment dated 27 May 2010, rejected the tenant's interpretation of the provisions of s.24C of the 1995 Act. He concluded that the tenant had no greater right under the 1995 Act than that which was conferred by the terms of his lease.

3. Mr Beedles is disabled, within the meaning of the 1995 Act. Amongst other conditions, he suffers from epilepsy which every one or two weeks causes generalised seizures of the *grand mal* variety. If he were to mount a ladder for the purposes of decorating his premises he might fall and seriously injure himself. The assured tenancy, which began on 4 September 1995, imposed on the tenant legal responsibility for internal decoration, to keep the interior of the premises clean and in a good state of decoration, allowing for fair wear and tear. He was required to decorate all internal parts of the home as often as necessary to keep them in reasonable decorative order (see clause 3.3.1).

4. The premises were decorated when he first arrived and he has redecorated them himself at least once.

5. The landlord, Northern Counties, has repeated both before the judge and before this court that it waives its right to require Mr Beedles to put or keep the house in good decorative repair. But it disputes that it has any obligation to undertake redecoration itself.

6. Mr Beedles' complaint is that he cannot decorate the house himself because he might have a seizure and seriously injure himself. He is at present in the house much more than other tenants might expect to be. But he cannot "enjoy" his occupation as tenant because the house has become shabby, to the extent that he feels uncomfortable in his surroundings. This is not only unpleasant but is likely to discourage visitors.

7. The focus of the case before Mr Justice Langstaff was directed to the meaning of the words "enjoy" and "enjoyment". He concluded that the use of the words "enjoy" or "enjoyment" in s.24C related to no more than the right to "enjoy" the premises as dictated by the terms of the lease (paragraphs 16 and 19 of the judgment).

8. The provisions relating to let premises were introduced by the Disability Discrimination Act 2005. The introduction of provisions relating to let premises represented some legislative progress towards equal treatment for the disabled. Those provisions have now been repealed and replaced by the Equality Act 2010 which contains, in different terms, provisions governing discrimination relating to disability in the context of premises (see in particular s.20 in Schedule 4). If this appeal turned on the original dispute as to the meaning of "enjoy" and "enjoyment" it would affect the construction of the new Act which refers to a tenant's "enjoyment of premises".

9. The provisions relevant to this appeal are:-

"**24A Let premises: discrimination is failing to comply with duty**

(1) It is unlawful for a controller of let premises to discriminate against a disabled person –

(a) who is a person to whom the premises are let;

(2) For the purposes of subsection (1), a controller of let premises discriminates against a disabled person if –

(a) he fails to comply with a duty under section 24C or 24D imposed on him by reference to the disabled person; and

(b) he cannot show that failure to comply with the duty is justified (see section 24K).

24C Duty for the purposes of section 24A(2) to provide auxiliary aid or service

(1) Subsection (2) applies where –

(a) a controller of let premises receives a request made by or on behalf of a person to whom the premises are let;

(b) it is reasonable to regard the request as a request that the controller take steps in order to provide an auxiliary aid or service; and

(c) either the first condition, or the second condition, is satisfied.

(2) It is the duty of the controller to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provide the auxiliary aid or service (but see section 24E(1)).

(3) The first condition is that –

(a) the auxiliary aid or service –

(i) would enable a relevant disabled person to 'enjoy', or facilitate such a person's 'enjoyment' of, the premises, but

(ii) would be of little or no practical use to the relevant disabled person concerned if he were neither a person to whom the

premises are let nor an occupier of them; and

(b) it would, were the auxiliary aid or service not to be provided, be impossible or unreasonably difficult for the relevant disabled person concerned to 'enjoy' the premises.

(4) The second condition is that –

(a) the auxiliary aid or service –

(i) would enable a relevant disabled person to make use, or facilitate such a person's making use, of any benefit, or facility, which by reason of the letting is one of which he is entitled to make use, but

(ii) would be of little or no practical use to the relevant disabled person concerned if he were neither a person to whom the premises are let nor an occupier of them; and

(b) it would, were the auxiliary aid or service not to be provided, be impossible or unreasonably difficult for the relevant disabled person concerned to make use of any benefit, or facility, which by reason of the letting is one of which he is entitled to make use.

24D Duty for purposes of section 24A(2) to change practices, terms etc

(1) Subsection (30 applies where –

(a) a controller of let premises has a practice, policy or procedure which has the effect of making it impossible, or unreasonably difficult, for a relevant disabled person –

(i) to 'enjoy' the premises, or

(ii) to make use of any benefit, or facility, which by reason of the letting is one of which he is entitled to make use, or

(b) a term of the letting has that effect,

and (in either case) the conditions specified in subsection (2) are satisfied.

(2) Those conditions are –

(a) that the practice, policy, procedure or term would not have that effect if the relevant disabled person concerned did not have a disability;

(b) that the controller receives a request made by or on behalf of a person to whom the premises are let; and

(c) that it is reasonable to regard the request as a request that the controller take steps in order to change the practice, policy, procedure or term so as to stop it having that effect.

(3) It is the duty of the controller to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change the practice, policy, procedure or term so as to stop it having that effect (but see section 24E(1)).

24E Sections 24C and 24D: supplementary and interpretation

(1) For the purposes of sections 24C and 24D, it is never reasonable for a controller of let premises to have to take steps consisting of, or including, the removal or alteration of a physical feature.

(2) Sections 24C and 24D impose duties only for the purpose of determining whether a person has, for the purposes of section 24A, discriminated against another; and accordingly a breach of any such duty is not actionable as such.

(3) In sections 24C and 24D 'relevant disabled person', in relation to let premises, means a particular disabled person –

(a) who is a person to whom the premises are let;

…

(4) For the purposes of sections 24C and 24D, the terms of a letting of premises include the terms of any agreement which relates to the letting of the premises."

10. The auxiliary aids or services, to which s.24C refers, are not defined. But the Act confers power to make regulations to identify those things which are and those things which are not to be treated as auxiliary aids or services (see s.24L(1)(h)). By Regulation 5(1) of the Disability Discrimination (Premises) Regulations 2006 SI 2006/887:-

> "(a) the removal, replacement or (subject to paragraph (2)) provision of any furniture, furnishings, materials, equipment or other chattels;
>
> (b) the replacement or provision of any signs or notices;
>
> (c) the replacement of any taps or door handles;
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> (d) the replacement, provision or adaptation of any door bell, or door entry system;
>
> (e) changes to the colour of any surface (such as, for example, a wall or door)."

11. The judge's conclusion was that the Act did not confer:-

> "some right to general happiness which is not necessary in the context of a letting…those who enter into letting agreements are contracting to have the use of premises within the landlord and tenant sense. The context here is not to disadvantage the man who is disabled where he is renting premises. It does not seem to me to make obvious sense that the legislation should be obliging provision to him of aid or services by reference to some broad concept of 'enjoyment' which goes beyond that which would ordinarily be expected in such a transaction." (Judgment, paragraph 18.)

12. This rejection of Mr Beedles's contention that his landlord was under an obligation to enable him to derive pleasure from his tenancy owed much to the decision of the House of Lords in *Southwark London Borough Council v Tanner & Others* [2001] 1 AC. It is worth, in the context of the arguments advanced before Langstaff J, quoting Lord Hoffman. He referred to a clause in the tenant's agreement that the council should not interfere with their right to "quiet enjoyment" of the premises. He continued:-

> "Read literally, these words would seem very apt. The flat is not quiet and the tenant is not 'enjoying' it. But the words cannot be read literally. The covenant has a very long history. It has been expressed or implied in conveyances and leases of English land for centuries. It comes from a time when, in a conveyancing context, the words 'quiet enjoyment' had a technical meaning different from what they would today signify to the non-lawyer who was unacquainted with their history. So in *Jenkins v Jackson* [1888] 40 Ch D 71,74 Kekewich J felt obliged to point out the word 'quietly' in the covenant:
>
> > 'does not mean undisturbed by noise. When a man is quietly in possession it has nothing whatever to do with noise… 'peaceably and quietly' means without interference – without interruption of the possession.'

> Likewise in *Kenny v Preen* [1963] 1 QB 499, 511 Pearson LJ explained that:
>
> > 'the word 'enjoy' used in this connection as a translation of the latin word '*fruor*' refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it.'
>
> The convenant for quiet 'enjoyment' is therefore a covenant of the tenant's lawful possession of the land and will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him. For present purposes, two points about the covenant should be noticed. First, there must be a substantial interference with the tenant's possession. This means his ability to use it in an ordinary lawful way." (10B-F)

Lord Hoffman took the view that regular excessive noise could constitute a substantial interference of "enjoyment" of the premises (11A).

13. It beggars belief that the draughtsman, less than five years after the decision in *Southwark,* used the words "enjoy" and "enjoyment" of premises to convey a meaning exactly the opposite to the meaning ascribed to those words not only in historical jurisprudence but as recently as October 1999 by the House of Lords.

14. The judge gave other reasons for rejecting the submission. In particular, he took the view that *Thomas Ashley v Drum Housing Association Ltd* [2010] EWCA CIF 265 was binding authority that the right to "enjoy" premises is dictated by the terms of the lease (Scott Baker LJ, paragraph 28).

15. It is unnecessary to analyse the judge's reasoning further and whether the passage in *Thomas Ashley*, on which the judge relied, was or was not part of the ratio. It is unnecessary because that which had hitherto been thought to be the nub of Mr Beedles' argument no longer appears to be the case. Mr McCormack, on his behalf, has moderated his submission.

16. In attractive submissions Mr McCormack does not persist in contending that the landlord was required to take steps to ensure that his disabled tenant obtained pleasure from his tenancy. He has advanced his case with firmer footing. To do the argument justice, I should set out what he now argues in a supplementary replacement skeleton argument in a passage which found no place in the argument before the judge or in the original written argument for this court:-

> "For the appellant to be able to 'enjoy' his premises he ought to be able to do more than simply 'live there'. He ought to be able to 'live' as would any typical tenant – whether disabled or not. – He should therefore be able to, for example: watch TV, listen to the radio, occupy himself with hobbies, have friends or family come to visit, and feel reasonably comfortable in his environment. These are the normal activities of any normal tenant, albeit that they go beyond the simple occupation of the premises."

17. Once Mr Crossfil, for Northern Counties, appreciated that he no longer needed to defeat the argument advanced before the judge he suggested that there was little difference between that for which Mr Beedles contended and a proper construction of s.24C. The use of the words "enjoy" and "enjoyment" in s.24C conveys the meaning that the tenant should be able to use those premises in "an ordinary lawful way". That may well connote the meaning that Mr Beedles ought to be able to live in his home as would any typical tenant, whether disabled or not. The reality seems to be that there was little space between the legal argument of landlord or tenant as to that which the relevant section conveyed.

18. But where did that leave Mr Beedles? He is faced with incontrovertible finding of facts as to the state of decoration. The judge found, as a fact, that wallpaper has curled away at the seams, notably above a radiator, there is a degree of discolouration above a lamp and some patches of damp and mould (judgment, paragraph 11). He found as a fact that the decoration in the premises was not "so woeful that it can be said that it would be unreasonably difficult for the claimant to continue living in the premises and 'enjoying the premises' in the sense in which he had construed the section". It is of note that the judge was not even prepared to make a finding that it was difficult to live in the house at all, without it being redecorated. But he was, for the purposes of the case, prepared to assume such difficulty without concluding that it was unreasonably difficult. The judge found:-

> "25. I turn therefore, with those observations, to apply the law as I have set it out to the facts which I have adumbrated. Here it is not impossible for the claimant to enjoy the premises. It has not been argued to the contrary. He does enjoy the premises in the sense that he lives in the house. Is it difficult for him to live in the house as it is without the house being redecorated? I find it difficult to conclude that it actually is because taking the view I do of what is meant by enjoyment, I ask whether there is any term or condition under which he is entitled to enjoy the premises in the landlord and tenant sense the observance or benefit of which is rendered more difficult as a consequence of his epilepsy. I am prepared, however, for present purposes to assume without deciding it that it is made out because one of the terms of the tenancy is that he should redecorate, and that this disabled man cannot reasonably do that, in so far as decoration is to be carried out from a ladder (no one has suggested in argument the utilisation, for instance, of long handled rollers or the like). The matter has been argued as one of general principle. I do, however, think that there are aspects of decoration, which are well within his physical capabilities without any more risk than sadly he already has in his day-to-day life, by reason of his condition. Accepting that it is difficult, though with hesitation is it unreasonably so? I have almost answered that question

> in the hesitation which I have expressed about the difficulty.
>
> 26. Taking an objective view and taking into account all I know of him, it seems to me that provided that the defendants, as they have said they will do, do not within the continuation of the tenancy require the claimant to decorate and do not claim against him or his heirs and assigns in respect of any want of decoration at the conclusion of the tenancy, the difficulty taken in context which he has is not unreasonable. He can occupy the premises. Indeed he does, he lives there. He spends much time there. The nature of the disrepair is demonstrated (though with the shortcomings I have mentioned) by the photographs. To the extent that the wallpaper is peeling, it looks to me to be easily remediable in many cases, if not all, from ground level, with the assistance of a bit of paste. In cross-examination, Mr Crosfill secured agreement to the proposition that the mould or the dirt above the light could be cleaned away. A bit of sugar soap, it was said, was what was required. This is not a case in which the state of decoration is so woeful that it can be said that it would be unreasonably difficult for the claimant to continue living in the premises and enjoying the premises in that sense."

19. These findings of fact make it impossible, in my view, to conclude that the absence of decoration undertaken by the landlord made it impossible or unreasonably difficult for Mr Beedles to "enjoy" the premises in the sense advanced now by both tenant and landlord.

20. In those circumstances, the appeal was doomed to failure, on the basis of the finding of facts, and it could only be kept alive by an attempt by Mr Beedles to maintain the legal dispute as to the meaning of the words "enjoy" and "enjoyment". Now that dispute has fallen away there is little left for argument and still less to form the basis of a successful appeal.

21. Extensive written argument and the written intervention of the Equality and Human Rights Commission lead me to stress the correct approach to ss.24C and D. I should record that no argument was advanced in reliance upon s.24D, either before us or before the judge. Had the landlord insisted upon the term requiring him to keep his home in "a good state of decoration" and "in reasonable decorative order", the tenant might have successfully argued that the landlord should have taken such steps as were reasonable to change that term so as to stop it having the effect of requiring him to put his safety at risk. There was some short debate as to the effect of s.24D in the context of 24C. Doubt was expressed as to the extent to which the court should take into account the fact that when the tenant entered into the tenancy agreement he entered into an obligation to keep the premises in good decorative order. It is unnecessary to resolve this issue save that Northern Counties accepted that the effect of s.24D might

have been to require it to abjure from relying on that provision. But it is unnecessary for the purposes of this appeal to reach any conclusion.

22. Of greater significance was the reliance by both Mr Beedles and the Equality and Human Rights Commission on the jurisprudence as to the objectives of the disability provisions; the Explanatory Notes when the amending provisions relating to premises were introduced and the statutory Codes of Practice all reinforce the need to construe the legislation purposefully. Parliament requires reasonable adjustments to be made to cater for the special difficulties of the disabled. In *Archibald v Fife Council* [2004] ICR 954 paragraph 47 [2004] UKHL 32 Baroness Hale described the duty to make reasonable adjustments as entailing "an element of more favourable treatment". As Lord Brown put it in *Lewisham LBC v Malcolm* [2008] 1 AC 1399 paragraph 114:-

> "…where Parliament is clearly intent not merely on levelling the playing field for the disabled but in securing positive discrimination in their favour it does so by requiring reasonable adjustments to be made to cater for their special difficulties."

Accordingly, as Lord Neuberger said in *Malcolm* (paragraph 141) anti-discrimination statutes should, in general, be construed benevolently towards their intended beneficiaries.

23. It seems to me that that approach to the construction of the words "enjoy" and "enjoyment" does require an assessment to be made as to whether the auxiliary aid or service requested by the disabled tenant would enable him to live as would any other typical tenant in the let premises. This construction derives from Lord Hoffman's recognition that "quiet enjoyment" connotes an ability to use the premises in "an ordinary lawful way".

24. The Code of Practice "Rights of Access. Services to the public, public authority functions, private clubs and premises" ("the Part 3 Code") provides illustrations of a landlord's obligations under s.24C. The Code was introduced pursuant to the power contained in s.53A of the 1995 Act. A tribunal or court is required to take into account any provision of a code which appears to that tribunal or court to be relevant to any question arising in any proceedings under the 1995 Act (s.51(5)).

25. The appellant sought to demonstrate the width of the references to "enjoy" and "enjoyment" in s.24C by reference to examples in the Code:-

> "The arthritic tenant in furnished accommodation requires a different chair in order to use the premises (15.35);
>
> A tenant with hearing impairment has the volume on his television turned up. On complaints by other tenants the landlord provides the tenant with a set of headphones, a step which the Code describes as reasonable. The Code also describes the replacement of fuses by a management company as a reasonable step for the landlord to take."

26. Although these examples were proffered in support of the appellant's original submission, they seem to me to be sensible illustrations of the more limited

submission that "quiet enjoyment" means an ability to use the premises in an ordinary, lawful way. Although these examples seem to me illustrative of the correct meaning of the section, it would be wrong in a postscript to this judgment to give any more forceful stamp of judicial approval to the examples in the Code. The examples in the Code cannot determine the meaning of the statute.

27. I should add that there was one point in the judgment where the judge might be understood as saying that cost of redecoration and the implications that housing associations might become liable to redecorate were irrelevant factors. The judge described that argument as "a floodgate" argument (paragraph 22). I do not agree. It seems to me issues of cost would be relevant to the question whether the steps requested were:-

> "reasonable, in all the circumstances of the case, for him to have to take in order to provide the auxiliary aid or service for the purposes of s.24C(2)."

But, for the reasons I have given, the argument never reached issues under s.24C(2) because the judge found as a fact that it was not impossible or unreasonably difficult for Mr Beedles to enjoy the premises for the purposes of s.24C(3)(b).

28. Accordingly, whilst this case affords yet another opportunity to encourage a benevolent approach to the statute to further its purpose of ensuring equality for the disabled, the facts as found preclude a successful appeal.

Lord Justice Carnwath:

29. I agree that the word "enjoy" must be read in its usual sense in similar contexts, as referring to "the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it" (per Pearson LJ in *Kenny v Preen* [1963] 1 QB 499, 511, cited above). I also agree that on the facts found by the judge, the appeal must fail for the reasons given by Moses LJ. I wish to reserve my position as to whether in any event the statute, in the absence of more specific words, can be read as transferring a positive contractual obligation to repair from the tenant to the landlord.

Lord Justice Maurice Kay:

30. I also agree.