FIELD COURT CHAMBERS

Housing Law e-bulletin

Knowsley Housing Trust v White, Honeygan-Green v Islington LBC, Porter v Shepherds Bush Housing Association **[2008] UKHL 70**

In *White*, W was an assured tenant who had breached an SPO. She sought a declaration that she remained an assured tenant and could proceed on her right to buy. In *Honeygan*, H was a secure tenant seeking to enforce her right to buy but who had, since service of her s.122 notice, been made subject to an SPO, which she had subsequently breached. Islington appealed the Court of Appeal's decision that her right to buy revived when the SPO was discharged. In *Porter*, P sought to discharge an SPO, having initially been in breach of it but later having discharged all his arrears.

The issues were: (i) where an SPO is made under the HA 1988, when does the tenancy come to an end? (ii) Under the HA 1985, can the court, when making an SPO, proleptically direct that the order be discharged once its terms have been complied with? (iii) if so, can the court proleptically direct that the order be discharged even if the terms of suspension have not been strictly complied with? (iv) Under the HA 1985, where the court has made an SPO, without a proleptic discharge clause but with a provision that the order will no longer be enforceable once the arrears and costs are paid, can a defendant who has paid those arrears and costs but not strictly complied with the terms of suspension seek a discharge/variation of the SPO? and (v) if a tenant who has served notice exercising the right to buy is then made subject to an SPO, does the right to buy pursuant to that notice revive if an when the order is discharged.

Held: (i) that an assured tenancy subject to a possession order does not end until possession is delivered up; the wide powers of variation and discharge under s.9 of the HA 1988 firmly points in favour that conclusion. Any other construction would create the same host of conceptual problems that have arisen in the context of secure tenancies and the "tolerated trespasser".

(ii) On a fair reading of s.85 HA 1985, it is open to a court to include a proleptic discharge provision in an SPO; that section should be construed to confer as much flexibility as possible on the court, and in such a way as to minimise future uncertainty and the need for further applications.

(iii) s.85(4) has the effect not merely that the court ordering possession can direct that the order be discharged if the conditions referred to in s.85(3) are met, but that the court can also then decide the extent to which compliance will not required in order for the SPO to be discharged.

(iv) The wide powers granted to the court under s.85 HA 1985 indicate that a tenant, who has paid off the arrears and costs, should have a right to apply for a discharge/variation of the SPO.

(v) the right to buy in such circumstances is so revived.

On the disposal of the appeals, Mrs White was entitled to a declaration that she is, and since the commencement of her

tenancy has always been, an assured tenant.

Mr. Porter's application for a discharge of the SPO made against him was remitted to the County Court.

Ms Honeygan-Green's right to buy was revived retrospectively and with immediate effect when the order for possession was discharged. Islington's appeal was dismissed.

Marshall [2002] HLR 428 and *Swindon v Aston [2002] EWCA Civ 1850* overruled.

Miles Croally of Chambers appeared as counsel for *Porter*.

***Dixon v Wandsworth LBC* [2009] EWHC 27 (Admin)**

(HHJ Bidder QC sitting as a deputy judge of the High Court)

On an application to set aside a possession order, the applicant argued that the common law rule in *Monk v Hammersmith & Fulham LBC* [1992] 1 AC 478 is inconsistent with Art 8 ECHR, relying on the decision of the ECHR in *McCann v UK* (application 19009/04).

Held: the domestic law strikes a proper and unassailable balance between the rights of joint tenants and their landlords, and it is not arguable that the rule in *Monk* is incompatible with article 8.

De Winter Heald v Brent LBC, unreported

Willesden County Court

12th & 13th January 2009

Ms De Winter Heald applied to the Respondent ("the Council") as homeless. In a review decision made in March 2008, it determined that she was not in priority need and therefore did it not owe her the 'full' housing duty under s.193 Housing Act 1996. Ms De Winter Heald appealed against that review decision and, amongst other grounds, argued that the Council had failed to make a review decision at all because it had unlawfully contracted out the review decision-making to an external Reviews Manager, who was not an employee of the local authority. The Council argued that its policy of contracting out its review decisions was lawful, relying, inter alia, on the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996 No. 3205) and Chapter 21 of the Homelessness Code of Guidance for Local Authorities.

Held: local authorities were lawfully entitled to contract out the review process, including the making of review decisions, for the reasons put forward by the Council. Ms De Weald is currently contemplating bringing an appeal to the Court of Appeal.

Adrian Davis of Chambers appeared for the Council.

***Banks v Kingston-upon-Thames RB* [2008] EWCA Civ 1443**

Mr Banks applied to the Council as homeless in 2006. In its first s.184 HA 1996 decision it found him not to be in priority need. Instead of requesting a review, Mr Banks entered into a short-term licence agreement for a room in a house. By February 2007, Mr Banks again applied to the Council as homeless and provided further medical information from his doctors.

The Council issued its second s.184 decision, this time finding Mr Banks neither homeless nor threatened with homelessness. Mr Banks requested a review of that decision, in the course of which he provided further medical information. In March 2007 his landlord served him with a notice to quit.

In its review decision, the Council varied its second s.184 decision, found Mr Banks to be homeless but held that he was not in priority need.

He appealed to the county court, pursuant to s.204 HA 1996, arguing that (i) the Council was bound (but failed) to implement the requirements of regulation 8(2) of the Allocation of Housing and Homelessness

(Review Procedures) Regulations 1999 (SI 1999 No. 71) because the review decision had upheld the original decision on different grounds; (ii) if reg. 8(2) was not applicable, natural justice required the Council to allow him the opportunity to comment on matters which were held against him; and (iii) the Council had failed to make sufficient inquiries. The County Court judge dismissed his appeal. Mr Banks appealed to the Court of Appeal.

Held: (i) the procedural safeguards in the 1999 Regulations are of the highest importance; (ii) one important objective of reg. 8(2) is to ensure that, where the review officer is minded to confirm a decision upon different grounds, an applicant has the opportunity to make representations; (iii) although a literal interpretation of reg. 8(2) would make it difficult to conclude that there was a 'deficiency...in the original decision', a purposive construction should be given to reg. 8(2) to achieve that objective; and (iv) in the present case, Mr Banks having become homeless, the second s. 184 decision became deficient in that it had not addressed the question of priority need.

***Wandsworth LBC v Whibley* [2008] EWCA Civ 1259**

Following a trial, a District Judge made a postponed possession order with conditions relating to payment of rent and observing the tenancy terms and conditions. Subsequently, neighbours complained to the Council about anti-social behaviour in the Respondent's flat and common parts. The Council wrote to the Respondent, asserting that he had breached the conditions of the possession order and asking him to notify them within 7 days if he disputed their right to apply for a date to be fixed for possession. He denied the allegations.

The Council then applied to the county court to fix a date for possession, asking that the application be determined without a hearing. However, a hearing was ordered, at which a District Judge set directions for a full contested hearing. The District Judge gave the Council permission to appeal his directions.

On appeal, the Council argued that, save in quite exceptional cases, county courts should give summary judgment without hearing evidence on applications to set a date on a postponed possession order, basing its argument primarily on the provisions of 55 CPR PD 10 (which was designed for cases of repeated non-payment of rent). HHJ Hallon rejected those arguments and dismissed the appeal. The Council appealed to the Court of Appeal.

Held: dismissing the appeal, there is no general rule that applications to fix a date for possession following the making and breach of a postponed possession order should be dealt with summarily, that is without considering more evidence than is submitted in writing by a lessor. In the present case, the Appellant had not yet proved a breach of the conditions of the possession order, and without such proof it could not ask the court to fix a date for possession.

And finally…

Miles Croally will be speaking about *Porter v Shepherd's Bush HA* at a Chambers seminar on Thursday 5th March at 6pm. Please contact our clerks on 020 7405 6114 or clerks@fieldcourt.co.uk for details.

Members of Field Court Chambers who practice in housing law can be found at our website www.fieldcourt.co.uk