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Housing Law E-bulletin

INTRODUCTION

Welcome to the latest issue of our regular Housing Law E-bulletin. Thank you for the positive feedback on the change of format – we are glad you like it!

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

- yet more guidance from the Court of Appeal on *Kay* gateway (b) defences in possession proceedings, this time in relation to tenancies granted under Part VII HA 1996 and the Introductory tenancy scheme: *Salford CC v Mullen and 4 other appeals;*
- consideration of whether it is an abuse of process to bring a disrepair claim after having previously compromised possession proceedings: *Henley v Bloom;*
- dogs, discrimination and the DDA 1995: *Thomas-Ashley v Drum HA Limited.*

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CASE UPDATES

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CASE UPDATES

***Salford CC v Mullen, Hounslow LBC v Powell, Leeds CC v Hall, Birmingham CC v Frisby, Manchester CC v Mushin, SS for CLG as Intervener* [2010] EWCA Civ 366**

The Court of Appeal heard these 5 appeals as it considered it important (i) for advisers and judges to know in which instances a *Kay v Lambeth LBC* gateway (b) defence is available in the County Court; and (ii) to be clear as to the scope of a gateway (b) defence in relation to different types of non-secure occupier. In reaching its decision, the Court was mindful that the case of *Pinnock v Manchester CC* [2009] EWCA Civ 852 (concerning demoted tenants) is due to be heard in the Supreme Court in July by a panel of 9 Justices – the size of the panel indicating that *Kay* and *Doherty* will be looked at again. In *Mullen*, *Frisby* and *Hall*, the occupiers had all been granted introductory tenants. In *Powell* and *Mushin,* the occupiers had been granted non-secure tenancies pursuant to the homelessness legislation. All had sought to utilize a gateway (b) defence in order to defend possession proceedings brought against them.

Held (dismissing all appeals. Permission to appeal to Supreme Court in *Powell* and *Hall*):

(1) in general, even when a person does not have private law right to occupy he is able to run a gateway (b) defence in the County Court. However, the County Court does not have jurisdiction to consider a gateway (b) defence if the provisions of a statutory scheme preclude it: *Doherty*;

(2) gateway (b) can apply to any decision of a local authority relevant to seeking possession which could be the subject of judicial review: *Taylor v Bedfordshire CC*;

(3) a gateway (b) defence does not permit a proportionality review under Article 8(2): *Doherty*;

(4) occupiers granted non-secure tenancies under the homelessness scheme are able to bring a gateway (b) defence in possession proceedings in the County Court: *Barber v Croydon LBC* & *McGlynn v Welwyn Hatfied DC*;

(5) where a NTQ has been served on a non-secure tenant occupying under the homelessness scheme it will take highly exceptional circumstances for there to be a gateway (b) defence, e.g. *Barber* (where, at the time of service of the NTQ, the authority had been unaware of Mr Barber's mental illness and of the risk to his life if he were moved). Anything less is unlikely to qualify as 'highly exceptional';

(6) the introductory tenancy scheme is compatible with Article 8: *R(McLellan) v Bracknell Forest BC*. In these cases, the County Court has no jurisdiction to entertain a gateway (b) defence in possession proceedings. However, the County Court does have the power to adjoin possession proceedings to enable the occupier to make a judicial review application to the Administrative Court: *Pinnock*;

(7) in such cases, the question is whether there is some highly exceptional circumstance which should lead the County Court to adjourn the possession proceedings so that a judicial review can be applied for in the Administrative Court. Personal circumstances, which are likely to be present in the context of such a scheme, are not to be considered as highly exceptional.

Commentary:

The Court of Appeal has given guidance on various aspects of gateway (b) defences in accordance with *Kay* and *Doherty,* which is generally helpful to local authorities. However, those two cases are to be reviewed in July by the Supreme Court in *Pinnock* and so it remains to be seen whether or not the guidance given in *Mullen* will stand the test of time. Given the conflicts between the Strasbourg jurisprudence and that contained in *Kay* and *Doherty,* all eyes are now on the Supreme Court hearing *Pinnock*. *AD*

Henley v Bloom **[2010] EWCA Civ 202**

Almost one year after agreeing the terms of a consent order in possession proceedings, under the terms of which the tenant agreed to give up possession of a flat, the former tenant issued proceedings for damages for disrepair. The court below struck out the claim as an abuse of process because it ought to have been raised in the possession proceedings and it was now impossible to have a fair trial. The former tenant appealed.

Held (allowing the appeal):

(1) there was no abuse of process. The central issue was not whether Mr. Henley could, but whether he should have raised the disrepair claim during the negotiations pursuant to which the possession claim was settled. There is a general principle, enshrined in Article 6 of the European Convention, that every person with an arguable claim should be able to pursue it in court. If a court is not satisfied a claimant's attempt to raise a claim is actually abusive in light of his previous failure to raise it, the claim cannot be struck out, however desirable it might have been for the claimant to have raised it earlier.

(2) a fair trial was still possible, notwithstanding the fact the Defendant was not now in a position to commission an expert report. It is not unusual in litigation for one party to be better informed than another. The landlady was on notice throughout the tenancy of the existence of disrepair.

Commentary:

In this case, which has general application, the Court of Appeal observed that where an action is brought by a claimant who was simply a defendant in an earlier action involving the same parties, it is more difficult to argue the later action is an abuse than when the same person was the claimant in both actions. The case highlights the importance of drafting a consent order in the tightest possible terms to ensure it resolves all potential claims, if that is the parties' intentions. *GSP*

Thomas-Ashley v Drum Housing Association Limited **[2010] EWCA Civ 265**

The Defendant had an AST and kept a dog at the premises, in breach of the conditions of tenancy. The landlord served a s.21 notice. The Defendant suffered from Bipolar Mood Disorder and asked the landlords to withdraw the notice, arguing that the dog was an important part of her rehabilitation. The landlords obtained a possession order and the Defendant appealed, arguing that the tenancy agreement was unlawfully discriminatory, contrary to s.24A Disability Discrimination Act 1995 and the landlord had been under a duty to revise its terms, under s.24D DDA.

Held: The condition prohibiting the keeping of animals did not make it impossible or unreasonably difficult for the Defendant to enjoy the premises. Accordingly no duty under s.24D DDA 1995 arose. Further, the landlord held the property under a head lease and the head landlord refused to consent to a change in the tenancy conditions and threatened to forfeit the head lease if the dog was not removed; there was therefore no reasonable adjustment that the landlord could have made; r.6 Disability and Discrimination (Premises) Regulations SI 2006/887 applied. *EG*

R (Coombes) v (1) SS for Communities & Local Government and (2) Waltham Forest LBC **[2010] EWHC 951 (Admin)**

In 1954 the Council granted C's father a tenancy of a 2 bedroom flat. Since that time, C had only ever lived in the property. When C's father died, his mother succeeded to the tenancy. Some time after she died the Council served a notice to quit and commenced possession proceedings. Before the High Court, C's principal argument was that he was unable to ventilate his personal circumstances before the County Court in the possession proceedings (namely the length of time he had lived at the flat, his attachment to it, his care of his parents) as justification to be able to remain there because s. 3 of the Protection from Eviction Act 1977 precluded him from doing to. Therefore, he sought a declaration that s.3 PEA 1977 was incompatible with Article 8 of the ECHR.

Held (dismissing the claim but granting permission to appeal):

(1) S. 3 PEA 1977 does nothing more than prohibit a property owner from taking possession without first seeking an order from the Court;

(2) S. 3 PEA 1977 is not incompatible with Article 8. It does not fall within the exceptional category, identified by the House of Lords in *Kay* and *Doherty* as passing through gateway (a), in other words, it is not beyond the boundary of democratic solutions to the problems of allocating scare public housing. *AD*

Hughes v Borodex Limited **[2010] EWCA Civ 425**

The Claimant had made improvements to a flat while she was a tenant under a long residential tenancy within Part 1 of the Landlord and Tenant Act 1954 but which on its expiry became an assured periodic tenancy (following the changes introduced by the Local Government and Housing Act 1989 to phase out long residential tenancies). If the improvements fell to be taken into account by the Rent Assessment Committee in determining the rent, her rent would be increased. If so, and on the facts of the case, her rent would exceed £25,000 per annum which would take her outside the current statutory maximum protection for an assured tenant and her landlord could simply serve a Notice to Quit.

Held (dismissing the Claimant's appeal):

(1) under s.14(2) and s.14(3) of the Housing Act 1988, improvements made by a tenant under a previous tenancy of the same premises were not to be disregarded unless that previous tenancy was also an assured tenancy.

(2) if Ms Hughes' improvements were to be disregarded under the new form of her tenancy, it could only be by reference to Schedule 10 of the LGHA 1989, and the construction of the same. However, the effect of paragraphs 9 and 11 of Schedule 10 in relation to rent was clear. Its function was limited to enabling the initial rent of the new form of tenancy to be fixed at the outset. Once the initial terms were fixed, paragraphs 9 and 10 were spent and the landlord could serve a notice to start the procedure for fixing a new rent under s.13 of the 1988 Act.

Commentary

Although this produces potentially harsh results, it was not possible to depart from the clear wording of the statute. It would be open to Parliament to ameliorate the position by raising the annual limit for the purpose of the qualifying conditions for assured tenancies. *GSP*

Birmingham City Council v Clue, SSHD and Shelter **[2010] EWCA Civ 460**

Birmingham refused to exercise its power to provide support to a Jamaican national and her children. Three of the Claimant's children were British citizens. The Claimant was in the UK as an "overstayer". No steps had been taken to remove her or her children. The Claimant,

together with her eldest daughter, had been in the UK for more than seven years. At the relevant time, it was the policy of the SSHD that where a child of a family had been resident in the UK for 7 years, indefinite leave to remain would be granted in all but exceptional cases. C's application for indefinite leave to remain was pending. The conclusion of Birmingham's human rights assessment was that they could go to Jamaica to enjoy a family life. The Administrative Court held Birmingham had erred in failing to take account of the reasons underlying an immigration policy and its assessment in relation to the claim for assistance was quashed.

Held (dismissing Birmingham's appeal):

(1) it was contrary to the division of functions provided by Parliament to require a local authority to decide for the purposes of Schedule 3 of the Nationality, Immigration and Asylum Act 2002 whether a non asylum-seeking applicant was entitled to leave to remain. Save in hopeless or abusive cases, the duty imposed on local authorities to act to avoid a breach of an applicant's Convention rights did not require or entitle them to decide how the SSHD would determine an application for leave to remain.

(2) save in hopeless or abusive cases, a local authority faced with an application for assistance pending the determination for an application for leave to remain on Convention grounds, should not refuse it if that would have the effect of requiring the person to leave the UK, thereby forfeiting his claim.

(3) For Article 8(2) purposes, where a person was unlawfully present in the UK, was destitute and would otherwise be eligible for services and had applied for leave to remain on Convention grounds, the local authority's financial situation was irrelevant. *GSP*

Mr Jonathan Cowen of Chambers appeared for Birmingham CC

***Joseph v Nettleton Road Co-operative Limited* [2010] EWCA Civ 228**

The landlord was a fully mutual housing association and the Defendant's tenancy was therefore non-secure. The tenancy agreement provided that "the Co-operative may bring the tenancy to an end by giving the tenant 4 weeks written notice to quit. This shall only be in the following circumstances:…if the tenant has committed any breach of the agreement and the Management Committee has given the tenant written notice of the breach…and the tenant has failed to remedy it within the period of time stated in the notice." An issue arose as to whether the landlord could rely on the rule in *Prudential Assurance Company v London Residuary Body* [1992] 2 AC 386, that the imposition of conditions on the service of a notice to quit in relation to a periodic tenancy was ineffective as a matter of law. The Defendant argued that the provisions of Housing Act 1988, which exclude tenancies granted by fully mutual housing associations from statutory security of tenure, must be construed to have also excluded the operation of the rule in *Prudential*, in order to be Art 8 compliant.

Held: The Court of Appeal declined to rule on the *Prudential* issue (but expressed doubts as to the Defendant's argument). On the facts the Defendant had been given a reasonable time to remedy the breach of covenant but had failed to do so, so the NTQ was valid in any event. The point therefore remains open for argument in future cases. *EG*

***Bury MBC v Gibbons* [2010] EWCA Civ 327**

After falling into rent arrears the Appellant was served with a NTQ. He applied to the local authority for housing, indicating that he was threatened with homelessness. The Council failed to provide him with any advice or assistance pursuant to s.195 HA 1996 and in particular failed to advise him that he was eligible for Housing Benefit and did not have to leave his accommodation until the landlord had obtained a possession order. The

Appellant left his accommodation before a possession order was obtained. The Council decided that he had become homeless intentionally by failing to pay his rent. Prior to a s.202 review the Council sent a "minded-to" letter, following which the Appellant's representatives requested an oral hearing at which they could be present; this was not provided although the Appellant was spoken to in person when he called into the Council's offices by chance.

Held: The local authority's failure to give advice under s.195 was a relevant factor that should have been taken into account. On the facts the failure to offer an oral hearing with representatives present was a breach of r.8 Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (although in some cases a telephone conversation may be sufficient for the purposes of r.8). *EG*

***R (Adow) v Newham LBC* [2010] EWHC 951 (Admin)**

A's one bedroom home was no longer adequate for her and her partner, their children and her mother. The property suffered from damp, which gave rise to health problems. Providing medical evidence, A asked the Council to carry out a medical assessment of her family and to re-assess her priority status. Pursuant to s.167 HA 1996, the Council's policy was that "every medical application is assessed on its merits by the medical assessment officer in the quality and review team". In fact, the Council 'out-sourced' its medical assessment to Dr Keen, who opined that there was no change in her priority status. Shortly after permission was granted, A herself found better accommodation for her family; nevertheless, she continued to seek a declaration that the Council's decision was unlawful. The Council failed to file an acknowledgement of Service, or react to the Order granting permission and it only lodged a skeleton argument one day before the hearing. The Council accepted that its practice of 'out-sourcing' medical assessments did not comply with either the Act or its policy but it urged the Court not to grant A any relief as because it was reviewing its allocation scheme with the intention of making a number of changes.

Held (claim succeeding):

(1) the Court made a declaration that the Council's decision was unlawful as it was not made in accordance with its allocation policy;

(2) McCombe J made it very clear that that the Court was displeased at the Council's failure to comply with court's procedures, and that this was a factor in deciding to grant A the relief she sought.

Commentary:

A sober lesson for those who fail to comply with the court's procedures. The Judge made it clear that he would have been more inclined not to grant relief if there had been a straightforward admission of breach from the outset and compliance with court rules. The Council's failure to do so played a very significant part in the Judge's exercise of his discretion to grant the relief sought. *AD*

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