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Housing Law E-bulletin

INTRODUCTION

Welcome to the latest issue of our regular Housing Law E-bulletin, the first of 2011. We hope this year will see some interesting developments in Housing law.

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

- *Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby* [2011] UKSC 8 – the Supreme Court takes another look at proportionality in certain types of possession cases; and

- *Yemshaw v Hounslow LBC* – the Supreme Court decided that 'violence' in s. 177(1) HA 1996 is not limited to physical violence;

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CASE UPDATES

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CASE UPDATES

LB Hounslow v Powell; Leeds CC v Hall; Birmingham CC v Frisby [2011] UKSC 8

Following the decision in *Manchester CC v Pinnock* [2010] UKSC 45, the Supreme Court has given guidance as to the form and content of the proportionality review that Art 8 ECHR requires.

Hall and Frisby were introductory tenants; in both cases complaints of anti-social behaviour were received and the local authority served a notice of possession proceedings under s.128 HA 1996. After a review Powell had been granted a non-secure licence in performance of the Council's duty to her under s.193 HA 1996. She fell into rent arrears after cancellation of her housing benefit, so the local authority served a NTQ. Housing Benefit was subsequently reinstated, but some rent arrears remained. Hounslow issued possession proceedings; the court found the measures taken by the local authority to be reasonable and proportionate and made a possession order.

HELD: the court has the power to assess whether making a possession order is proportionate and for a legitimate aim, in any case where a local authority seeks possession of a property that is a person's home for the purposes of Art 8 ECHR. In making that assessment it can decide issues of fact.

In the majority of cases it can be taken for granted that the property is the Defendant's "home"; an issue is likely to arise only where the Defendant has recently moved into the premises on a temporary or precarious basis.

The making of an order will be for a legitimate aim where (a) it would serve to vindicate the Council's property rights and (b) it would enable to the Council to comply with its public duties in relation to the management and allocation of housing. These aims should always be taken for granted. It is against these aims that a court considering proportionality must weigh any factual objections raised by the Defendant and any arguments based on personal circumstances.

The court only needs to consider proportionality if the issue has been raised by the Defendant and the court considers the point to be seriously arguable (a high threshold). It will only be in a very exceptional case that the issue is seriously arguable - in the great majority of cases the court can make a possession order summarily. There is no general requirement for the local authority to advance a positive case that the making of a possession order would be proportionate and there is no need for it to plead its precise reasons for seeking possession at the outset; however if a proportionality Defence is raised it may want to plead more detailed reasons in a Reply.

Where the court is asked to consider proportionality it must attach great weight to the fact that it is in the interests of the community as a whole for local authorities to take decisions as to how best to manage its housing stock; in the majority of cases the court should proceed on the basis that the Council has sound management reasons for seeking possession. In an introductory tenancy case, the social purpose of the regime (to allow local authorities to grant tenancies which do not confer security of tenure until the tenant has demonstrated himself to be responsible) will always be highly relevant, as will the fact that refusing a possession order will allow an introductory tenant who may be undeserving of a secure tenancy to gain one

automatically.

Where s.89(1) Housing Act 1980 applies, the court cannot suspend or postpone a possession order beyond the limits set out in that section, simply because it considers this to be the proportionate outcome. Its options are (i) to make an immediate order for possession; ii) to make an order for possession which is postponed up to the statutory limits in s.89; or (iii) to refuse to make a possession order on the grounds that doing so would infringe Art 8. However, their Lordships declined to make a declaration of incompatibility in relation to s.89.

On the facts, Hall and Powell had been made offers of alternative accommodation and there would be no purpose in maintaining the order for possession; appeals allowed. In Frisby, it was not seriously arguable that the making of a possession order was disproportionate; appeal dismissed. (*EG)*

***Yemshaw v Hounslow LBC* [2011] UKSC 3**

The Appellant ("A") was a married woman with two young children. She left the matrimonial home (rented in her husband's sole name) and application to the Council for housing assistance. Although A complained that her husband shouted at her in front of the children, withheld housekeeping money from her and that she was scared of him removing the children, the Council found that he had never actually hit her or threatened to do so. It also found that the probability of domestic violence was "low" and accordingly held that it was reasonable for her to continue to occupy the matrimonial home. The Council applied the ratio of *Danesh v Kensington & Chelsea RLBC* [2006] EWCA Civ 1404, namely that "violence" in s.198 HA 1996 (referral to another local authority) meant physical violence. The Court of Appeal in the present case also followed *Danesh*. A appealed to the Supreme Court.

Held: (allowing the appeal)

The concept of 'domestic violence' in section 177(1) of HA 1996 is not limited to physical violence. Lady Hale opined that 'domestic violence' includes 'physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm'. As the Council and the Court of Appeal had applied the narrow definition set out in *Danesh* the appeal would be allowed.

Commentary:

(1) The ratio of *Yemshaw* brings the caselaw into line with the advice given by the Secretary of State on the meaning of the word 'violence' in the Homelessness Code of Guidance (2006) at paragraph 8.21; although it is noteworthy that the Supreme Court did not adopt the definition set out in that paragraph, preferring their own formulation;

(2) Given that *Danesh* had applied the previous Code of Guidance, not the current 2006 version, and given societal changes, it is not surprising that the Supreme gave a wider meaning to the concept of 'domestic violence';

(3) in practice the wider definition of 'domestic violence is likely to mean that more individuals will be found 'homeless at home' under s 177 HA 1996. (*AD)*

***Leeds & Yorkshire HA v Vertigan* [2010] EWCA Civ 1583**

LYHA granted Mr Vertigan an assured tenancy of a property in 2001. It brought possession proceedings based on breaches of the tenancy agreement which included repeatedly breaking into a cellar that did not form part of the demise; dog-fouling in the front garden; and the erection of a metal structure with two discos balls onto the front of the property as part of Mr Vertigan's 40th birthday celebrations. Although he did not evidence in the witness box on whether or not he

would comply with the terms of a suspended order, his counsel submitted he would. The trial judge decided that, having considered his attitude towards his tenancy obligations, the landlord's requests for compliance and his credibility, that it was reasonable to make an immediate order for possession. Mr Vertigan appealed.

HELD: (dismissing the appeal)

1. in the circumstances of this case, the trial judge was entitled to make an immediate order for possession;

2. although breach of a tenancy agreement may not individually be serious, persistent breaches of it run the risk of an immediate order for possession, in an appropriate case: Tenants "*should not assume that, because an individual breach is not serious, the outcome will inevitably be a suspend order, however many or repeated the breaches*". *(AD)*

***Hackney LBC v Findlay* [2011] EWCA Civ 8**

The question for the Court of Appeal in this case was: are the matters listed at CPR 39.3(5) highly relevant factors to be taken into account when a court is asked by a tenant to exercise its discretion to set aside a possession order made in his absence?

In *Forcelux Limited v Binnie* [2009] EWCA Civ 854, the Court of Appeal held that, where a court makes a possession order in the tenant's absence, following forfeiture of a lease for non-payment of ground rent, and the tenant applies to have that order set aside, the court has a wide discretion under CPR 3.1(2)(m) to set the possession order aside. The Court in Forcelux decided that CPR 39.3 did not apply because the hearing at which the possession order was made was not a 'trial' for the procedural rules.

In the present case the county court judge applied *Forcelux* and set aside the order for possession. The Council appealed.

Held:

(1) In the absence of some unusual and highly compelling factor (as existed in *Forcelux*) where a court is asked to set aside a possession order under CPR 3.1 it should, in general, apply the requirements of CPR 39.3(5) by analogy, in addition to applying CPR 3.9 by analogy;

(2) However, in the absence of an unusual or highly compelling factor, the court should give precedence to the provisions of CPR 39.3(5) above those set out in CPR 3.9;

(3) In any event, both the provisions in CPR 39.3(5) and 3.9 are subject to qualification in the case of a secure tenancy: s 85(2) HA 1985 provides the tenant with a chance to persuade a court to modify an immediate possession order. Accordingly, the court should not decline to exercise its power to set aside a possession order if in consequence the statutory purpose in s. 85(2) would be defeated. *(AD)*

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