Public / Landlord & tenant

Valuable possession

Jon Holbrook considers recent case law on possession claims that could cause untold harm to social housing

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IN BRIEF

- A proportionality defence will only assist an occupier in an exceptional case.
- A public law defence will only assist an occupier in a highly exceptional case.
- Almost all possession claims should continue to be determined on a summary basis.

Thousands of possession claims are brought each year by landlords who only have to prove ownership of the land and service of a valid notice. These claims are brought against occupiers who, for reasons that serve the wider public interest, do not have security of tenure. Two recent decisions by the Supreme Court have transformed the legal landscape for social landlords who seek to exercise these rights (*Pinnock* [2010] 3 WLR 1441, [2011] 1 All ER 285 and *Powell* [2011] UKSC 8, [2011] All ER (D) 255 (Feb)). It is now open to an occupier to resist a possession order on the grounds that it would not be proportionate, having regard to Art 8 of the ECHR, to make the order. This defence will often be combined with a public law defence which has been given life by other recent House of Lords judgments (*Kay* [2006] 2 AC 465 and *Doherty* [2009] 1 AC 367).

These cases are perplexing for deciding that County Courts have powers to trump the will of Parliament (see *Trouble at mill*, 160 NLJ 7444, p1663). And the cases are puzzling because they raise more questions than they answer. After obligating the court to consider the proportionality issue, the Supreme Court observed that "the wide implications of this obligation will have to be worked out" (para 57).

The burden of "working out" will fall to hard pressed public bodies and their advisers with county court judges playing a particularly important role. In the *Pinnock* and *Powell* era robust judicial management will be required if uncertainty, confusion, delay and expense are to be mitigated.

Proportionality & exceptionality

With a proportionality defence the question of exceptionality arises in two ways. First, in practice it will only be in a minority of cases that proportionality will need to be considered by the County Court because the Supreme Court has adopted a no-defence, no-issue stance. In other words if the occupier does not raise a proportionality issue then there is nothing for the court to consider (*Pinnock* paras 40, 45, 61 and *Powell* paras 33–34, 88).

> "Unless judges apply these objectives robustly then great harm will be caused to social housing"

Second, if a proportionality defence is raised then it will take an exceptional case for it to succeed. The Supreme Court has stressed that if the landlord has a domestic right to possession then it will only be in an exceptional case that a proportionality defence can trump that right (*Pinnock* paras 54, 62 and *Powell* paras 92, 113).

Public law & exceptionality

When the *Powell* cases were in the Court of Appeal the Court took the opportunity to set out for the benefit of "advisers, District Judges and Circuit Judges…in which instances a [public law] defence is available in the County Court and…to be clear as to the scope of [such a] defence" (*Salford v Mullen*, [2010] EWCA Civ 336, [2011] 1 All ER 119, para 5). When three of these cases went forward to the Supreme Court there was no challenge from the occupiers as to the Court's rulings on these points. The following points that arise from the Court of Appeal's judgment will assist judges who have to consider public law defences.

First, it will take "highly exceptional circumstances" for there to be a public law defence (*Salford* paras 62, 65, 67, 76, 77).

Second, that highly exceptional circumstance cannot arise from circumstances that Parliament must have contemplated would be likely to arise when it passed the relevant legislative scheme. For example, with a scheme intended to deal with anti-social behaviour, such as an introductory or assured shorthold (starter) tenancy scheme, Parliament must have known that there may be difficult questions of fact as to whether anti-social behaviour had occurred or not. But the public body does "not have to conduct a full inquiry to establish the truth or otherwise of such allegations knowing that those are just the situations in which getting witnesses to attend and give evidence would be difficult". The public body has to take a decision and unless the occupier can show that that decision was perverse having regard to "the duties [the public body] had to perform in relation to managing its social housing" the public law challenge should fail (*Salford* paras 17, 65).

Third, those housed under duties owed to the homeless have been denied security of tenure for sound management reasons and the court must not treat them as entitled to rights that Parliament has denied them. Issues that such an occupier may want to raise about his conduct or over the suitability of any alternative accommodation that is offered are to be dealt with in the context of the review and appeal procedure that Parliament has created under Pt VII of the Housing Act 1996. In the absence of a highly exceptional circumstance they should not afford a defence to a possession claim (*Salford* paras 66–67).

What sort of case is exceptional?

The exceptionality test that the occupier will need to satisfy is similar whether he defends on a proportionality or public law basis. In each case the court's assessment of the alleged exceptionality will need to be measured against the legislative scheme that has denied the occupier security of tenure.

For example, anti-social behaviour may be the landlord's motivation for seeking possession. (Although a "motivation" it is not a "reason" for possession because the landlord does not need a "reason".) As noted above the occupier cannot, unless the landlord's decision to evict is perverse, succeed with a public law challenge in which he merely denies the allegations. The hurdle is equally high where an occupier denies the allegations as the basis for a proportionality defence (*Salford* para 65). This is because "the authority does not have to be in a position to prove that [the allegations] are well founded in order to justify terminating the tenancy" as "the right question under the scheme will be whether in the context of allegation and counter-allegation it was reasonable for the council to take a decision to proceed with termination of the introductory tenancy." (*Powell* para 93).

Examples of the very high threshold required for a case to be exceptional are set out in the box.

Landlord's procedure

Defences, particularly of the public law type, may be directed at the landlord's procedures. But here too the threshold will be exceptionally high in circumstances where Parliament has established limited procedural safeguards (*Salford* para 18 and *Powell* para 47). In the absence of a statutory obligation to give reasons for a decision or to require a particular process the occupier will need to show that the landlord's procedural conduct was perverse (*R(Khatun) v Newham* [2005] QB 37, CA, para 35).

What defences are exceptional?

Anti-social behaviour

- Denials are not exceptional (*Salford* para 65, *Powell* para 93).
- Alleged last minute redemption is not exceptional (*Salford* para 79).
- An example of an exceptional case could be where the occupier has cogent evidence of a disability that is related to the bad behaviour which the landlord has disregarded (Equality Act 2010, ss 15, 149, which comes into force on 11 April 2011).

Rent arrears

- Rent arrears caused by a failure to provide information to the housing benefit authority are not exceptional (*Salford* paras 41, 76)

Homelessness cases

- Any issue that may be raised in a review or appeal under the Housing Act 1996 is not exceptional (*Salford* para 66). The following two examples indicate possible exceptions to this rule.
- Where the occupier has a life threatening reason for staying in his existing accommodation that the landlord has not properly considered (*Salford* para 67).
- Where possession is motivated because of under-occupation but the occupier's temporary accommodation has become permanent since a family had lived there for many years and the wife and children who had left wanted to return (*Salford* para 77).

If the occupier can establish that a particular provision was required then the landlord's failure to provide it need not invalidate its right to possession. For as Lord Neuberger has stated in the homelessness context, where statutory obligations are imposed on local authorities, "a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached." Lord Neuberger then noted that "save, perhaps, in wholly exceptional circumstances relief for the aggrieved party would not be warranted" (*Holmes-Moorhouse v Richmond* [2009] 1 WLR 413, HL, para 51).

Cases on a summary basis

Possession claims are normally assigned to District Judges with a time allocation of about five minutes. Landlords should not tempt fate by pleading a motivation for possession when this motivation is not a material part of the claim (*Pinnock* para 53 and *Powell* para 41). If the occupier is to raise a proportionality or public law defence then the occupier will need to set it out and file a defence within 14 days of receiving the claim (CPR 15.4 & 55.7).

It will be possible for judges to filter out most proportionality or public law defences at the first hearing having regard to the high thresholds required. But if the issue needs further consideration a subsequent hearing of, say, one hour may be required. Given the limited basis for an arguable proportionality or public law defence there should be very few cases where trials result, as opposed to summary determinations with written evidence.

Litigants and judges must apply the overriding objective of the rules in an effort to save expense, to ensure that a case is dealt with expeditiously and fairly and with an appropriate share of the court's resources (CPR 1.1). Unless judges apply these objectives robustly then great harm will be caused to social housing with, as Lord Hope observed, "prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing" (*Powell* para 41). Parliament needs to re-assert its authority over social housing law with clear and determinative legislation that strikes a fair balance between the narrow interests of a particular defendant and the wider interests of society as a whole. But until then county court judges will need to manage cases robustly with Lord Hope's words ringing in their ears. NLJ

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