Valuable possession: a reply

Practitioners should be wary of ignoring the enduring lessons of Salford v Mullen, says **Jon Holbrook**

In my article on the new legal landscape for social landlords who seek possession I argued that "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". I also noted that "if the issue needs further consideration a subsequent hearing of, say, one hour may be required". And that overall "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". (*NLJ*, 25 March 2011, p 425)

In their response Sam Madge-Wyld and Sarah Salmon "are in full agreement that such defences [ie public law and proportionality defences] are likely to be rare" (*NLJ*, 15 April 2011, p 527). And on proportionality defences they agree with me that they have a threshold that "is undoubtedly a high one, which may be crossed rarely".

But on public law defences Madge-Wyld and Salmon state that "even if a gloss of 'exceptionality' had been added by *Mullen*, it is hard to see how this test can survive the comments made in *Pinnock*". Their claim that the test of exceptionality is gloss that was swept away by *Pinnock v Manchester City Council* [2010] 3 WLR 1441 is wrong on three counts.

- First, what the authors dismiss as "a gloss" is nothing but the ratio of the case. This is clear from the Court of Appeal stating that "it is important for advisers, district judges and circuit judges to know in which instances a gateway (b) [ie public law] defence is available in the County Court and in which not". (*Salford CC v Mullen* [2011] 1 All ER 119, para 5)
- Second, the Court of Appeal concluded on the nature and scope of a public law defence by stating that "it will only be in highly exceptional cases that any gateway (b) [ie public law] defence to possession proceedings could be established" (*Mullen,* para 62). As if to make the point the Court of Appeal came to this conclusion, after citing Dyson LJ from another case, with the following words underlined: "It will only be in a truly exceptional case that it will even be seriously arguable that such a [public law] defence will succeed."
- Third, the *Mullen* ratio clearly survives *Pinnock*. *Pinnock* was concerned with a proportionality defence rather than a public law one. Moreover, three of the five cases in *Mullen* were appealed to the Supreme Court, after *Pinnock*, in what became known as *Powell v Hounslow*. In those appeals the occupiers did not challenge the Court of Appeal's rulings on the nature and scope of judicial review defences (*Powell v Hounslow LBC* [2011] 2 WLR 287, para 8).

It is important to note that *Mullen* involved five cases, the government intervened and the Court of Appeal gave a judgment that did, as was its intention, address some of the problems that arise when occupiers without security of tenure seek to defend possession claims on a public law basis. The Court of Appeal cannot do more to make its point than qualify the word "exceptional" with words like "truly" and "highly" and to add emphasis to its ratio by using underlining to establish that a public law defence will only be seriously arguable in a truly exceptional case.

The enduring ratio of *Mullen* on public law defences may be an inconvenient truth for Madge-Wyld and Salmon but as practitioners it is necessary to engage with the law as it is.

In the rest of their article the authors talk up the prospects of occupiers raising public law and proportionality defences. They are entitled to their opinions but the consequences are likely to be undesirable as the great majority of public law and proportionality cases that practitioners have taken through the courts have been hopeless. Writing extra-judicially HHJ Madge has noted how "it is likely that the defences in all the recently reported Gateway (b) cases would have been summarily dismissed" and that "the merits of these cases were truly appalling" (*The game of ping pong is over*, 26 March 2011, www.nicmadge.co.uk). And the Supreme Court in *Pinnock* (which remained live) and in *Powell* (where one case remained live) found on the facts that the proportionality defences were not seriously arguable.

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Lord Hope warned of the risks of "prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing" (*Powell,* para 41). Those who are concerned to mitigate these risks, which is hopefully all practitioners, would do well to follow the opinions in my article. NLJ

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