The Court of Appeal considers suspended possession orders –

City West Housing Trust v Massey

City West Housing Trust v Massey, Manchester and District Housing Association v Roberts [2016] EWCA Civ 704 is a somewhat troubling development for landlords seeking to control anti-social behaviour in their properties. When there has been criminal activity in the property, the landlord will normally seek an order for possession on the basis that it is reasonable to grant possession. This gives the Court options including imposing a suspended possession order and giving the tenant the chance to mend his ways. In what circumstances should this be done?

In *Bristol City Council v Mousah* (1997) 30 HLR 32, the Court of Appeal considered the case of a tenant who had schizophrenia, and who had used his Council house for the supply of Class A drugs. The Court of Appeal held that where a serious criminal offence had been committed at the premises, only in exceptional cases could it be said that it was not reasonable to make an order for possession; that should be the usual approach in such cases. However, in *Stonebridge HAT v Gabbidon* [2003] EWHC 2091 Lloyd J was persuaded not to make an outright possession order, and this case was sometimes cited as authority for the proposition that possessing or dealing cannabis is not so serious that a possession order must be made. However, the true ratio is that the tenant was not herself a perpetrator: her liability was limited to permitting smoking of joints on two occasions and on three occasions allowing crack to be dealt at the flat. That was the state of the law when the Court of Appeal had to consider the case of someone who had given their Council house over to the cultivation of cannabis: he considered growing cannabis to be a hobby, such as everyone should have! He had previous convictions for cannabis cultivation and yet the District Judge., who did not hear evidence from him, accepted the submission on his behalf that he had turned over a new [skunk] leaf. She made a suspended possession order. The Council successfully appealed and the Court said

> *The more serious the offence, the more serious the breach. Convictions of several offences will obviously be even more serious. In such circumstances, it seems to me that the court should only suspend the order if there is cogent evidence which demonstrates a sound basis for the hope that the previous conduct will cease.*

Arden LJ also commented

> *For my part, I do not consider that the question of whether the serious conduct would cease is the only factor, since the court has a very wide discretion, including the duty to consider the effect on those living in the locality. This was a serious and serial drug-related offence and that would, in my judgment, normally give rise to a necessity for a tenant to have to show a strong case to resist an immediate possession order. I think that the making of a stay in this type of case is likely to be exceptional.*

And Gage LJ said

> *I would add that the council, as a provider of social housing, have a duty to make sure (so far as it can) that its properties are properly managed and are kept free from the sort of activity with which we are concerned. This, in my judgment, is another factor which weighs the balance in favour of an outright order.*

These useful dicta from *Hensley* have been cited by landlords in many cases of criminal activity in the property. For example, in *Knowsley Housing Trust v Prescott [*2009] EWHC 924 (QB), Blair J noted that the one of the joint tenants, who asserted that she was innocent of her husband's drug dealing, had failed to give evidence. That was not cogent evidence demonstrating a sound basis for the hope the conduct would cease. The social factors cited by Arden and Gage LIJ added weight to the decision to make an outright order.

In *City West Housing Trust v Massey, Manchester and District Housing Association v Roberts*, the Appellant tenants sought to challenge this long-established case law. Both tenants' houses had been used for the cultivation of cannabis and in both cases, the tenants claimed that they were not responsible for it. They were made subject to suspended possession orders which required them to allow inspections by their landlords at any time. Both housing associations appealed to the County Court, one successfully, one not; both then came to the Court of Appeal with two issues: what should the Court do when a tenant has lied in evidence? Can that be considered "cogent evidence" upon which the Court can be satisfied that there is a sound basis for the hope the conduct would cease? And is it right for the Court to impose conditions of suspension which, in fact, put the onus on the landlord? That had been considered in *Hensley* but only briefly, Arden LJ being told, to her surprise, that landlords can't just go in and inspect a property at will.

On the question of lies, the District Judge had firmly rejected Ms Massey's story that she knew nothing of the cannabis being grown in her home. She had lied because she didn't want to lose her house. But she was willing to allow the landlord to inspect the property and to exclude her partner, who had grown the plants. Mr Roberts claimed that he had been coerced by a gang into letting them use his house to grow cannabis, but he had been found guilty of the offence of permitting the production of cannabis. He said that now the Police had raised his house, he thought that the criminals would move elsewhere. The District Judge accepted that. Again, he made a suspended possession order with a condition that the Housing Association could inspect the flat monthly. The Circuit Judge, on appeal, found that there was no sound basis for the hope that the conduct would cease.

The Court of Appeal (Arden LJ giving the leading judgment) said that cogent evidence had to be not just credible but also persuasive. It must persuade the Judge that there is a sound basis for the hope that the conduct will cease. That standard is pitched at a realistic level:

> *On the one hand, the tenant does not have to give a cast-iron guarantee. On the other hand, a social landlord does not have to accept a tenant who sets out to breach the terms of his tenancy and disables the landlord from providing accommodation in more deserving cases*
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The Judge should have regard to all the evidence, such as the support that might be available to a tenant to give firmer foundation for that hope.

The fact that a tenant had lied cannot be an absolute bar to the making of a suspended possession order. If that were the case, lying on an application for housing should be a case for immediate possession, which it is not. There are many reasons why a person might lie, such as fear of the consequences. That is something to be taken into consideration, but at the same time

> *Tenants should realise that if they lie in their evidence to the court they run the risk that the court will find that their evidence is not to be trusted on other matters and that the court will not accept assurances*

from them for the future. Giving false evidence is a very serious matter and it may have very serious consequences for the tenant

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If a Judge thinks that there is cogent evidence when a tenant has lied, she should be careful to give reasons for that.

There is nothing controversial in the Court's comments here. To say that the Court has to look at all the surrounding circumstances and make a judgment for the future is common sense and is consistent with earlier case law. That there are many reasons why a person may lie, or that a person who lies about part of her evidence may be believed on other parts, is not a new principle. The Judge has to make an overall assessment of what will happen in future, making the best guess possible from all that has been said.

What is more controversial is that the Court considered that part of the circumstances that can be taken into consideration is the fact that the landlord can be given a right to inspect the property which, if the tenant thinks it will really happen, is something that will tend to prevent future offending. That means that the onus is on the landlord to inspect – or have some inkling that there is something to inspect. Arden LJ brushed over the resource implications and commented that sometimes landlords have to be ready to take an active role.

It will be a matter of evaluation for the district judge whether the prospect of inspection in fact, or the perception of a risk of inspection, is sufficient to support an overall assessment that there is cogent evidence which provides real hope that the terms of the tenancy agreement will be properly respected in future.

There was no discussion by the Court of Appeal of how such a condition was to be enforced. If a tenant does not allow an inspection one day, but allows it the next, the landlord may suspect that there was something hidden the previous day but be unable to prove it. If the tenant refuses to allow inspection at all, it may be many months before any application to enforce gets back before the Courts, in which time much damage may be done – to the community, to the property and to the tenant and his household. Although the Court emphasised that a condition of this nature was not a panacea in each case, the Court of Appeal in the end upheld the suspended possession orders made by the District Judges partly on the basis that the existence of that condition, and the tenant's willingness to have such a condition imposed, made it more likely that the conduct complained of would cease. It is to be expected that tenants in similar circumstances in future will ask for suspended possession orders on a similar basis, with potential resource implications for landlords. Any landlord presenting a case to Court would be well advised to bring evidence of the cost of such inspections. Another concern in cases like *Roberts* is the risk of violence to the inspector: if the gang threatened the tenant, they would probably not hesitate to do as much or more to an official interrupting them at work. Given these issues, is it reasonable to expect the landlord to undertake the role of policing their tenants? How does that sit with the comments in *Hensley* about the need to keep social housing clear of drugs and drug users?

The landlords are considering a further appeal to the Supreme Court which may give further guidance on this aspect.

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