

Unlawful sub-letting & the abuse of social housing

High court overturns SPO and gives unprecedented UPO guidance

Poplar HARCA v (1) Begum (2) Rohim [2017] UKHC 2040 (QB)

"... it is not compassionate to allow profiteering fraudsters indefinitely to continue to occupy premises and thereby exclude from such accommodation more needy and deserving families."

Turner J

The High Court has overturned a suspended possession order in a case concerning the partial sub-letting of social housing.

In the first case to consider the proper interpretation of section 5 of the Prevention of Social Housing Fraud Act 2013, it has also ordered the tenants to yield up their unlawful profits.

Dean Underwood and Pupil Liam Wells explain the judgment.

The background

The Respondents were the assured tenants of social housing in Poplar – a two bedroom flat, which they occupied with their children. They received Housing Benefit to cover their rent in full. In about August 2015, they moved out of the flat and went to live with the First Respondent's mother. They sublet the flat to a couple, at a rent of £400 pcm, but retained one bedroom, containing children's belongings, to convince their landlord – should they need to – that they still lived there.

On 12 November 2015, their landlord visited the flat and the mother's house simultaneously, accompanied by local authority fraud officers and a BBC camera crew. They found the Respondents and their children at the mother's house; the flat sublet; and the retained bedroom padlocked shut. The Second Respondent later evicted the sub-tenants unlawfully, threatened to burn their clothes and bragged that he would 'get away with it'. He and the First Respondent then moved back into the flat with their children.

Six months later, the police raided the flat and found the Second Respondent in possession of cannabis; and drug dealing paraphernalia in the kitchen, including scales, dealing bags and calling cards.

The trial

At trial, Poplar HARCA claimed that the Respondents had, in effect, parted with possession of the whole of the flat and had lost security of tenure by operation of section 15A of the Housing Act 1988. In the alternative, it claimed, it was entitled to possession on Grounds

10, 12 and/or 14 of the 1988 Act, the Respondents' tenancy breaches being such an affront to the public interest that nothing less than outright possession would be reasonable.

The Respondents denied moving out of the flat at all, or that they had received any money from the 'distant relatives' who were staying there. They claimed that, at 4am on 12 November 2015, they had been called to the mother's house to care for the First Respondent's brother and had gone there as a family to do so, locking the children's bedroom behind them; and leaving the 'relatives' to sleep in their bed.

The Recorder dismissed the Appellant's primary claim: the Respondents had neither sublet nor parted with possession of the whole flat. In the alternative claim, he granted but suspended enforcement of a possession order, finding that the Respondents had not made a profit, had moved into the mother's house for altruistic reasons – to care for the First Respondent's brother – and had been living in cramped conditions. These, he held, were 'special circumstances' which took the case 'right out of the ordinary'.

He also refused the Appellant's claim for an UPO under section 5 of the 2013 Act on the premise that the Respondents had not made enough from sub-letting to cover the rent for the flat.

The appeal

Poplar HARCA appealed. It argued that the exercise of the Recorder's discretion had been seriously flawed; his decision to suspend enforcement of the possession order contrary to the public interest and plainly wrong; and his decision not to make an UPO premised on the erroneous belief that the Respondents had not made a profit.

It invited the court to exercise the Recorder's discretion afresh, applying the approach taken to claims on Ground 17 of the 1988 Act (misrepresentation inducing the grant of a tenancy; see *Shrewsbury & Atcham BC v Evans* (1998) 30 HLR 123) and, in that context, the approach to claims on grounds of criminal conduct (see *Sandwell MBC v Hensley* [2007] EWCA Civ 1425; [2008] HLR 22). It further invited the court to make an UPO.

The decision

Possession

Satisfied that the Recorder's decision had been, "fatally and demonstrably flawed," Turner J allowed the appeal on all grounds. Declining Poplar HARCA's invitation to apply *Evans*, he held that there was nonetheless a "complete dearth of material which could amount to cogent evidence that the Respondents would mend their ways in future." Having observed that,

"... there is a very long waiting list indeed for [affordable] accommodation and that those who secure it should ... be slow to abuse the benefits and advantages which it brings,"

he went on to stress that,

"... it is not compassionate to allow profiteering fraudsters indefinitely to continue to occupy premises and thereby exclude from such accommodation more needy and deserving families"

and substituted an outright order for the Recorder's suspended order.

Unlawful Profit Order

In the first appellate decision to consider the proper interpretation of section 5 of the 2013 Act, Turner J gave guidance about the relevance of ill-gotten Housing Benefit in the UPO calculation.

Prevention of Social Housing Fraud Act, subsection 5(6)

(6)The maximum amount payable under an unlawful profit order is calculated as follows

Step 1

Determine the total amount the tenant received as a result of the conduct described in subsection ... (4)(c) (or the best estimate of that amount).

Step 2

Deduct from the amount determined under step 1 the total amount, if any, paid by the tenant as rent to the landlord (including service charges) over the period during which the conduct described in subsection ... (4)(c) took place.

Finding that the Respondents had not profited from their sub-letting, the Appellant argued, the Recorder had clearly accounted for the Housing Benefit they received under Step 2 (above), but not Step 1. That was plainly wrong: to safeguard the purpose and effect of the UPO, Housing Benefit should be taken into account in both Steps or neither.

The better approach, the Appellant contended, was to take it into account under neither Step: to do otherwise would require the court to depart, in Steps 1 and 2, from the plain meaning the words, "...as a result of the [subletting]..." and "...paid by the tenant as rent...". In that regard, it argued, the dicta in *Wallace v Manchester CC* (1998) 30 HLR 111 at [26] were obita and of no material application. Further, if the tenant were to receive but not pass on his Housing Benefit to the landlord the UPO would become, in effect, a backdoor and unintended means of rent or Housing Benefit recovery. In the alternative, the Appellant argued, Housing Benefit should be taken into account in both Steps.

The Respondents contended that the Recorder had been right: Housing Benefit should be included in Step 2, but not Step 1.

Adopting the Appellant's alternative submission, Turner J held that,

"the word, "total" [in Step 1] indicates that the gross receipts secured and consequent upon the dishonest relinquishment of possession should be considered under Step 1. To hold otherwise would be to render all but nugatory the clear purpose of the section. A very

considerable proportion of tenants in socially rented homes are in receipt of Housing Benefit and those who have their rents paid for them are those in the best position to be able to benefit from unlawful profiteering of this type. To disregard Housing Benefit under Step 1 but include it to the ill-gotten advantage of the fraudster under Step 2 would be to thwart the obvious intention of Parliament to provide a mechanism with which to strip him of his spoils."

He overturned the Recorder's decision and ordered the Respondents to pay over the profits of their sub-letting.

Commentary

Turner J's decision in the possession claim will be welcomed by social landlords nationwide, reinforcing as it does the policy rationale of the 2013 Act and dicta in both Evans (at 132-133) and Lewisham LBC v Malcolm [2008] UKHL 43; [2008] 1 AC 1399 at [61] about the public interest in safeguarding social housing for those who genuinely need it.

For lawyers, the decision is primarily of interest for its interpretation of section 5 of the 2013 Act – the first appellate decision on point. In future, when proving and calculating the maximum amount available under section 5 of the 2013 Act, landlords and their representatives will be required to evidence, "the gross receipts secured and consequent upon the dishonest relinquishment of possession". That, the court has found, is the proper meaning of "total" in Step 1 and, it is suggested, will therefore include rent and any other ill-gotten rewards, whether deposits, Housing Benefit, Discretionary Housing Payments, attendance or service charges.

[Dean Underwood](#) and Pupil [Liam Wells](#) appeared on behalf of the Appellant, Poplar HARCA Ltd, instructed by Helen Gascoigne of Capsticks LLP.

For a full transcript of the judgment [click here](#).

Dean Underwood
Barrister
And
Liam Wells
Pupil Barrister
Cornerstone Barristers