IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRENTFORD COUNTY COURT
(HIS HONOUR JUDGE OPPENHEIMER)

CCRTF 1999/0198/2

Royal Courts of Justice
Strand
London WC2

Friday, 14 May 1999

B e f o r e:

LADY JUSTICE BUTLER-SLOSS
MR JUSTICE HOLMAN

- - - - - -

CLICKEX LIMITED

Claimant/Respondent

- v -

JONATHAN MCCANN

Defendant/Appellant

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

- - - - - -

MR A PANTON (Instructed by Hounslow Law Centre, Middlesex, TW31 1JG) appeared on behalf of the Appellant
The Respondent did not attend and was not represented

- - - - - -

J U D G M E N T
(As approved by the Court)

- - - - - -

LADY JUSTICE BUTLER-SLOSS: I will ask Holman J to give the first judgment.

MR JUSTICE HOLMAN: This appeal comes before us in somewhat unusual circumstances. In December 1995 Clickex Ltd (whom I will call "the landlords") proposed to rent a room at 20 Lampton Road, Hounslow to Jonathan McCann (whom I will call "the tenant"). The landlords wished and intended that the tenancy would be an assured shorthold tenancy under the provisions of Chapter II of the Housing Act 1988. So far as is material to this case, section 20 of that Act provides:

> "(1) ... an assured tenancy ... is an assured shorthold tenancy if -
> ...
> (c) a notice in respect of it is served as mentioned in subsection (2) below.
> (2) The notice referred to in subsection (1)(c) above is one which -
> (a) is in such form as may be prescribed;
> (b) is served before the assured tenancy is entered into;
> (c) is served by the person who is to be the landlord under the assured tenancy on the person who is to be the tenant under that tenancy; and
> (d) states that the assured tenancy to which it relates is to be a shorthold tenancy."

The form of notice prescribed in the relevant regulations for the purpose of section 20(2)(a) is Form 7 in the schedule to those regulations or "a form substantially to the same effect".

On 20 December 1995, which was a date before the proposed tenancy was entered into, the landlords did indeed serve upon the tenant a printed "Notice of an Assured Shorthold Tenancy" of which all the printed parts reproduce and correspond to Form 7. The printed words read, so far as is material:

> "1. You are proposing to take a tenancy of the dwelling known as: [blank] from [blank] 19 [blank] to [blank] 19 [blank]."

The printed prescribed sidenote reads:

> "The tenancy must be for a term certain of at least six months."

The blanks as to the term of the tenancy were filled in so that the form read:

"... from 21 Dec [for December] 1995 to 23 June 1996."

A tenancy agreement was signed by both parties on 21 December 1995. Again it is in a standard printed form with the blanks filled in. It specifies that the tenancy is for:

"A term certain of 6 [months] ... from the Commencement Date."

In the space provided in which to insert the commencement date there was originally inserted (as is still plain to see, although it was subsequently altered) "21.12.1995".

A printed clause towards the end of the tenancy agreement states:

> "This Agreement is intended to give rise to an assured shorthold tenancy as defined in Section 20 of the Housing Act 1988 and the Tenant acknowledges that the Landlord has given the Tenant a valid notice for the purposes of subsection (1) (c) of Section 20."

On the date that the tenancy agreement was apparently signed, viz 21 December 1995, there could not, I think, be any basis for doubting or disputing that the notice in Form 7 was indeed "a valid notice" for the purposes of subsection (1)(c) of section 20.

The case before the circuit judge proceeded without oral evidence on the basis of certain agreed or admitted facts which the judge recorded and recited in his judgment as follows (I am reading from page 3D-F):

> "The plaintiffs say that a previous tenant was late in leaving these premises, hence the defendant did not go into the property until 8th January, 1996. It is agreed that he did actually go in on that day. It is agreed that the defendant got the notice on 20th December, 1995. It is not agreed that the defendant knew that the reason that he did not go in on 21st December, 1995, was that the former tenant was late in leaving. On the contrary, the defendant says he thought that the premises were empty on 21st December, 1995, and that there was no hurry for him to go in. So he went in on 8th January, 1996."

Thus all the paperwork, if I can so describe it, was initially prepared, signed and served on the basis that there would be an assured shorthold tenancy for six months, commencing on 21 December 1995 and expiring on 20 or 23 June 1996. The dates in the notice in Form 7 and in the tenancy agreement were in harmony, no point having been taken as to the apparent minor discrepancy between 20 June, which is six months from 21 December, and 23 June.

But, in the event, the tenant could not or did not enter the property until 8 January 1996. Critically, someone on behalf of the landlords at some stage scratched out (although leaving it visible underneath) the date 21.12 on the tenancy agreement and inserted above it the date 8.1 and wrote over the figure 5 in the year so as to make it read 6. In short, the commencement date was altered from 21.12.95 to 8.1.96. Accordingly, the dates in the notice in Form 7, which remained as 21 Dec 1995 to 23 June 1996, and the commencement date and term in the tenancy agreement (6 months from 8.1.96, namely until 7.7.96) were, and are, in conflict.

In November 1997 the landlords served a notice under section 21 of the Housing Act 1988. In March 1988 they commenced proceedings in the Brentford County Court for possession. By his defence, the tenant took two points. The first point was that the tenancy which had, in fact, been created was not an assured shorthold tenancy. He claimed that the statutory requirements of section 20 were not fulfilled in that the notice in Form 7 was invalid or ineffective due to the discrepancy as to dates. I will call this "the section 20 point".

The second point was that the notice requiring possession, which the landlords had served in November 1997 under section 21, was technically defective for reasons which it is not necessary to relate. I will call this "the section 21 point".

On 4 December 1998 in the Brentford County Court, His Honour Judge Oppenheimer held that (i) the

notice in Form 7 under section 20 was valid, so an assured shorthold tenancy had indeed been created; but (ii) the section 21 notice was indeed defective. So he dismissed with costs the claim for possession and, to put it colloquially, the tenant won. But if Judge Oppenheimer is right on the section 20 point, it will be a pyrrhic and short-lived victory for the tenant. All the landlords have to do (and indeed I understand from their solicitors' letter to the Court of Appeal dated 18 March 1999 that they have now already done so) is serve a fresh and technically correct section 21 notice and the ensuing claim to possession will be unanswerable. So it is very important to the tenant to establish, if he can, that Judge Oppenheimer was wrong on the section 20 point and that this is indeed an assured, but not an assured shorthold, tenancy.

When granting leave to appeal the single judge, Laws LJ, said:

> "The judge's decision to uphold the s20 notice is arguably wrong for the reasons given in the Notice of Appeal and Skeleton Argument.
>
> Exceptionally, I consider that the applicant should not be debarred from appealing because the action against him was dismissed: he is or may be fixed with a finding that he is an assured shorthold tenant which he cannot challenge in subsequent possession proceedings. But of course it will be open to the respondents to argue that the appeal is incompetent because no order for possession was made against the appellant."

The respondent landlords have not chosen to argue that the appeal is "incompetent". Instead, their solicitors wrote to the Court of Appeal office on 18 March 1999 saying:

> "We have been notified that Leave to Appeal has been granted and we have received a copy of the Notice of Appeal...
>
> Our concern about this matter is that the possession proceedings which we commenced on behalf of our client was dismissed by His Honour Judge Oppenheimer on the 4th December 1998. Our client is liable to pay the costs in respect of those proceedings and Leave to Appeal at that hearing refused.
>
> So far as our clients are concerned, they do not propose to pursue the original proceedings any further and, indeed, we have some weeks ago served a Section 8 and

> Section 21 Notice so that fresh proceedings can be commenced in the coming weeks.
>
> It seems to us, therefore, that the Appeal is academic and we do not believe that the outcome of the Appeal will be of any benefit to the Appellant against whom fresh proceedings for possession will be commenced very shortly.
>
> We consider that our clients' interests in this matter are best served by writing to you to let you know our clients' concerns, rather than attending Court at considerable expense to our clients.
>
> We would emphasise that we do not intend to show any disrespect to this Honourable Court by not attending nor should it be interpreted that failure to attend is in any way an admission of liability.
>
> In view of the above, we would ask that the Court does not, in any event, make any Order for costs against our client, in view of the circumstances mentioned above."

The notice of appeal, which the solicitors for the landlords acknowledged receiving, very clearly sets out why, in the view of the appellant tenant, his appeal is far from being academic and that in his view the outcome (if favourable to him) will be of crucial benefit to him. The notice of appeal concludes by saying (this is paragraph 14 on page 4 of the bundle):

> "The learned Judge conceded that the section 20 point was arguable and the only reason that leave to appeal was not given was that the tenant had won. Whilst the tenant may have `won' the possession action, he will be soon evicted unless the section 20 point is overturned on appeal. Therefore unless the section 20 point is appealed, the tenant will have won the battle, but will lose the war. The most recent authority for the proposition that [it] is possible to appeal a judgment in the appellant's favour is to be found in Curtis v London Rent Assessment Ctte..."

Curtis v London Rent Assessment Committee is now reported at [1999] QB page 92 and the relevant passage is at page 107D-109D. The situation in the present case is not strictly analogous to the situation in that case. In that case the Court of Appeal was able itself, in substitution for the order of the judge, to remit the references for determination of rent to the tribunal for fresh determination. So Auld LJ was able to say at page 109B:

> "If ... McCullough J 's rulings on the substantive issue are wrong or are such as possibly

> to mislead a new committee into repeating the errors of the present committee, the judge's order has not given the landlord all that he wants and to which he is entitled and the Court of Appeal can do something about it... It can exercise ... the power of the court below to remit the matter for rehearing and determination ... in accordance with the correct opinion of the court."

In the present case, however, there will not be a rehearing of the present proceedings, they having fatally failed on the section 21 point, and there is effectively nothing to remit for redetermination. I accept, however, the submission of Mr Panton, on behalf of the tenant, that although Judge Oppenheimer made one order, namely to dismiss the proceedings, he made two decisions or determinations, namely decisions or determinations on each of the section 20 and the section 21 points. Further, although Judge Oppenheimer does not say so in so many words, his rejection of the section 20 point and his going on to deal with the section 21 point clearly implies a judicial finding that on the correct application of the law to the facts of this case the tenant has only the security of an assured shorthold tenancy. That finding may or may not amount to res judicata or an issue estoppel in subsequent proceedings between the same parties. But I do not see why the tenant should be exposed to the risk that it does; nor the utility, if it does not amount to res judicata, in these parties having to reargue the identical point before the same or another circuit judge only, perhaps, to arrive at the Court of Appeal on the same issue on a later date.

In this case, as much as in the Curtis case, the judge's rulings (if not his order) have not, if wrong, "given to the appellant all that he wants and to which he is entitled." He, and indeed the landlords, are entitled to a correct ruling on a point of intense direct interest to each of them. So, in my judgment, this appeal is not "academic" and we should entertain it. If, anticipating the result, we decide that Judge Oppenheimer was wrong, we have power under the Rules of the Supreme Court, Order 59, rule 10(3) to give any judgment which ought to have been given, and power under rule 10(4) to make any order to ensure the determination of the real question in controversy between the parties. The real question in controversy between these parties is, indeed, the section 20 point.

I, for my part, much regret that the respondent landlords have not chosen to participate, not least because I would have valued the benefit of their argument. But if it is right that we should entertain this appeal we cannot be thwarted by their decision not to participate.

The effect of errors, omissions or discrepancies in notices under section 20 has been considered by this court in at least three reported cases, two of which were cited to the judge and considered at length by him in his judgment. The first was Panayi & Pyrkos v Roberts [1993] 25 HLR 421. In that case the section 20 notice described the term of the proposed tenancy as being "from November 7, 1990 to May 6, 1991" i.e. for six months. But the tenancy itself was expressed to be for a term of 12 months from November 7, 1990.

Counsel for the landlord submitted, as described by Mann LJ:

> "... first that the appearance in the notice of `May' rather than `November' was an evident error and, secondly, that the legislative purpose had been achieved because the appellant was warned by paragraph two of the notice that she was about to enter into a shorthold with limited rights of protection after either six months or an expiration in accord with the terms of the tenancy..."

Mann LJ continued:

> "The issue can be narrowed. There is a statutory precondition that a notice should have been served in the prescribed form. The prescribed form requires for completion a specification of the date on which the tenancy in respect of which a notice is served both commences and ends. The narrow issue is whether a notice which gives a wrong date (here a termination) is `substantially to the same effect' as one which gives the correct date. Authority and an evident error apart, I would exclude a quality of obtuseness as being extraordinary. The writing of `1793' for `1993' would be an evident error. The writing in this case of `May' rather than `November' in my judgment would be a perplexity rather than an evident error to an ordinary recipient proposing and taking a tenancy of [the property in question]."

After referring to certain previous authority Mann LJ concluded:

> "Those observations confirm the view which I independently formed. Form No. 7 requires for its completion the specification of a date of termination and must therefore predicate the insertion of the correct date for the tenancy `in respect of which a notice is served.' A notice with an incorrect date is not substantially to the same effect as a notice with the correct date and in this case the mistake was not obvious. The short answer to [counsel for the landlord's] submission is that although the legislative purpose of the primary legislation could perhaps be met without a specification of date, the legislative requirement of the secondary legislation is that there should be a date, and a correct one, in respect of the tenancy granted.
> I wish to give no encouragement to arguments which are based on what were described to us as `slips of the pen' and which I have exemplified as `1793' for `1993.' However, an insistence on accuracy seems to me likely to simplify the task of the county court and more importantly to enable tenants to know with certainty of their status."

The second case cited to the judge was the later case of Andrews v Brewer [1997] 30 HLR 203. In that case the section 20 notice provided that the tenancy would commence on May 29, 1993 and end on May 28, 1993[sic] (rather than 1994). The tenancy agreement itself was for a term of one year commencing on 29 May 1993. As Auld LJ said:

> "The date specified in the notice was clearly a clerical error. It provided that the tenancy would commence on May 29, 1993 and end on May 28, 1993, on the face of it a day before its commencement."

He said later that:

> "The prescribed form required, among other things, a clear indication of the start and end of the proposed tenancy. It is quite clear, as I have already said, that in misstating the year of the termination this notice was wrong, but it was obviously wrong and clearly a clerical error. Put in a way in which this court has done in the case of Panayi & Another v Roberts ... it was an evident error, one which would have been understood to be so by the parties and one which would not vitiate the notice."

Auld LJ then cited passages from the judgment of Mann LJ, which I have already cited above, and concluded that:

> "It is my firm view that the obvious clerical error here does not detract in any way from the effect of the notice. It certainly does not mean that it is not substantially to the same effect as that in the prescribed form."

It is clear that Auld LJ regarded himself as adopting and applying the approach of Mann LJ in Panayi which, on the facts of the Andrews case, clearly left the notice as valid and effective in the latter case.

The third and most recent authority was not, in fact, cited to His Honour Judge Oppenheimer and, indeed, it seems to me at least possible that if it had been he might have reached a different conclusion. The authority is York and another v Casey and another [1998] 2 EGLR page 25. In that case the section 20 notice was dated 6th September 1996. It correctly stated that the commencement date was 28 September 1996, but incorrectly stated that the termination date was 6 September 1996. That was a manifest absurdity, preceding, as it did, the commencement date. In that case the notice had been accompanied by a letter from the landlords which clearly and correctly stated that the proposed tenancy was for a term of six months from 28th September 1996. Since the earlier cases of Panayi v Roberts and Andrews v Brewer, the House of Lords had considered the effect of errors in notices between landlords and tenants in the case of Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd. [1997] AC 749. Peter Gibson LJ reviewed the cases of Panayi v Roberts and Andrews v Brewer in the light of the decision of the House of Lords in Mannai and concluded:

> "I agree with [leading counsel for the appellant landlords] however, that the test posed and applied in those cases accords with the test found to be appropriate in the Panayi [(sic), as reported, but the reference should clearly be to the Mannai] case. Accordingly, what the court must do is to see whether the error in the notice was obvious or evident and, second, whether notwithstanding that error the notice read in its context is sufficiently clear to leave a reasonable recipient in no reasonable doubt as to the terms of the notice."

On the facts of that case he held that (i) the error was evident, as the termination date preceded the

commencement date and was plainly a repetition of the date of the notice itself; and (ii) the letter which accompanied the notice made the true termination date sufficiently clear.

In my judgment, the present case does not raise any new issue of law and properly falls to be determined by reference to the approach culled from those three cases and the two-stage approach formulated by Peter Gibson LJ. In my judgment, the present case is clearly on the Panayi rather than the Andrews and York v Casey sides of the line. In Andrews and York v Casey there were "evident" or patent errors in the notices, since they each purported to describe a tenancy which ended before it began. There was no real ambiguity or conflict between the terms of the notices and the terms of the tenancy agreements. To the tenant or to any other reader of the two documents side by side (augmented in the case of York v Casey by the letter which accompanied the notice), the tenancy agreement manifestly described the terms.

In the present case, however, as in the Panayi case, there is no "evident" or patent error in the dates on the notice. Indeed, there was no "clerical error" at all, for on the date that the section 20 notice was prepared and served it did indeed correctly describe both the commencement and termination dates of the proposed tenancy. The dates on the two documents are in complete conflict with each other and it is impossible to determine by reference to the documents alone which is correct. In the words of Mann LJ they are "a perplexity rather than an evident error".

So in the present case I would unhesitatingly hold that the error in the notice was not obvious or evident, so that the notice which is, in fact, erroneous does not even satisfy the first stage of Peter Gibson LJ's approach. Nor does it satisfy the second stage, for when the notice is read in the context of the tenancy agreement, i.e. side by side, it cannot be said that a reasonable recipient is left in no reasonable doubt as to the term of the notice. The plain fact is that the reader is left with two documents which are in conflict and the reasonable recipient could be left in real doubt as to whether,

in truth, this tenancy ends on 7 July or 23 June.

Judge Oppenheimer, however, said (at page 6D to 7C):

> "Now, first of all, in this case the tenant knew the date of the commencement of the tenancy had changed. On the agreed facts, he knew that he had received the section 20 notice on 20th December, 1995, his tenancy being proposed to start the following day. He asserts that he thought the premises were empty on that day, 21st December, 1995, and that there was no hurry for him to go in. He received his tenancy agreement dated 21st December, 1995, with a commencement date starting that day for a period of six months. But the date was scratched out on the tenancy agreement, and the date of 8th January, 1996 was substituted, because he went in on that day, 8th January 1996.
>
> In the particular circumstances of this particular case, the tenant, in my judgment, could have had no doubt as to the length of his tenancy. If either the landlord or the tenant had thought about it, they would immediately, in my judgment, have realised that the dates on the section 20 notice were no longer applicable or relevant to this tenancy. By an error, the landlord did not take the notice back, scratch out the dates and put the fresh dates thereon, and hand the notice back to the tenant, in other words, re-serve the notice in its new form prior to handing him the tenancy agreement.
>
> That seems to me to have been an error which in no way could have misled the tenant."

He went on to say (at page 7F-H of his judgment):

> "I agree with the suggestion that I am in this case taking account not only of the face of the documents, but the agreed circumstances surrounding their execution.
>
> There is nothing in any authority that suggests that I should not do so. The question is difficult, but I resolve it in favour of the landlord, for the reasons that I mention."

In my judgment, however, and with respect to Judge Oppenheimer, existing authority does not justify looking into the circumstances beyond the context of the contemporary documents themselves. Further, the judge was not justified in his conclusion that: "That seems to me to have been an error which in no way could have misled the tenant". There is room for real confusion in this case as to the termination date of his tenancy.

Judge Oppenheimer concluded this part of his judgment by saying (at page 8A-C):

> "Finally on this point, it is perhaps pertinent to point out ... that a new section 19 (A) has been added to the 1988 Act reversing the position in relation to the service of section 20 notices, indeed making them not used at all. In other words, that the law has changed since this tenancy was granted, and that there is every reason, as far as legal policy is concerned, to take a more benevolent view to what is a rather technical question."

With respect to the judge, I cannot accept that argument. The policy behind the enactment in 1996 (too late for this case) of section 19 (A) may well have been to make the law less technical and thus to encourage the supply of more rental properties. But that does not seem to me to justify taking a more benevolent view as to the prior law, thereby depriving tenants of whatever security they are entitled to under that law. The fact that the law has been made less technical tends to emphasise, rather than to detract from, its prior technical state.

For these reasons, in my judgment we should allow this appeal and make an order that the Court of Appeal determines that the notice of an assured shorthold tenancy to Jonathan McCann, dated 20 December 1995, is not a valid or effective notice in respect of the tenancy created by the tenancy agreement dated 21.12.95 for the purposes of section 20(1)(c) and (2) of the Housing Act 1988.

LADY JUSTICE BUTLER-SLOSS: I agree with the judgment of my Lord. The appellant in this case won the skirmish and lost the battle. The consequence of the judge's judgment was the dismissal of the action, but it also cleared the way for the landlord to serve another Section 21 notice on the tenant seeking possession to which, in the light of the judge's decision, there was likely to be no defence by the tenant at the subsequent proceedings. That is because the judge held that the Section 20 notice complied with the requirements of the Housing Act 1988. The judge had made two decisions in his judgment: first, on the Section 20 notice and, second, on the Section 21 notice.

I agree with Holman J that it would be appropriate for the Court of Appeal to entertain an appeal from the judge's finding on the Section 20 issue which the appellant lost, although he had won on the overall action.

The finding on the Section 20 notice establishes that the appellant held an assured shorthold tenancy. If the appellant is right on his argument on the Section 20 notice, as this court considers he is, he holds an assured tenancy and not an assured shorthold tenancy. He, therefore, would have a much increased security as a tenant. It is therefore very important for the tenant that he should have the right to appeal the decision which went against him. This issue is not academic but real.

I agree therefore that the court should entertain an appeal by the tenant, even though the action against him was dismissed. Although we have only heard submissions on behalf of the tenant, we are most indebted to Mr Panton for providing us both with written and oral arguments and a careful review of the relevant law. I agree with Holman J that the facts in the present case fall on the Panayi side of the line rather than the Andrews v Brewer and York v Casey side.

Paraphrasing Mann LJ in Panayi, the inconsistency between the Section 20 notice and the tenancy agreement would be a perplexity and not an evident error to an ordinary recipient proposing to take a tenancy of Room 2a, 20 Lampton Road, Hounslow.

I agree that the appeal should be allowed. Consequently the appeal is allowed and it is determined that the notice of an assured shorthold tenancy to Jonathan McCann, dated 20 December 1995, is not a valid or effective notice in respect of the tenancy created by the tenancy agreement, dated 21 December 1995, for the purposes of Section 20(1)(c) and 20(2) of the Housing Act 1988.

Order: Appeal allowed with costs; legal aid taxation of the appellant's costs. (This order does not form part of the approved judgment)