

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London, WC2A 2LL
18 December 2012

Before:

MR JUSTICE RAMSEY

EVANS

Appellant

- and -

- and -

LONDON BOROUGH OF BRENT

Respondent

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(Official Shorthand Writers to the Court)

MISS VICTORIA OSLER (instructed by Gillian Radford) appeared on behalf of the Appellant
MR DONALD BROATCH (instructed by Borough Solicitor, London Borough of Brent) appeared on
behalf of the Respondent

HTML VERSION OF JUDGMENT (APPROVED)

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Mr Justice Ramsey:

Introduction

1. This is an appeal by Ms Angela Evans, the Appellant, against the decision of His Honour Judge Copley at Willesden County Court on 1 May 2012, by which he granted the Claimant Council possession of a property at 114 Mordent Road, London NW10 (which I will refer to as "the Property") of which Ms Evans' deceased father was a secure tenant. She brings this appeal with permission granted on 5 October 2012.

Background

2. The appellant's father, Mr Peter Evans, lived at the Property as a secured tenant, having been granted a tenancy on 27 January 2007. The Property is a three bedroom house and the Appellant was a named individual on the tenancy agreement. She had lived there before that date, it appears, and she lived

there with her three children from January 2007 until she moved to take an assured shorthold tenancy of 208A Chapter Road, London NW2 for a fixed term of 12 months from 1st December 2010.

3. In paragraphs 6 (a) to (d) of her Defence, the Appellant pleads that her father had cancer and in 2006 was in remission. She avers that from the date of the commencement of the tenancy until December 2010, she, together with her children, occupied the Property as her only or principal home; that prior to the commencement of the tenancy, the First Defendant was diagnosed with cancer. In 2006 he was informed that he was in remission.
4. In 2010, the First Defendant began to feel extremely fatigued and because of his previous health problems and the fact that he was near the end of the remission window, his consultant advised that he needed to rest. In light of that advice and to allow the First Defendant more opportunity to rest, the Appellant (the Second Defendant) took an Assured Shorthold Tenancy Agreement in Chapter Road, London NW2 for a fixed term of one year. While the Appellant moved some of her belongings to Chapter Road, the majority of her and the children's belongings remained at the Property and at all times she intended to return to the Property when the First Defendant felt better.
5. In or about autumn 2011, the First Defendant's health deteriorated. He asked the Appellant to be in the Property at all times to care for him. In November 2011, the Appellant terminated her tenancy of Chapter Road, so the Property was her sole residence.
6. On 16 December 2011, the First Defendant, the Appellant's father, died. By a Claim Form issued on 18 April 2012, the Council sought possession of the property. The Council pleaded that the Appellant was not qualified to succeed her father under the secured tenancy because under Section 87 of the Housing Act 1985, she did not occupy the property as her only or principal home at the time of her father's death and she had not resided with her father throughout the period of 10 months ending with the tenant's death. The possession claim was accompanied by a witness statement in support by Ms Eileen O'Neill, a council employee. She exhibited relevant documentation.
7. In her Defence and Part 20 claim, the Appellant relied on the matters set out in paragraph 6(a) to 6(d) and pleaded that notwithstanding her temporary accommodation at 208A Chapter Road, she resided with the First Defendant in the 12 month period immediately prior to his death. Accordingly, she is entitled to succeed to the tenancy, evidently relying on Section 87 of the Housing Act 1985. In the alternative, she pleaded a public law defence challenging the Council's policy or the operation of the Council's policy in relation to succession rights, and in the further alternative, she contended that eviction would be disproportionate given her Article 8 rights.
8. The judge at the possession hearing considered the pleadings and decided that the Appellant could not succeed. In relation to the position under Section 87 of the Housing Act, he said this:

"It is common ground that the defendant did not reside with the tenant for a period of 12 months preceding his death and on those agreed facts, whatever her intention may have been, it does not seem to me that, as a matter of law, she is entitled to succeed."

9. In relation to the public law defence he said this, combining both the public law defence and the Article 8 defence:

"Having regard to a public law defence, as I understand the legal position, it is that there has to be some seriously arguable case that Article 8 comes into play to the extent it will be disproportionate for the council, notwithstanding the legal position, to claim possession."

Again, it does not seem to me that it could be seriously arguable here that even if the claimant had a discretion in the matter, that it would be a wrong exercise of their discretion not to allow the Appellant to remain in these premises. It is common knowledge that demands on the local authority in this case and in every other case throughout the country exceed the supply of the housing stock and the local authority has to manage its stock in the best possible way."

10. On this appeal, I have had detailed Skeleton Arguments from Miss Victoria Osler, who appears on behalf of the Appellant, and from Mr Donald Broatch, who appears on behalf of the respondent Council. It is convenient to deal with each matter in turn: Section 87 of the Housing Act, the public law defence, and the Article 8 rights claim.

11. I remind myself of the scope of appeal in a case under CPR 52. It is limited to review and as Brooke LJ said in Tenfern Limited v Cameron-Macdonald [2000] 1 WLR 1311 at [32], referring to what Lord Fraser of Tullybelton said in the House of Lords in G v. G (Minors: Custody Appeal) [1985] 1 WLR 647 at 652, the court should not interfere unless the judge of the court below has exceeded the generous ambit within which a reasonable disagreement is possible.
12. In relation to the Section 87 position, Ms Osler submits that this was a case where the court should have decided whether or not there was a succession under Section 87 of the Housing Act 1985, which provides as follows:

"A person is qualified to succeed the tenant under a secured tenancy if he occupies the dwellinghouse as his only or principal home at the time of the tenant's death and either (a) [which is not applicable]; or (b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death."

13. I have been referred to the case of Camden London Borough Council v Goldenberg (1996) 28 HLR 727 which deals with the question of residence. I need not deal with the facts of the particular case. Rather, in the judgment of Thorpe LJ at 732 to 733 he referred, first of all, to the Rent Act case of Brickfield Limited v Hughes (1998) 20 HLR 108 where Neill LJ extracted the following guidelines at 113:

(1) Where the tenant's absence is more prolonged than is to be explained by holiday or ordinary business reasons and is un-intermittent, the onus lies on the tenant of establishing intention to return if he seeks the protection of the Act.

(2) An inward intention, however, is not enough. It must be accompanied by some outward and some visible sign of the tenant's intention. The continued occupation by a caretaker or relative, or the continued presence of furniture may be sufficient, but in each case the question is whether or not the person or furniture can be regarded as a genuine symbol of his intention to return 'home'.

(3) In addition the tenant must show that there is a 'practical possibility' or a 'real possibility' of the fulfilment of that intention within a reasonable time. What is a reasonable time depends on the circumstances.

(4) The protection of the Act can be *claimed even though the tenant has another home or residence, but the court will look with particular care at two homes cases.*"

14. Thorpe LJ then said:

"Extending those principles to the present case it is clear that a period of absence does not necessarily break the continuity of residence. In determining whether or not that departure has that consequence regard must be had to:

(1) The nature and extent of the continuing connection with the premises in dispute throughout the period of absence; and

(2) The quality of the intention to return."

15. The judgments in that case emphasise that the question of whether a person is residing is a matter of fact and degree and each case has to be decided on its own facts.
16. On this appeal, Ms Osler says that whether or not, in this case, Ms Evans has, on the facts, resided with her father throughout the period of 12 months ending with his death, and whether that has been satisfied, given the tests in Camden London Borough Council v Goldenberg is dependant, she says, on the matters pleaded. In particular, the fact that her belongings were in the property; that she had her postal address there; how often she and the children returned to the property; whether the children continued to go to school close to the property; whether there had been overnight stays by the Appellant and the children; the nature of the Appellant's father's illness and whether the intention to return was made out; the reason for leaving the property and whether there was an intention to return during the period of absence. Ms Osler submits that this is a case where the judge, in coming to the conclusions he came to, rejected any question other than the fact that the Appellant had not resided with the tenant for the full 12 months and said, in terms, that whatever her intention it was not going to affect whether she

could succeed. It is submitted by Ms Osler that the Appellant had no opportunity to have the factual matters addressed, which are, as set out in Camden v Goldenberg, of importance in cases such as this.

17. On behalf of the Council, Mr Broatch refers me to three sets of documents. First, documents in 2003, which indicate that there was a breakdown in relations between the Appellant and her father; secondly, documents in November 2010 when, in seeking accommodation elsewhere, the Appellant had indicated that she could not longer live with her father; and, thirdly, documents in May 2011 when, in applying for Housing Benefit to live elsewhere, she did not indicate that she was wishing to live with her father.
18. It seems to me that what Mr Broatch puts forward is strong evidence in this case that the Appellant did not have an intention. However, those are three sets of documents. There is, in my view, a case here which raises matters of fact which should be determined by the court and not dealt with on the basis of the jurisdiction, either under summary judgment or on the basis of CPR rule 55.8, which provides that the court may proceed to decide the claim unless the claim is genuinely disputed on the grounds which appear to be substantial.
19. In my judgment, this was a case which, in a busy possession list, the judge should properly have considered the defences and, although there is strong evidence one way, there was also evidence the other way. I do not consider that this is a case where either approaching the matter with a summary judgment test in mind or a test under CPR rule 55.8, the court could grant summary possession on the basis of the allegations and matters which are properly the subject of evidence and investigation by the court, rather than summary disposal.
20. In relation to the second ground of appeal which is put forward in this case, it is submitted that the Council had a discretion but they fettered themselves in exercising that discretion by applying a policy only for successors who would otherwise be excluded under the final provision of Section 87 of the Housing Act 1985, which provides that: "*Unless, in either case, the tenant was himself made successor, as defined in section 88.*"
21. It is submitted in this case that the Council fettered its discretion by limiting themselves to the policy they had set out in relation to second successors and had failed, in doing so in any event, to exercise a discretion taking into account the relevant matters.
22. In my judgment, this is a case where the judge came to the right conclusion based on his view of matters. In my judgment, what happened in this case was on 24 January, the council wrote a letter in which they set out the relevant matters which had to be considered when exercising discretion. They put it in broad terms that there was an application for the Applicant "to side step" the Council's own allocations policy. I take that to be a reference to the exercise of discretion and they set out the reasons in that letter as to why, in the circumstances of this case, they had decided not to exercise the discretion.
23. It seems to me that on the basis of that letter, first of all, there is not a seriously arguable case or a case which complies with Rule 55.8 that the Council did not exercise discretion because they were fettered by their own policies. Secondly, it seems to me there is not a similar seriously arguable case or one which comes within Rule 55.8 that they failed to take into account the relevant matters in that letter in exercising their discretion. Therefore, it seems to me that the judge's conclusion that the matter should not proceed on the basis of that defence was substantially correct.
24. So far as the third ground is concerned, it is said in the further alternative that if the position is that first of all the case fails on the first ground of not being a case under Section 87 and, secondly, it fails on the basis that the council did exercise its discretion properly, there is a fall back position which is that it was not proportionate in the circumstances of this case for the court to grant a possession order and evict the Appellant from the Property. In my judgment given, in particular, the recent decision of Thurrock Borough Council v West [2012] EWCA Civ 1435 and the judgment of Etherton LJ in that case, this is not a case where it is seriously arguable (which is the test) that in the circumstances of this case there is an open Article 8 defence if the other matters do not succeed. In those circumstances, the judge was entitled not to take account of that defence in coming to his conclusion.
25. In those circumstances, I consider that the matter which is open as a result of this appeal is the ground under Section 87 of the Housing Act 1985, which will need to go back to the County Court for there to be a short trial to make the necessary findings of fact so that the necessary issue under Section 87 of the Housing Act 1985 can be determined. Therefore, to that extent, this appeal is allowed.

26. This is a case where I have held that the Appellant succeeds in part. I consider that this is a case where, despite the fact the Appellant has not won on all grounds, the Appellant has won on a substantial ground and in those circumstances, the appropriate order is that the Respondent should pay the Appellant's costs of the appeal. Those costs are to be assessed on a standard basis, but the order is not to be enforced pending the determination of the underlying proceedings.