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The South West Housing Conference
Possession Proceedings and Proportionality - where are we now?

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London & Quadrant Housing Trust v Weaver – where it all began

* But for the decision in Weaver v London & Quadrant [2009], proportionality in possession proceedings would not matter much to Housing Associations;

* Housing Associations are now regarded as hybrid public authorities post the Weaver decision.
Weaver v London & Quadrant [2009]

Weaver claims legitimate expectation that London & Quadrant would only use a Ground 8 Notice (rent arrears) as a last resort in pursuing possession proceedings because of Housing Corporation guidance;

To argue legitimate expectation, Weaver had to show London & Quadrant amenable to a judicial review challenge;

Associated argument that London & Quadrant were directly subject to the provisions of the Human Rights Act and the use of Ground 8 was in breach of Article 8 of the Act;
Weaver v London & Quadrant [2009]

To argue application of the Human Rights Act, Weaver was required to show London & Quadrant was a public body;

The Divisional Court found that London & Quadrant was amenable to judicial review on public law grounds including decisions concerning the termination of Tenancy Agreements and that London & Quadrant was to be regarded as a public authority for the purposes of the Human Rights Act in relation to decisions concerning the termination of Tenancy Agreements;
Weaver v London & Quadrant [2009]

* The Court of Appeal dismissed the London & Quadrant challenge and the Supreme Court of England and Wales chose not to tamper with that decision;

* The practical effect of that decision was that some functions of management of housing stock (including decisions concerning the termination of a Tenancy Agreement) are functions of a public nature and therefore susceptible to a judicial review challenge and/or a human rights challenge under the Human Rights Act 1998.
The Legislative Framework

* By Section 6.1 of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with the rights in the European Convention on Human Rights set out in Schedule 1 to the 1998 Act;

* In particular, Article 8(2) of the Convention provides that everyone has the right of respect for his private and family life, his home and his correspondence and that there will not be an interference by a public authority with the exercise of this right except in accordance with the law, where is it necessary in a democratic society, public safety requires it or for the prevention of disorder or crime.
Kay v Lambeth Borough Council [2006] UKHL10 – further down the road

Lambeth gave notice to terminate the interests of the London & Quadrant Housing Trust to whom it had granted a licence of short life premises.

Various premises were occupied by licensees who had lived in the individual units for up to 20 years.

Lambert brought possession proceedings against Mr Kay and other occupiers as trespassers.

The County Court, Court of Appeal and ultimately the House of Lords gave consideration to the scope and application of the right to the respect for the home protected by Article 8.
Kay v Lambeth Borough Council [2006] UKHL10 – further down the road

- It held that the making of a Possession Order was an interference of Mr Kay’s rights of respect for his home, but the issue was whether that interference was justified;

- The House of Lords held that ordering possession accordance with the law, would serve the legitimate aim of protecting Lambeth’s property rights.

- The Court was satisfied that the domestic law requirements for making a Possession Order were met.

- The Court said that a court should make an Order unless the occupier shows that highly exceptionally, he has a seriously arguable case on one of two grounds:
Kay v Lambeth Borough Council [2006] UKHL10 – further down the road

1) That the law which requires the Court to make a Possession Order despite the occupier’s personal circumstances is convention incompatible; and

2) Having regard to the occupier’s personal circumstances and the authority’s own policies and procedures in progressing possession proceedings, no other Landlord would have sought possession of the property in the circumstances
Kay v Lambeth Borough Council [2006] UKHL10 – further down the road

* Importantly, the Court stated that in deciding whether or not a Defendant had a seriously arguable case, would not call for a full blown trial but instead could be decided summarily, i.e. on the basis of contents of a Defendant’s Defence;

* Mr Kay’s appeal was dismissed and a Possession Order confirmed;
Doherty v Birmingham City Council [2008] UKHL57 – further Development of the Law

* The description of the two Grounds referred to in Kay and Lambeth described as “Gateways” by Lord Hope;

* Gateway B, which was relied upon by Doherty, takes the form of a challenge to the decision of the landlord’s decisions to seek possession: in effect, it is a form of judicial review in the County Court.
Manchester City Council v Pinnock [2010] - UK Supreme Court goes European

Factual Background

- Manchester City Council secured a Demotion Order in respect of Mr Pinnock’s property in June 2007;

- The Court found 32 incidents of antisocial behaviour committed by Mr Pinnock and his family and determined that it was reasonable to make the Demotion Order;
Manchester City Council v Pinnock [2010] - UK Supreme Court goes European

In June 2008 Manchester City Council served Notice of Proceedings of Possession under Section 143E of the Housing Act 1996;

The Notice relied on two further alleged breaches of the nuisance clause in Mr Pinnock’s Tenancy Agreement;

Mr Pinnock requested that the Local Authority review that decision. The panel upheld the decision to evict Mr Pinnock and thereafter commenced possession proceedings;
Manchester City Council v Pinnock [2010] UK Supreme Court goes European

Mr Pincock stated that the decision to evict was an interference with his rights under Article 8 and that the Court had jurisdiction to conduct a judicial review of the decision to seek possession;

The County Court ordered possession and stated that the Local Authority was entitled to possession so long as the Notice Before Commencement of Possession was valid and the Review Panel was not acting unreasonably in upholding the decision to evict;
Mr Pinnock appealed that decision to the Supreme Court. The Court dismissed the appeal and made the following general points in relation to possession proceedings and proportionality:

1) Article 8 only comes in to play when a person’s home is involved;

2) The proportionality of seeking possession only needs to be considered by the Court if the point is raised by the occupier concerned;
Manchester City Council v Pinnock
[2010] UK Supreme Court goes European

3) Any Article 8 Defence should initially be summarily considered by a County Court Judge;

4) When an outright Order for Possession is valid under domestic law and an Article 8 Defence has been consider summarily, the Court should award an Order for Possession;

5) Article 8 proportionality is more likely to be relevant in respect of occupiers who are vulnerable, due to either a mental or physical disability;
Hounslow London Borough Council v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby [2011] – The European Tour Continues

* Possession proceedings and proportionality were again considered by the Supreme Court in Powell, Hall and Frisby in the context of Introductory Tenancy Agreements;

* Miss Powell was granted a non secure licence to occupy a flat;

* Hounslow served a Notice to Quit because she fell in to rent arrears and then progressed possession proceedings in the County Court;
Miss Powell admitted the arrears but sought to defend the possession claim by challenging the decision to serve a Notice to Quit as being an unreasonable decision i.e. raising a Gateway B Defence to the claim;

A Possession Order was made in the County Court but permission to appeal was granted;
Again, the Supreme Court took the opportunity to confirm the basic rules to be followed by a County Court Judge in these types of possession proceedings. The basic rules were:

1) The Court would only have to consider whether making the Possession Order was proportionate if the issue was raised by the occupier and had crossed the threshold of being seriously arguable;
Hounslow London Borough Council v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby [2011] – The European Tour Continues

2) The question for the Court would then be whether the making of a Possession Order would be a proportionate means of achieving a legitimate aim;

3) The threshold for raising an arguable case on proportionality was a high one and Defences would only cross it in a small proportion of cases;
Hounslow London Borough Council v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby [2011] – The European Tour Continues

4) The Court should proceed on the basis that the landlord had sound management reasons for seeking a Possession Order;

5) If the threshold was crossed, the Court should then consider Article 8(2) of the European Convention on Human Rights and then balance the landlord’s management reasons for seeking a Possession Order against the tenant’s rights to respect for his home being interfered with in accordance with law;
6) The Supreme Court was absolutely clear that the County Court should initially consider proportionality issues at a summary hearing and only if the Defendant raised seriously arguable human rights and public law points should the Court not then award a Possession Order but instead allow the case to proceed to a trial.
Corby Borough Council v Nicholle Scott [2012] EWCA CIV276

- LA grant an introductory tenancy;
- Tenant fell in to arrears and complaints were made in relation to noise nuisance;
- Tenant’s family paid off the arrears the day before the possession hearing;
- Tenant had been a victim of a serious assault;
- County Court Judge agreed the Claimant was entitled to possession but there were exceptional circumstances which meant it was not proportionate to award possession;
Corby Borough Council v Nicholle Scott [2012] EWCA CIV276

* The Court of Appeal overturned the County Court decision and made a Possession Order;

* The Court held that the Claimant’s action in evicting Miss Scott was not disproportionate regardless of having arrears paid off and being the victim of an attack i.e. the attack had nothing to do with the claim for possession or the home from which she was being evicted.
West Kent Housing Association Ltd v Jack Haycroft [2012] EWCA CIV276

* Tenant had been granted an Assured Short hold Tenancy in the form of a Starter Tenancy;

* Neighbour of tenant made an allegation of indecent exposure – investigated by the Local Authority and the Police;

* Possession proceedings were instigated;

* Tenant applied for a review at which case the decision to evict was upheld;
West Kent Housing Association Ltd v Jack Haycroft [2012] EWCA CIV276

※ Judge made an outright Possession Order;

※ Tenant appealed raising a proportionality argument;

※ The Court of Appeal considered the tenant’s appeal and held that the tenant had not raised a sufficiently strong Article 8 Defence i.e. the Review Panel had properly investigated the issues before it and the conclusion of that hearing was well reasoned;

※ Appeal dismissed.

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Birmingham CC v Lloyd [2012] EWCA CIV969

⊙ Mr Lloyd’s brother had a secure tenancy from Birmingham City Council;

⊙ Mr Lloyd’s brother died and Mr Lloyd moved in to his flat without the knowledge or consent of his brother’s estate or the Local Authority;

⊙ Possession proceedings commenced to recover possession of Mr Lloyd’s deceased brother’s property;
Birmingham CC v Lloyd [2012] EWCA CIV969

- County Court proceedings were dismissed – eviction would be disproportionate interference with Mr Lloyd’s rights under Article 8 and considered Mr Lloyd’s diagnosis of depression, good behaviour and likability by neighbours as factors making it disproportionate to evict him;

- Court of Appeal allowed the appeal;

- For a trespasser to have a successful proportionality defence, they would require the most exceptional circumstances;
Birmingham CC v Lloyd [2012] EWCA CIV969

Mr Lloyd’s circumstances were not exceptional;

Sympathy with personal circumstances could not translate in to the eviction amounting to a disproportionate interference with Mr Lloyd’s Article 8 rights.
Southend on Sea Borough Council v Allen

* Mr Allen lived at the property since 1955 and suffered depression;

* Mr Allen’s father and then subsequently his mother died and he was informed that he could not succeed to the tenancy;

* Possession proceedings issued;

* County Court refused to deal with the possession claim summarily and made directions for trial;
Southend on Sea Borough Council v Allen

* LA appealed on the basis that the Judge had failed to deal with the matter on a summary basis;

* The appeal was allowed and the Possession Order was made;

* His Honour Judge Lochrane noted in his judgment “The District Judge was wrong and applied the wrong test. Having considered the Defence in my judgment it cannot be said, given the test set out and summarised, that Mr Allan has an Article 8 proportionality defence which is seriously arguable”.

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Thurrock Borough Council v West [2012] EWCA CIV1435

* Mr West moved in to his grandparents property in 2007 and was joined by his partner and sons;

* Mr West was not entitled to succeed when his grandparents died;

* Possession proceedings issued;

* Mr West defended the possession claim on the basis that if he was evicted, his family would become homeless;
Thurrock Borough Council v West [2012] EWCA CIV1435

* Possession claim dismissed in the County Court. The County Court stated that evicting the family only to then re-house them in another property would be disproportionate;

* Local Authority appealed on the basis that the facts did not come near the threshold of a seriously arguable Article 8 Defence;

* Appeal allowed;

* Appropriate test established by Pinnock;
Thurrock Borough Council v West [2012] EWCA CIV1435

Threshold for establishing that the decision was disproportionate was an exceptionally high one and sympathy should not obscure the effect of the Judge’s decision i.e. the Local Authority had been stopped from recovering possession from an unauthorised occupier.
Southend-on-Sea Borough Council v Armour [2013]

- Mr Armour, an introductory tenant of the Southend-on-Sea Borough Council;

- Reports of antisocial behaviour shortly after he moved in;

- Notice of possession proceedings served and possession claim made;

- Two adjournments (because of Mr A);
Southend-on-Sea Borough Council v Armour [2013]

* County Court – possession claim dismissed – no criticism of actions of the Claimant but as of the date of the hearing, it was no longer proportionate for a Possession Order to be made as the Defendant had behaved and complied with the terms of the Tenancy for almost a year;

* Appeal to the High Court dismissed. Cranston J decided the Recorder had considered the relevant facts and good behaviour was a relevant consideration when considering proportionality and the amount of weight to be given to each factor is a matter for the County Court;
Southend-on-Sea Borough Council v Armour [2013]

* Court of Appeal gives permission to appeal the decision of Cranston J (16 April 2013) on the basis that the facts of this case were not sufficient to meet the high threshold of amounting to a seriously arguable Article 8 Defence as outlined by the Supreme Court in Pinnock and Powell, and the evidence of Louise Ward set out in her statement dated 16 January 2013 is cogent relevant evidence upon which a Judge could find that Mr Armour misled the Judge in the first instance, Appeal to be listed in the Summer.
Possession Proceedings and Proportionality – practical points to consider

* Ensure proper compliance policies and procedures at all times;

* If a review of a decision to progress possession proceedings is offered and accepted, ensure that the review hearing complies with the rules of natural justice;

* Proper consideration of and responses to representation from tenants and affected parties – consider carefully and personal circumstances differed;
Possession Proceedings and Proportionality – practical points to consider

- When deciding to terminate a Tenancy Agreement, remember the importance of recording decisions and the importance of an upward review of decisions;

- Keep clear and accurate records of decisions made;

- Avoid hearsay and personal comments;

- If you decide that an internal review is flawed, consider making a new decision;
Possession Proceedings and Proportionality – practical points to consider

✳ Change direction if necessary i.e. consider seeking an alternative remedy e.g. an Injunction Order;

✳ When progressing possession proceedings against an introductory, starter or assured shorthold tenant, consider setting out a ‘proportionality position’ in Particulars of Claim and supporting witness evidence to be considered by the Court at an initial hearing;
Possession Proceedings and Proportionality – practical points to consider

※ If at that initial hearing, the Defendant states that he/she has an Article 8 Defence, ask the Court to order that the Defendant file and serve a fully pleaded Defence within 14 days and then ask the Court to set the claim down for a hearing so that the case can be dealt summarily;

※ List the hearing for 30 minutes to 1 hour;

※ Make these directions subject to an Unless Order.
By failing to prepare, you are preparing to fail

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