



HOUSING LAW UPDATE:
THE TEST FOR SUSPENDING
POSSESSION ORDERS

CITY WEST HOUSING TRUST -V- MASSEY

&

ROBERTS -V- MANCHESTER DISTRICT HOUSING ASSOCIATION

[2016] EWCA CIV 704

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Introduction

On 7th July 2016 the Court of Appeal (Arden, Floyd and Sales LJJ) handed down its judgment in the conjoined second appeal cases of *City West Housing Trust -v- Lindsey Massey & Vincent Roberts -v- Manchester & District Housing Association* [2016] EWCA Civ 704.

The appeals considered the interpretation and scope of the test for suspension set out by Gage LJ at paragraph 17 of the Court of Appeal judgment in *Sandwell -v- Hensley* [2007] EWCA Civ 1425. That is to say, the forward-looking test as to whether there was “cogent evidence of a real hope that the previous conduct would cease.”

At the heart of the appeals were two issues: firstly, the affect of a finding of dishonesty against tenants upon the test and, secondly, whether tenants could rely upon external factors to satisfy the test.

The Court unanimously preferred the tenants’ arguments on both issues and in doing so upheld the first appeal decision in *Massey* whilst overturning that in *Roberts* so as to reinstate the first instance decision.

Gary Lewis, instructed by Stepehnsons Solicitors, represented the successful tenants at first instance, on first appeal and in the Court of Appeal.

Background to the Cases

Both cases commenced separately as discretionary possession claims under Grounds 12 and 14 to Schedule 2 of the Housing Act 1988 (as amended) ('the Act') and both cases had a number of common features in that:

- The landlords each relied upon a sole breach of tenancy by virtue of the tenants having had cannabis farms at their properties (albeit *Roberts* was criminally convicted and *Massey* was not).
- The tenants, while admitting breach of the tenancy by reason of cannabis having been found at their properties, disputed the factual circumstances surrounding the presence of cannabis therein.
- *Roberts* maintained that he was pressurised by a local gang to allow them to grow cannabis at his property.
- *Massey* maintained that she had no knowledge of cannabis having been grown at her property and that the same was the full responsibility of her ex-partner (who was criminally convicted).
- Although a possession order was inevitable at trial, the tenants each sought to rely upon the Courts extended discretion pursuant to Section 9(2) of the Act.
- To do so, the tenants were required to persuade the Court that there was "cogent evidence of a real hope that the previous conduct (of cultivating cannabis) would cease" (as per Gage LJ at paragraph 17 of *Hensley*).

A detailed consideration of the background to the cases can be found at paragraphs 18 – 30 of their Lordships judgment.

First Instance Decisions

The *Roberts* case was heard by District Judge Hayes sitting in the Altrincham County Court whereas the *Massey* case was heard by District Judge Harrison sitting in the Manchester County Court.

Again, the cases had a number of common features following judgment:

- Both tenants' evidence was disbelieved in respect of the circumstances put forward as to the presence of cannabis at their properties (albeit the findings of dishonesty made against *Massey* were both much more extensive and clearer than those made against *Roberts* whose evidence was accepted in part).
- The Court was not persuaded that *Roberts* was as innocent a victim as he claimed to be and that it was all a one-way fear of reprisals by virtue of him having received circa £1,200 from the local gang over a three year period while the cannabis was being grown.
- Whereas the Court in *Massey* went much further and found her to have lied in respect of each and every aspect as to her alleged lack of knowledge of the cannabis but, crucially, that such lies were as a result of her being frightened that she was going to lose her home.
- Both tenants were nonetheless found to have satisfied the test set out above namely that there was "cogent evidence of a real hope that the previous conduct (of cultivating cannabis) would cease" and in doing so both tenants had relied upon, and great weight was given to, the strict conditions of the terms of suspension that were put forward.

- *Roberts* had put forward his willingness and ability to comply with suspension terms permitting the landlord access to inspect his property above and beyond this set out by the tenancy agreement.
- *Massey* likewise submitted to greater inspection provision for her landlord together with the exclusion of her ex-partner from her property going forward.

Possession in *Roberts* was therefore suspended for a period of three years upon condition of compliance with the tenancy agreement and upon permitting the landlord reasonable access for the purpose of inspections on a monthly basis, if so advised, without notice between the hours of 9am – 5pm.

Possession in *Massey* was also suspended for a period of three years on condition of compliance with the tenancy agreement; permitting the landlord reasonable access upon no less than two hours' notice for the purposes of inspections and further upon the tenant excluding her ex-partner from staying at her property overnight or from storing any belongings therein.

First Appeals

The *Roberts* appeal was heard by HHJ Armitage QC whereas the *Massey* appeal was heard by HHJ Platts. It was on first appeal that the common features between the cases came to an end with two diverging decisions.

In *Roberts*, HHJ Armitage QC overturned District Judge Hayes' decision and held that he had erred in finding that the test was made out in circumstances where had not trusted the evidence of the tenant. It was further held that the test required something to do with the tenant and could not be met in circumstances where the tenant had pinned hopes on external factors for compliance with the tenancy by way of the terms of suspension as the same was not a basis of hope for the tenant.

Whereas in *Massey*, HHJ Platts upheld District Judge Harrison’s decision and, unlike HHJ Armitage QC, held that while it would have been open to the court not to trust the tenant’s evidence in respect of the test for suspension it was not an inevitable conclusion. Further, the Court was also entitled to conclude that the conditions upon which the possession was suspended would create a sufficient safeguard for the purpose of the tenant’s future conduct and therefore the test for suspension.

Second Appeals

Vos LJ granted permission to second appeal on the basis that the cases raised two issues of importance namely the affect of a finding of dishonesty upon the test for suspension and whether tenants could rely upon external factors to satisfy the test. In doing so, Vos LJ commented that Gary Lewis was the first advocate to have persuaded him to grant permission in a renewed oral application where had refused permission on the papers.

Arden, Floyd and Sales LLJ heard the appeals on 11th May 2016 and reserved judgment. A summary of the parties’ respective arguments can be found at paragraphs 31 – 44 of their Lordships judgment.

The Judgment

By its judgment, the Court upheld the first appeal decision in *Massey* whilst overturning that in *Roberts* so as to reinstate the first instance decision. Arden LJ gave the leading judgment (with whom Floyd and Sales LJJ agreed) and held, inter alia, that:

- For the tenant’s evidence to be ‘cogent’ it “must be more than simply credible: it must be persuasive...” (paragraph 47).

- There is no principle that the cogent evidence regarding future compliance with the tenancy must stem from the tenant himself...”the likelihood or possibility of action by others, or even the perception that others might take action, may in an appropriate case be evidence which supports an overall assessment that there is a real hope of compliance in the future...similarly, the inclusion of an inspection condition in a SPO might provide support for an assessment that the tenant will comply in future, if his fear of being evicted is sufficiently strong and he thinks the risk of inspection is real rather than illusory...” (paragraph 49).
- While trial judges, when considering terms for suspension, should be careful not to expect a social landlord to do more than is reasonable in all of the circumstances the landlord may in certain circumstances be expected to take an active role as is inherent in managing its housing stock (paragraph 50).
- While tenants who lie in their evidence run the risk of not being trusted on their assurances for the future, it does not necessarily prevent the Court from finding the test to be satisfied and there is no absolute rule that a tenant who has lied in his evidence cannot succeed in having the benefit of an SPO – “...even a person who genuinely wants to comply with his tenancy agreement in the future may give false evidence and make up a false story because he thinks that the truth is unlikely to be plausible or acceptable...” (paragraphs 51 – 53).
- Accordingly, the Court at first instance in *Massey* was entitled to undertake an assessment based on demeanour and consider the tenant’s motive for lying because it had to decide if that affected the credibility of her assurance about future conduct. The first appeal decision was therefore upheld (paragraph 66).

- However, the Court on first appeal in *Roberts* had read the test too literally in overturning the first instance decision and excluding external means of monitoring the tenant. The first appeal decision was therefore overturned and the first instance decision reinstated (paragraphs 67 – 70).

Comment

On its face, the following are considered to be the most noteworthy points arising from the judgment:

- The threshold that tenants' evidence is required to overcome in order to persuade the Court as to the 'cogency' of assurances regarding future behaviour. That is to say, that the evidence must be "more than simply credible" but not necessarily a "cast-iron guarantee" (paragraphs 47 – 48).
- The fact that dishonest tenants, while running a risk of not being trusted as to future behaviour, are still able to rely upon the Court's discretion under Section 9 of the Act and are also able to rely upon external factors in doing so including, amongst other things, provision for the landlord to inspect the premises.
- Finally and perhaps most notably, the Court, while declining the landlords' invitation to provide a checklist of factors in respect of the exercise of the discretion, offers non-exhaustive guidance to trial judges in future cases at paragraphs 54 – 62 of the judgment including, amongst other things –
 - The trial judge should be explicit in determining which of the relevant evidence is accepted and which is rejected;
 - The tenant should normally give evidence to the Court so that his credibility can be assessed;

- The trial judge may choose to cross-check the promises made by the tenant with all of the available objective evidence together with the motives and interests behind a tenant's actions;
- Finally, while trial judges are required to provide adequate reasons, appellate courts will be slow to interfere with a decision simply because the judge has referred to a point and one stage in his judgment but not again when he comes to exercise his discretion.