

Housing Law Update: Smith -v- Contour Homes

On 12th May 2016, His Honour Judge Main QC handed down judgment in a case which is understood to be one of the first cases of its kind to consider and apply the Supreme Court guidance in the case of *Akerman-Livingston v Aster Communities Limited (formerly Flourish Homes Limited) [2015] UKSC 15* in a residential landlord and tenant context.

Background

The claim started life as an accelerated possession claim arising out of the tenant's conviction for indecent exposure at the property with his having masturbated at the front door in view of neighbouring residents. Upon investigation, it transpired that the tenant had a previous conviction for like-behaviour albeit at a local church and prior to the commencement of the starter tenancy. The landlord was therefore concerned as to the risk of repeat behaviour upon neighbouring residents and served a Section 21 Notice and thereafter issued its claim for possession.

No issue was taken with the Section 21 Notice. Rather, the tenant sought to defend the otherwise mandatory claim on the following grounds:

- Public Law Grounds – the landlord had considered an irrelevant factor or had alternatively given undue weight to it namely the pre-tenancy conviction.
- Human Rights Grounds – the personal circumstances of the tenant rendered an order for possession disproportionate and contrary to his rights secured by Article 8.

- Equality Act Grounds – the landlord had breached Section 15 of the Equality Act 2010 in that the tenant was disabled by reason of a schizoaffective disorder; his behaviour occurred as a result of such disability and his eviction was disproportionate so as to mean that the landlord was therefore unlawfully discriminating against him.

In reply, the landlord maintained that the Defence fell short of being ‘seriously arguable’ as per the now well known Supreme Court guidance in *Manchester City Council -v- Pinnock* [2010] 3 WLR 1441 and *Hounslow LBC -v- Powell* [2011] 2 WLR 287. In particular, the landlord sought to rely upon the Court of Appeal decision in *Akerman* (as it then stood) to the effect that the Article 8 and Section 15 proportionality tests were the same such that the tenant had to demonstrate “exceptional personal circumstances”.

First Instance Decision(s)

District Judge Hovington initially heard the case in January 2015 and therefore prior to the Supreme Court decision in *Akerman*. Judgment was reserved and, though a draft judgment was circulated on 5th March 2015 and therefore six days before the Supreme Court’s decision on 11th March 2015, it was not to be handed down until some time after in April 2015. By the draft judgment, District Judge Hovington had agreed with the landlord in every respect and, most notably, had relied upon the Court of Appeal decision in *Akerman* which of course was bad law as at the date of handing down. Accordingly and in consideration of the Supreme Court’s approach in overturning the Court of Appeal, the Section 15 proportionality issue was adjourned for trial. That approach was to the effect that:

- The burden of proving proportionality is on the landlord (paras.27 & 33).

- The landlord must show that the impact on the tenant's rights are not disproportionate to the likely benefit of the steps taken (para.28).
- While still relevant, the vindication of the landlord's property rights are not a trump card like with Article 8 cases, as per *Pinnock* and *Powell* given that the protection to the rights under the 2010 Act are stronger (paras.30, 34 & 55).
- It is to be considered whether there is any lesser measure which might achieve the landlord's aims and a balance is to be struck between the seriousness of the impact upon the tenant and the importance of the landlord's aims (para.31).
- Further, it is to be considered whether the landlord has done all that can reasonably be expected of it to accommodate the disability (para.32).
- The Court must consider the particular type of alleged discrimination and under Section 15 the landlord would have to show that there was no less drastic means of solving the problem and that the effect upon the occupier was outweighed by the advantages (para.34).

At the trial in September 2015, the sole issue for determination was as to whether the landlord could show that the eviction of the tenant was a proportionate means of achieving a legitimate aim in accordance with Section 15 of the 2010 Act. Notwithstanding the high threshold upon the landlord, District Judge Hovington found that the landlord came to proof and ordered possession. It was held that:

- The landlord's aim of protecting neighbouring residents from the risk of experiencing further inappropriate and offensive sexualised behaviour was a legitimate one.

- The tenant's eviction was proportionate in light of, inter alia, the tenant having support in place to ensure that he would not be rendered street homeless; the rights of the neighbouring residents and the underlying risk of the behaviour recurring by reason of past behaviour and the tenant's continued use of cannabis (as agreed by the expert psychiatric evidence).
- There was no less drastic means of the landlord achieving its aim in the circumstances where an injunction was not an appropriate remedy – the landlord not being a local authority and being helpless to eliminate or control the tenant's cannabis use.

Appeal Decision

The tenant appealed the decision on the basis that District Judge Hovington had erred in applying the guidance in *Akerman* and, in particular, had erred in finding that an injunction was not a viable and less drastic means of achieving its aims. With the benefit of permission having been granted on the papers, the appeal was listed for hearing on 18th March 2016. By his judgment dated 1st April 2016, His Honour Judge Main QC upheld the decision on the basis that:

- The narrow issue of proportionality had to be considered in a context where the aim to be achieved (to protect other residents from the risk of repeat behaviour) and the way in which it was sought to be achieved (by eviction) had to be outweighed by the impact upon the tenant and there had to be considered whether there were other measures available to the landlord to realistically achieve that aim (paras.36 – 39).
- Of particular note was the fact that the tenant was an unrepentant and habitual cannabis user whilst he also continued to use alcohol – both of

which increased the risk of repeat behaviour and were recognised by the expert's report. Further, the tenant had not always been compliant with his medication and showed no insight into his mental illness and need for treatment (paras.41 – 42).

- While there was a causal connection between the tenant's disability and the behaviour giving rise to the proceedings, the incident more reflected, when the tenant was stressed, his abuse of alcohol and drugs (para.43).
- Significantly, an injunction could only operate reactively and the tenant's third party support could only monitor the tenant so far – there was no guarantee as to the tenant's future behaviour as was reflected by his support missing the red flags when the behaviour had previously taken place (para.44).

Comment

Although the case is no more than a persuasive county court decision, it proves to be useful to both landlords and tenants in a number of respects:

- From a landlord-perspective, the decision offers some comfort following the initial concerns that the Supreme Court guidance would render the Section 15 proportionality test far too difficult to prove. For the purpose of necessity of eviction, it also underlines the importance of identifying from an early stage as to what exactly is the aim that is sought to be achieved (crucially here, the aim was to eliminate the risk of repeat behaviour).
- From a tenant-perspective, the most notable point is to avoid an over-reliance upon an injunction being a 'less drastic means' in each and every

case of this kind. The tenant should first consider the aim put forward by the landlord before considering the alternative steps that could and/or should have been taken to achieve that aim without the need for eviction.

- Finally and by way of a general observation, the case highlights the relevancy of the level of the causal link as between the disability and the offending behaviour giving rise to the proceedings. That is, the weaker the causal link the easier it will be for the landlord to satisfy the Court as to proportionality. In the instant case, great weight was given to the causal link being weakened by the use of drugs and alcohol as opposed to a full psychotic episode.

Gary Lewis

6th June 2016

Direct Dial: 0161 833 6078 19 Quay Street
Chambers: 0161 833 6000 Manchester, M3 3HN
Fax: 0161 833 6001 DX 14327 Manchester
w www.cobden.co.uk **e** gary.lewis@cobden.co.uk

Cobden House
CHAMBERS