

Possession Claims after Pinnock & Powell

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Introduction

1. This article looks at the application in practice of the principles set down by the Supreme Court in the cases of *Manchester City Council v Pinnock*¹ and *Hounslow London Borough Council v Powell*². Has the requirement to consider a tenant's Article 8 Convention rights and proportionality led to a change in the courts' approach to possession claims?

Public law to human rights

2. The public law defence to possession has been widely acknowledged for nearly 30 years. In the case of *Wandsworth LBC v Winder (No 1)*³, the House of Lords confirmed that a council tenant in a rent arrears case could raise a public law challenge to an essential part of the council's possession claim. It was not necessary to launch a separate claim for judicial review proceedings; the challenge could form part of the tenant's defence. In *Winder*, the tenant argued that the rent increase which he had refused to pay had been imposed by the council acting *ultra vires*. He was ultimately unsuccessful, but the principle remained good law.

3. In the cases of *Kay v Lambeth LBC*⁴ and *Doherty v Birmingham City Council*⁵, the House of Lords reaffirmed the role of the public law defence in possession proceedings brought by public bodies. In *Kay*, Lord Hope acknowledged the *Winder* authority and confirmed that it would be open to any defendant "to challenge the decision of a local authority to recover possession as an improper exercise of its powers at common law" on the traditional judicial review ground "that it was a decision that no reasonable person would consider justifiable".

4. Further, the House identified a potential human rights challenge to possession on the basis that the law which enables the court to make a possession order is itself incompatible with article 8.

5. Aside from the above two defences (identified by the Court of Appeal in *Doherty* as gateways (a) and (b)), it was held by a majority of the House of Lords in each case that "a defence which does not challenge the

¹ [2010] UKSC 45; [2010] 3 WLR 1441

² [2001] UKSC 8; [2011] 2 AC 186

³ [1984] AC 461; (1984) 17 HLR 196

⁴ [2006] UKHL 10; [2006] 2 AC 465

⁵ [2008] UKHL 57; [2009] AC 367

law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out".

6. Following the House of Lords' consideration of the issue of article 8 challenges in *Kay* and *Doherty*, a line of authorities in Strasbourg developed the law in the European Court of Human Rights⁶. There, it was held that any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end. Nevertheless, the ECtHR commented that it would only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain.

Manchester City Council v Pinnock

7. Against such developments in Europe, the question came back to the highest UK court in 2010, this time before 9 judges of the Supreme Court in *Pinnock*.

8. Mr Pinnock had been a tenant since November 1978 in his home let to him by Manchester City Council. He lived there with his partner, Christine Walker, and, from time to time, with some or all of their 5 children. In March 2005 the Council issued proceedings for possession of the property, or alternatively, for a demotion order in respect of the secure tenancy. The claims were based on the contention that Mr Pinnock's partner and all of their children had been guilty of serious anti-social behaviour, in breach of the covenants of the tenancy. After a 6-day hearing of evidence and argument, Mr Recorder Scott Donovan held that a large number of serious allegations were well founded. However, he declined to make an order for possession in view of the length of the tenancy and Mr Pinnock's blameless life and lack of involvement in any criminal activity. The recorder was, however, satisfied that it was reasonable to order demotion of the tenancy.

9. The demotion took effect from 8 June 2007. On 6 June 2008 (one day before the expiry of the demotion order), the council served notice for possession under s.143E. Possession proceedings were issued and came before HHJ Holman in the Manchester County Court, who made an outright order for

⁶ *McCann v United Kingdom* 47 EHRR 913; *Cosic v Croatia* 15 January 2009; *Zehentner v Austria* 16 July 2009; *Paulic v Croatia* 22 October 2009; *Kay v United Kingdom* 21 September 2010.

possession. Mr Pinnock appealed to the Court of Appeal, which upheld the decision, and then to the Supreme Court.

10. Following consideration of the developments in *Strasbourg*, the Supreme Court held:

*If our law is to be compatible with article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact.*⁷

11. The court made clear that the decision relates only to possession proceedings by local authorities:

*Nothing we say is intended to bear on cases where the person seeking the order for possession is a private landowner. Conflicting views have been expressed both domestically and in *Strasbourg* on that situation.*⁸

12. Applying the general principles to the demoted tenancy provisions at s.143D of the 1996 Act, the Court held that the provisions could be interpreted so as to give effect to an occupier's article 8 rights⁹. The wording of the Act appears to be mandatory – “the court must make an order for possession unless it thinks that the procedure under sections 143E and 143F has not been followed”. The Supreme Court considered that the procedure laid down in the 1996 Act must be lawfully complied with, both in terms of the express requirements of the relevant sections and in accordance with the rules of natural justice. As lawfulness must be an inherent requirement of the procedure for seeking a possession order, it must equally be open to the court to consider whether that procedure has been lawfully followed having regard to the defendant's article 8 Convention rights.

13. The Supreme Court held that, in order to give effect to such a purposive interpretation of the 1996 Act, the Court has the power to consider all the facts relevant at the time of the hearing.

*In summary, where it is required in order to give effect to an occupier's article 8 Convention rights, the court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view*¹⁰.

⁷ Per Lord Neuberger of Abbotsbury MR at para. 49

⁸ Ibid at para.50

⁹ Ibid at para. 77-9

¹⁰ Ibid para.74

14. Applying *Winder*, the Court held that, just as a tenant could seek judicial review of a landlord's decision to pursue possession within the same possession proceedings in the county court, so could a tenant raise the issue of proportionality within county court proceedings, without recourse to any higher jurisdiction.

15. Recognising that claims for possession in demoted tenancies would arise relatively infrequently by comparison with other non-secure tenancies, the Supreme Court declined to give extensive general guidance, largely because the matter was due to be considered again by the Court in the same month as the *Pinnock* judgment was handed down.

Hounslow London Borough Council v Powell

16. *Powell* was the hearing of three conjoined appeals which had been heard by the Court of Appeal in *Salford City Council v Mullen*¹¹. They were concerned with possession proceedings brought by a local authority in circumstances where the occupier was not a secure tenant. Two of the tenants, *Hall* and *Frisby* were occupying under introductory tenancies pursuant to Chapter I of Part V of the Housing Act 1996. *Powell* had been granted a licence of property under the homelessness regime in Part VII of the 1996 Act.

17. The Supreme Court applied the finding in *Pinnock* to the issues arising from introductory tenancies and licences under the homelessness regime. In both cases, it was held that occupiers are entitled to raise the issue of proportionality in defence to possession proceedings, and that county courts have the power to consider all relevant facts in making such a determination.

18. The Court was satisfied that a purposive interpretation of sections 127-129 of the Housing Act 1996 would allow the court the power to refuse possession on grounds that it would be disproportionate to make such an order. As with the provisions for demoted tenancies, the introductory tenancy provisions contain an inherent requirement of lawfulness and natural justice.

19. Whilst confirming the existence of the article 8 defence, the Supreme Court considered the practicalities and potential extent of its application. Lord Hope of Craighead confirmed the principles set down by *Pinnock* as being "*not now in doubt*":

- (1) The court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier;

¹¹ [2010] LGR 559

- (2) If an article 8 issue is raised, the court should initially consider it summarily and should dismiss it if the court is satisfied that even if the facts relied upon are made out, the point would not succeed. Only if the point has crossed the high threshold of being seriously arguable should the issue proceed to a full hearing.
- (3) The question will then be whether making an order for the occupier's eviction is a proportionate means of achieving a legitimate aim.
- (4) It will first be necessary for the court to consider whether the property in question constitutes the defendant's "home" for the purposes of article 8.¹²

Presumption of proportionality

20. The Supreme Court stressed in both *Pinnock* and *Powell* that the court is not required to consider proportionality in every possession case:

Practical considerations indicate that it would be demanding far too much of the judge in the county court, faced with a heavy list of individual cases, to require him to weigh up the personal circumstances of each individual occupier against the landlord's public responsibilities¹³.

Further, the Court urged against county courts usurping the housing management role of local authorities.

This is a factor to which great weight must always be given, and in the great majority of cases the court can and should proceed on the basis that the landlord has sound management reasons for seeking a possession order.

21. In *Pinnock*, the Court raised the notion of a presumption of proportionality:

To require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile. In other words, the fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties, will be a strong factor in support of the proportionality of making an order for possession.

¹² *Powell* at para.33

¹³ *Ibid* at 35

[...]

Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way.

Legitimate aims

22. The presumption of proportionality is supported by a presumption as to legitimate aims. In *Pinnock* and *Powell*, the Supreme Court identified two legitimate aims of seeking possession which should be taken as a “given” which do not have to be explained or justified in court. Those aims are:

- (1) To vindicate the authority’s ownership rights of the property;
- (2) To enable the authority to comply with its public duties in relation to the allocation and management of its housing stock. Various examples were given in *Pinnock*¹⁴, such as the fair allocation of housing, the redevelopment of a site, the refurbishment of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs and the need to move vulnerable people into sheltered or warden-assisted housing.

23. The Strasbourg court indicated in *Kryvitska and Kryvitsky v Ukraine*¹⁵ that the first aim will not suffice on its own where the owner is the state itself. But, taken together, the twin aims will satisfy the legitimate aim requirement.

24. So it was held that, in the vast majority of claims, it will be enough that the authority is entitled to possession because the statutory pre-requisites have been satisfied and that it is to be assumed to be acting in accordance with its duties in the distribution and management of its housing stock. The court will need only be concerned with the occupier’s personal circumstances and factual objections, which should be weighed up against the authorities aims *which should always be taken for granted*.

Procedural requirements

¹⁴ Para. 52

¹⁵ 2 December 2010, para. 46

25. Against such presumption of proportionality and legitimate aims, the Supreme Court held that *in the great majority of cases the local authority need not plead the precise reasons why it seeks possession in a particular case. But if an article 8 defence is raised it may wish to plead a more precise case in reply.*¹⁶

26. The local authority need only give reasons for wanting possession of the property if there is a particularly strong or unusual reason for doing so, in addition to the two given legitimate aims. If the authority chooses to raise additional reasons, it must plead the reasons and adduce evidence in support of the same. However, no point can be taken against the local authority if it chooses not to take this course and to leave it to the tenant to raise points by way of defence.¹⁷

27. The Supreme Court indicated that procedural requirements must be considered against the fact that the tenant has a statutory right to request a review and/or a right of appeal against a local authority's decision to seek possession in the introductory and demoted tenancy provisions and in the homelessness scheme under the 1996 Act. In light of such protection, the Supreme Court rejected any structured approach to the issue of proportionality, and held that pre-action protocols would have no obvious place in such proceedings.

28. Nevertheless, Lord Phillips suggested that the tenant must be informed of the reason for the authority's action so that he can, if so minded, attempt to raise a proportionality challenge:

*I do not believe that the Strasbourg court would tolerate a regime under which a person can be deprived of his home by a public authority without being told the reason for this. Nor would I, for it is fundamentally unfair.*¹⁸

It was acknowledged that such a requirement is unlikely to place any significant burden in practice, since local authorities are already likely to be informing tenants of the reason for any proposed relocation or possession.

29. Somewhat surprisingly, the Supreme Court held that the local authority landlord of an introductory tenant does not need to prove allegations of anti-social behaviour in order to establish proportionality.

¹⁶ *Powell* at 34

¹⁷ *Powell* at 43

¹⁸ *Powell* at 115

Citing Waller LJ in *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129, para.97, Lord Phillips noted:

“Under the introductory tenancy scheme it is not a requirement that the council should be satisfied that breaches of the tenancy agreement have in fact taken place. The right question under the scheme will be whether in the context of allegation and counter-allegation it was reasonable for the council to take a decision to proceed with termination of the introductory tenancy.”

Home

30. The notion of “home” is dependent on the individual showing *sufficient and continuous links with a specific place*¹⁹. Lord Hope held that *in most cases it can be taken for granted that a claim by a person who is in lawful occupation to remain in possession will attract the protection of article 8*, but he left open the possibility for consideration on the facts in cases where an order for possession is sought against a defendant who has only recently moved into accommodation on a temporary or precarious basis²⁰.

31. Lord Phillips of Worth Matravers held that accommodation provided to the homeless will normally become their homes for the purposes of article 8.

Application of Proportionality Defence

32. With the extension of secure tenancies to most social housing tenants in the early-mid 1980s, there was little call for the public law defence, save in cases where the tenant enjoyed no security of tenure.

33. Similarly, it was anticipated by the Supreme Court in *Pinnock* that the need to consider proportionality within the context of Article 8 would add little to possession proceedings against secure tenants, where the court is required to consider “reasonableness” in any event. It was noted that reasonableness involves the trial judge *“taking into account all the relevant circumstances in a broad common-sense way”, such that it “seems highly unlikely, as a practical matter, that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under article 8.”*²¹

¹⁹ *Paulic v Croatia* 22 October 2009, para.33

²⁰ *Powell* at 33

²¹ *Pinnock* at para. 56

34. Three cases heard before the Court of Appeal in 2012 suggest some discrepancies in the approach of first instance judges and the appeal courts to the issue. The trend to date suggests that trial judges, sympathetic to the plight of the tenant, have welcomed the flexibility of the proportionality defence, whereas the Court of Appeal has sought to reinforce the exceptional circumstances required for proportionality to stand in the way of an order for possession.

Corby BC v Scott²²

35. The Court of Appeal heard two conjoined appeals arising out of claims for possession of residential property brought by a public authority against a tenant who has no domestic law defence, but who invoked article 8 of the ECHR.

36. In *Corby*, the tenant had been granted an introductory tenancy of a flat. Within 6 months she fell into rent arrears. 2 months later she was the victim of a brutal assault, for which the perpetrator was convicted of attempted murder. A month after the assault, when rent arrears were £287, the authority served notice of proceedings for possession. The tenant's mother paid off the arrears within the notice period. The introductory tenancy was extended for a further 6 months. When the defendant again fell into arrears, the authority served another notice of proceedings for possession, and subsequently issued proceedings for possession. In addition to the rent arrears, there had been 4 complaints of loud music from the flat in the early hours of the morning. In the month before the final hearing, the defendant's mother and grandmother paid off the rent arrears.

37. At a hearing before HHJ Hampton, it was held that the gravity of the assault on the defendant and the clearing of the rent arrears constituted exceptional circumstances which justified not making the possession order. The local authority appealed.

38. In *West Kent Housing Association Ltd v Haycraft*, the Claimant housing association was a private registered provider of social housing under s. 80 of the Housing & Regeneration Act 2008. The Defendant was granted an assured shorthold tenancy of a flat. Two days after the start of the tenancy, a neighbour complained that the Defendant had indecently exposed himself. The allegation was investigated by the association and the police. Over the following 10 weeks, the association received 4 further complaints of antisocial behaviour.

²² [2012] EWCA Civ 276; [2012] HLR 23

39. The association served notice on the Defendant under s.21 of the Housing Act 1988. At his request, the association conducted a review of the decision to seek possession. At a hearing before a panel, the Defendant denied the allegations against him and confirmed that he was not being prosecuted for the alleged indecent exposure. The panel concluded that he had indecently exposed himself and upheld the decision to evict him.

40. The association issued possession proceedings. An order for possession was made by a Deputy District Judge. On appeal, a circuit judge upheld the order on the ground that the Defendant did not merit a trial to determine whether it was proportionate to evict him. The Defendant appealed to the Court of Appeal.

41. In both cases, the Court of Appeal held that there was no arguable defence of proportionality. Lord Neuberger MR, giving the judgment of the Court, reconfirmed the effect of *Pinnock* as being that, *at least in relation to demoted and introductory tenancies, "it will only be in "very highly exceptional cases" that it will be appropriate for the court to consider the proportionality argument", although "exceptionality is an outcome and not a guide".*²³

42. Lord Neuberger emphasised Lord Phillips' opinion in *Powell*²⁴:

The judge should summarily dismiss any attempt to raise a proportionality argument unless the defendant can show that he has substantial grounds for advancing this. Two factors make it extremely unlikely that the defendant will be in a position to do this. The first is the relatively low threshold that the authority has to cross to justify terminating the introductory tenancy. The second is the significant procedural safeguards provided to the tenant.

43. The Court of Appeal dismissed the notion that payment of rent arrears at the last minute could carry sufficient weight in the art. 8 proportionality argument:

In the absence of extraordinary facts, it seems to me fanciful to suggest that a residential occupier should be able to pray in aid the fact that she has paid the landlord money which she owed him, as a significant

²³ *Corby* at 18

²⁴ At 92

*factor, which enables her to cross the high threshold identified in the two Supreme Court cases, when invoking art.8.*²⁵

44. It was suggested that the trial judge in *Corby* concentrated too much on the question of whether the facts of the case were exceptional, such that she was distracted from the relevant issues. Although the tenant's attack was exceptional, it had nothing to do with the claim for possession.

45. In *Haycraft*, the Court of Appeal confirmed that the reasoning and approach in *Pinnock* and *Powell* applied to a starter tenancy, just as it did to an introductory tenancy. Even though there had been no further complaints about the tenant's behaviour, and he had a child by the time the claim came to court, such factors were not considered sufficiently significant to establish that it would be disproportionate to order possession. The case was said "*to emphasise the significance of the height of that threshold, or, to put it another way, how exceptional the facts relied on by any residential occupier must be, before an art.8 case can have a real prospect of success*"²⁶.

46. When formulating wider lessons to be learnt from the cases, Lord Neuberger emphasised that a judge:

- (i) *should be rigorous in ensuring that only relevant matters are taken into account on the proportionality issue; and*
- (ii) *should not let understandable sympathy for a particular tenant have the effect of lowering the threshold identified by Lord Hope in Powell [2011] 2 A.C. 186 at [33] and [35].*

47. The Court used the opportunity to emphasize *the desirability of a judge considering at an early stage (normally on the basis of the tenant's pleaded case on the issue) whether the tenant has an arguable case on art.8 proportionality, before the issue is ordered to be heard. If it is a case which cannot succeed, then it should not be allowed to take up further court time and expense to the parties, and should not be allowed to delay the landlord's right to possession.*²⁷

²⁵ *Corby* at 25

²⁶ *Corby* at 35

²⁷ *Ibid* at 39

Birmingham City Council v Lloyd²⁸

48. The property in question had been let pursuant to a secure tenancy to Mr Lloyd's brother, who died in August 2009. Mr Lloyd moved into the property during the next month. Mr Lloyd informed the Council that he was giving up his tenancy of another council property of which he was a tenant, and that he was living in his brother's flat. When the Council issued proceedings for possession, Mr Lloyd accepted that he was a trespasser but raised the issue of proportionality.

49. At first instance, the Council's claim for possession was dismissed. The recorder took into account Mr Lloyd's history of depression, his financial circumstances, and his intentional homeless status upon eviction. Further, there was no history of rent arrears, nuisance or antisocial behaviour.

50. The Court of Appeal allowed the council's appeal. Lord Neuberger MR observed:

*The defendant in this case was not merely a trespasser in the property concerned at the time the possession order was sought but he never has had any right to occupy the premises, whether under contract or statute. He entered the property as a trespasser and a trespasser he has remained.*²⁹

He went on to state that it would *be wrong to say that it could never be right for the court to permit a person, who had never been more than a trespasser, to invoke Article 8 as a defence against an order for possession. But such a person seeking to raise an Article 8 argument would face a very uphill task indeed, and, while exceptionality is rarely a helpful test, it seems to me that it would be require the most extraordinarily exceptional circumstances*³⁰.

Thurrock Borough Council v West³¹

51. Thurrock had granted a joint tenancy to George and Violet West in 1967. Aaron West was their grandson. He moved into the property with them in 2007. George West died in 2008, and the tenancy automatically vested in Violet West as successor pursuant to ss.87 and 89(2) of the Housing Act 1985. She died in 2010. As she was a successor, s.87 of the 1985 Act precluded any further right of succession, and

²⁸ [2012] EWCA Civ 969

²⁹ *Lloyd* at 13

³⁰ *Ibid* at 18

³¹ [2012] EWCA Civ 1435

the tenancy vested in her estate. The Council served notice to quit on the Public Trustee, and issued a claim for possession against Aaron West.

52. West defended the claim on the ground that it would be disproportionate to evict him, his partner and his son after living in the property paying rent for 4 years. The case was allocated to the multi-track and was dismissed by a District Judge.

53. The Court of Appeal allowed the Council's appeal. The Court emphasised that the threshold for establishing an arguable case that possession is disproportionate is a high one and will be met in only a small proportion of cases. Etherton LJ held:

The reasons why the threshold is so high lie in the public policy and public benefit inherent in the functions of the housing authority in dealing with its housing stock, a precious and limited public resource. Local authorities, like other social landlords, hold their housing stock for the benefit of the whole community and they are best equipped, certainly better equipped than the courts, to make management decisions about the way such stock should be administered: Powell at [35].

54. It was held that there was a particularly important policy consideration when dealing with succession rights. Parliament had decided to limit the persons and the occasions for automatic succession to a secure tenancy, and *the court should respect the legislative judgment as to what is in the general interest unless that judgment was manifestly without reasonable foundation.*³²

55. Further, the Court held that even where an article 8 defence is established, it is difficult to imagine circumstances in which a defendant with no legal right to remain in the property could be given an unlimited and unconditional right to remain, particularly if the defendant has never been a tenant or licensee of the local authority.

56. On a procedural note, the Court held that the matter should not have been allocated to the multi-track.

³² *R (on the application of Gangera) v Hounslow LBC* [2003] EWHC 794; [2003] HLR 68 at 23

Successful proportionality defences

57. On consecutive days in October 2012, three unrelated tenants were successful in arguing a proportionality defence on different grounds.

58. In *The Ralph & Irma Sperring Charity v Tanner*³³, an assured shorthold tenant with a learning disability was spared eviction on the ground that it would not be proportionate to evict her. Possession proceedings had been brought because, 7 years after the start of the tenancy, the claimant charity landlord had received complaints about the condition of the property and the garden. The state of the property and garden were found to be attributable to the tenant's learning difficulties. There had been improvement before trial and more intensive support was to be introduced. In dismissing the claim, the judge took into account a number of factors, including the low risk of any future breach of covenant; the fact that the breaches had been addressed and there was no damage to the structure of the property; the absence of any complaints in the first 7 years of the tenancy; and the inevitable distress caused by the eviction to the defendant's 12-year-old daughter.

59. In the case of *Affinity Sutton Homes Ltd v Cooper*³⁴, a District Judge dismissed the Claimant's claim for possession on the basis of the Defendant's article 8 defence. Mr Cooper was an assured tenant of Affinity. Although there was no statutory right of succession, his tenancy agreement contained an option for a new tenancy to be granted to any family member who resided with the tenant throughout the 12-month period before his death. Mr Cooper died in March 2009. His son, Colin Cooper, had been living with him for 37 years. He did not make a claim for a new tenancy within 6 months of his father's death, as required by the tenancy agreement, but Affinity was aware of his desire to succeed to the tenancy. Affinity served notice to quit and began a possession claim. Colin Cooper was sectioned under the Mental Health Act 1983 in October 2009.

60. The DJ was persuaded that the claim fell foul of article 8 because Affinity had waived its right to insist on written notice, and it would be disproportionate to deprive Mr Cooper of his home of 37 years because of a technical omission.

³³ 16 October 2012, Bristol County Court

³⁴ Bromley County Court, 17 October 2012

61. In *Southend-on-Sea BC v Armour*³⁵, the High Court upheld a recorder's first instance decision to deny the council possession of property let to Mr Armour pursuant to an introductory tenancy. It was alleged that Mr Armour had been verbally abusive to a neighbour, a contractor and a member of staff, and he had switched off electricity while the contractors were working, such that a workman suffered an electric shock. The possession claim did not get to court for 11 months, during which time Mr Armour was discovered to have Asperger's syndrome and to be suffering from depression. He did not have capacity to defend the claim and a litigation friend was appointed. There were no further incidents before trial and Mr Armour was supported by family and a number of agencies.

62. In the High Court, it was emphasised that proportionality must be decided as at the date of the hearing, and that all relevant facts at that stage should be taken into account. Subsequent behaviour, even good behaviour, could be a relevant consideration.

Conclusions

63. Drawing together the themes of the key decisions following *Pinnock* and *Powell*, it seems that the starting point should be that courts will be reluctant to interfere with the local authority's or housing association's legitimate aims of exercising its property rights and managing its housing duties. Even where antisocial behaviour has ceased or rent arrears have been cleared following the notice for possession, the threshold to establish a seriously arguable defence is a high one, particularly where there are procedural safeguards in place to allow the tenant the opportunity for review. Where the defendant has entered into occupation without tenancy or license, he will have a particularly high hurdle to overcome.

64. A glimmer of hope for tenants arises in circumstances where the tenant is particularly vulnerable. As the Supreme Court identified in *Pinnock*: *Proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty, and that the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases.*³⁶

Georgina Cursham

³⁵ (2012) 18 October, QBD

³⁶ At 64

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