



## Housing Litigation Update: Spring 2010

In this edition, we review:

- *Barber v London Borough of Croydon* - Vulnerable tenants, anti-social behaviour, possession orders and the HRA 1998
- *R (on the application of McIntyre) v Gentoo Group* - Judicial review and the interplay of public and private remedies in the context of a tenancy exchange scheme
- *Daejan v Benson* - Variable service charges and the consequences of not following the section 20 consultation procedure
- *Henley v Bloom* - Disrepair claims and the abuse of process

### ***Barber v London Borough of Croydon [2010] EWCA Civ 51***

Mr. Barber suffered from learning difficulties and a personality disorder. He was a non-secure tenant of the local authority, having been assessed as having a priority need in 1999.

In May 2007, following an unremarkable tenancy history, Mr. Barber became agitated over some glass that was allegedly lying on the floor near the block of flats. He spoke to the caretaker in a threatening and abusive manner (this he admitted later, for the purposes of a police caution), and according to the caretaker also kicked the caretaker in the knee, which called for a visit to A&E. This was denied by Mr. Barber.

On 22nd June, Mr. Barber was served with a notice terminating his tenancy. In the month between the incident and the service of the notice, no attempt was made to interview Mr. Barber. The decision to serve the NTQ was taken without any inquiry into the incident.

The matter came before the judge at Croydon County Court, in November 2007, and was adjourned to get a report on Mr. Barber's mental health from a consultant psychiatrist. As well as appraising Mr. Barber's state of mind, the psychiatrist was asked to say whether Mr. Barber would be able to cope with street homelessness as well as an

ordinary average person, which would have implications under part 7, Housing Act 1996 (assessing priority need).

The psychiatrist's report underlined Mr. Barber's vulnerability and suggested that there was a causal link between his behaviour towards the caretaker and his condition. Homelessness would be likely to cause Mr. Barber's mental health to deteriorate and might end in attempted suicide, as had happened during his last period of homelessness.

The ASB Team Manager reviewed the decision to pursue possession proceedings in light of the report, and concluded that it remained a proportionate response. The county court judge gave an immediate possession order, which was stayed pending an appeal to the Court of Appeal.

The Court of Appeal allowed the appeal. They dealt with it in the following way.

### **Common law**

Although it was argued in the county court that Mr. Barber had a secure tenancy, this was rejected by the trial judge and did not form a ground of appeal. This means that Mr. Barber's only protection was the four weeks under the Protection from Eviction Act 1977.

### **DDA**

This defence was raised by Mr. Barber, however following the House of Lords' decision in *Malcolm*, this was not successful. Note, however, that if the Equality Bill becomes law, this may strengthen the position of tenants in Mr. Barber's position.

### **Human Rights Act 1998, Article 8 and the two gateways**

Following Kay, the Lord Justice reminded himself of the two "gateways" that Mr. Barber had to get through in order to establish a violation of his Article 8 rights.

The default situation, which tenants asserting an Article 8 defence, must get over, is that domestic law relating to possession actions, strikes a fair balance between the tenant's right to a private home

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life, and society's need to allocate scarce resources fairly.

The only way out of this assumption is by:

**Gateway A:** there are circumstances in which it is exceptionally arguable that the law giving the right to possession was incompatible with Article 8. These tend to involve situations where there was no opportunity to allow the court to review the proportionality of the case, since domestic law gave the tenant only very minimal protection.

**Gateway B:** this is essentially a conventional public law test, namely that the decision arrived at was one no reasonable landlord, by its officers, could have come to.

### **Mr. Barber and the gateways**

Mr. Barber was not going to be able to get through Gateway A. There was nothing exceptional about his circumstances.

The Court of Appeal did however hold that the local authority's behaviour was unreasonable, and that Mr. Barber could get through Gateway B.

### **Interaction of Housing Authority policies**

Section 218A, Housing Act 1996 requires local housing authorities to have a policy for dealing with ASB. In drawing this up, they are required to have regard to the Code of Guidance 2004, drawn up by the Secretary of State.

Croydon had an ASB policy. It stressed that vulnerability was no bar to the officers taking action against ASB. Balancing this was a commitment to refer ASB cases to a specialist mental health service. This, the ASB team leader had failed to do.

The Court of Appeal also underlined the time line of the eviction process. There was no once and for all decision, but a process of re-evaluation of the proportionality of the ongoing eviction. Even had the local authority been unaware of Mr. Barber's condition when the NTQ was issued, they had failed, even after they had found about it, to follow their own policy. The psychiatrist's report had also not persuaded the officers of the need to adopt a multi-disciplinary approach. In effectively ignoring what the medical report said, the local authority had behaved unreasonably, by its own lights, and therefore the eviction order would be set aside.

### **The Moral of the Story**

This illustrates how a public authority landlord came to grief by failing to follow their own policies. In addition, the failure to interview Mr. Barber after the alleged incident before deciding to serve an NTQ is a clear breach of natural justice and unlikely to find favour with a court.

An RSL should always conduct its own investigation of ASB, and should ensure that if there is any suggestion of vulnerability, that the policies it has in place are followed, and documented as being followed.

### ***R (on the application of McIntyre) v Gentoo Group Ltd [2010] EWHC 5***

The housing world may be waiting for a suitable case to go up to the Supreme Court and say about *Weaver* "Only joking!", but in the real world, courts are treating *Weaver* as gospel.

So in this case, which concerned the reasonableness of the refusal of the RSL to consent to a tenancy swap, the judge dealt very swiftly with the question of whether *Gentoo* was amenable to a judicial review challenge or not. It was.

Following this point, the judge went on to deal with the question of the interaction of public and private law remedies. Remember, judicial review is the remedy of last resort.

Mr and Mrs. McIntyre wanted to do a tenancy swap. He had run up arrears on another property.

*Gentoo* gave consent on the condition that he paid off his arrears on his old address. Mr. McIntyre offered to pay them off in instalments.

Had the McIntyres been properly advised, there was a perfectly good private law remedy against the RSL. Their tenancy agreement provided that they had the right to exchange their house with another tenant, on the satisfaction of certain conditions. These included the landlord's written consent and no breach of any tenancy obligations.

Their tenancy was caught therefore by section 1 of the Landlord & Tenant Act 1988, and section 19 of the Landlord & Tenant 1927. Section 19 implies into the tenancy agreement the term that if the assignment is conditional on landlord's consent, then that shall not be unreasonably withheld. Section 19 was given real teeth by the Landlord & Tenant Act 1988. This placed the burden on the landlord to prove why it was not reasonable

to consent, as well as making the landlord liable for damages if he unreasonably refused consent, or didn't do it within a reasonable time.

Although the judge was very critical of permission being granted at all, he still dealt with the private law point. The case law surrounding section 19(1) is very well established. One of the central points is that a landlord can refuse only for a reason that applies to the tenancy. So, if for example, the person who is the tenant owes money to the person who is the landlord for the supply of goods, the landlord cannot, within the legislation, use his consent as a leverage to get payment for the other debt.

The court held that owing rent on another property which had come into the landlord's ownership was analogous to this. Although as a public landlord the desire to recoup monies owed by Mr McIntyre was a reasonable one, it did not fit into the statutory scheme.

If you are faced, therefore with an application for permission to bring judicial review of your decision to withhold consent, then following this case, it can be countered by pointing out that judicial review is not a proper remedy as a remedy exists in private law.

### ***Daejan Investments v Benson [2009] UKUT 233 (LC)***

This is a cautionary tale for landlords who are going to carry out works that they intend to recoup through variable service charges. Follow the statutory consultation requirements, or you will find yourself out of pocket!

In this case, the landlord owned a block consisting of flats and some shops. It did actually give notice to the long leaseholders that it intended to carry out major works costing £270,000. Before the LVT, it argued that its non-compliances with the section 20 regime were relatively minor, compared with the disproportionate financial consequences it would suffer if it were restricted to being able to claim only £250 per head from the tenants. It asked for dispensation on this basis, but the LVT declined.

The landlord appealed to the Lands Chamber of the Upper Tribunal, but was unsuccessful there too. Disproportionate financial consequences will not be a validation of a defective consultation process. The message is: follow the section 20 regime to the letter.

### ***Henley v Bloom [2010] EWCA 202***

In this case involving a private landlord and tenant relationship, the tenant bought a claim for disrepair following his departure from the flat. He had suffered from the effects of damp caused by a failure to maintain during the five years that Mrs. Bloom was landlady.

Mrs. Bloom had bought a possession claim against Mr. Henley. He had defended it substantially on the grounds that he was a Rent Act tenant. The matter was compromised, with Mr. Henley paying a sum of money to Mrs Bloom.

Mr. Henley moved out and bought the claim against Mrs. Bloom. She applied for it to be struck out on the basis that it was an abuse of process. The time for bringing such a claim was with the defence to the possession action.

The Appeal Court did not agree with her, and allowed Mr. Henley to pursue his claim. One of their reasons was that if Mrs. Bloom had intended her payment to be in full and final settlement of any claim at all arising out of Mr. Henley's occupation of the flat, she should have spelled this out in the compromise agreement. She had failed to do so, and left the door open for future claims. The lesson from this is that when settling claims with tenants, make sure you bar all possibility of claims that they might bring from their occupation of your premises.

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