Claim No. B00EC907

In the County Court at Central London
On Appeal from District Judge Sterlini
Sitting at Clerkenwell & Shoreditch

His Honour Judge Parfitt

EASTEND HOMES LIMITED

Appellant

- and -

(1) AFTAJAN BIBI
(2) MAHANARA BEGUM

Respondents

JUDGMENT

Dates: 24 August 2017

Nicholas Grundy QC instructed by **Batchelors Solicitors** for the Appellant

Sally Blackmore instructed by **Miles & Partners LLP** for the Respondents

Introduction & Summary

1. The Appellant provides social housing. It is the landlord of a property known as Flat 32, Loweswater House, 22 Southern Grove, E3 4PY ("the Property"). The Property is occupied by the Respondents who are the daughter and granddaughter of Barful Bibi. Barful Bibi has been the tenant of the Property since 23 July 1990 (initially her landlord was the London Borough of Tower Hamlets) and since 11 April 2005 Barful Bibi has been an assured tenant under a periodic tenancy the terms of which are contained in writing ("the Tenancy")

2. In this judgment, I will refer to Barful Bibi and the Respondents as "Barful", "Aftajan" and "Mahanara" respectively.

3. In March 2015 Barful brought proceedings against Aftajan and Mahanara seeking possession based on their occupation of the Property being unlawful. The basic chronology was common ground before me: Barful required care; in January 2012 Aftajan and Mahanara moved in to the Property with the agreement of Barful; in November 2013 Barful left the Property and then towards the end of 2014 or Spring of 2015 made it clear to Aftajan that she, Barful, wanted Aftajan and Mahanara to leave. Barful has not been back to the Property since November 2013. Aftajan and Mahanara have continued to live there.

4. The pleaded issues in the proceedings below were limited to whether or not Barful was estopped from seeking possession against Aftajan and Mahanara because of Barful representing to Aftajan that she could remain at the Property indefinitely. Barful denied making any such representation. By the conclusion of the trial Aftajan and Mahanara had a counterclaim repeating the issues in the defence.

5. In an approved note of judgment dated 18 April 2016, District Judge Sterlini made the following material core findings:

    (a) By no later than January 2012, Barful represented to Aftajan that (a) Aftajan would be able to live with Barful for as long as she wanted and (b) Barful would put Aftajan on the tenancy.

    (b) The representations were unconditional, in that they were not dependent on Aftajan providing care for Barful (albeit that this happened and was contemplated).

    (c) Aftajan reasonably relied on those representations in moving into the Property and to her detriment gave up her family's temporary accommodation arranged by the London Borough of Tower Hamlets, who had accepted a full duty to house Aftajan and her family, for which, until she moved in with Barful, Aftajan was on the waiting list.

    (d) Barful knew that Aftajan would give up her existing accommodation and her place on the Tower Hamlets' housing waiting list because of Barful's representations.

6. In making those findings the estoppel defence alleged by Aftajan and Mahanara was made out but the case was not finished:

    (a) Aftajan and Mahanara had been allowed during the course of the Trial to raise a counterclaim. The terms of the counterclaim did not add any new facts or issues to

the statements of case: the counterclaim referred to paragraphs 1 to 13 of the defence and sought at paragraph 1 of its prayer: *equitable relief to satisfy the estoppel*.

(b) The judge described this, in paragraph 35 of his April judgment, as opening up an entirely new avenue. And later in that paragraph stated that this would go beyond dismissing the claim for possession and then making a declaration as to the estoppel. It is clear from the paragraph that one of the judge's concerns was that Barful could move back into the Property – *The counterclaim does not preclude the Claimant from moving back in; this is not impossible legally*.

(c) In paragraph 36 of the April judgment the judge noted that Aftajan was arguing that the tenancy should be assigned to her or that Aftajan should become a joint tenant with Barful. The judge said this *may be possible* but that he would be concerned to allow the Appellant to make submissions and if necessary to be joined to the proceedings.

(d) In the light of those considerations, in paragraph 41, the judge adjourned the decision as to whether to grant any further relief and give notice to the Appellant.

7. For those reasons, the order made after the April 2016 trial was to dismiss the possession claim and to declare that Aftajan and Mahanara *have an equity in the property arising by virtue of proprietary estoppel*. The recital stated that it was agreed that any decision on relief would be adjourned.

8. It is the decision on relief, made on 14 September 2016, that is the subject of this appeal. For the reasons given in an approved transcript of judgment, District Judge Sterlini ordered Barful to assign the tenancy to Aftajan. The core of the judge's reasoning was:

(a) The representation that Barful would put Aftajan on the tenancy meant that Aftajan would become a tenant, with all the protection that followed from that status (paragraph 8).

(b) Although the Tenancy restricted Barful's right to assign the tenancy, it expressly permitted, by clause 14.9.1, any assignment that might be necessary to comply with a court order which would be wide enough to cover a court order made to meet Aftajan's equitable right (paragraph 11).

(c) Aftajan's expectation was to have the benefit and security of a long-term tenancy of the Property, over and above that of being a joint tenant – which would be vulnerable to Aftajan's interest being determined by Barful (paragraph 13) because such an expectation would be consistent with what Aftajan gave up which was a place on the Tower Hamlets waiting list with a reasonable likelihood of being granted a local authority tenancy (paragraph 15). The remedy needed to meet the equity in the case had to provide for Aftajan's expectations and what she had given up (paragraph 16).

(d) The minimum that could be done in the circumstances to meet that equity was an assignment of the tenancy from Barful to Aftajan: this would put Aftajan on the tenancy; a joint tenancy would be hopelessly vulnerable to Barful determining it

unilaterally; and the Appellant would have merely exchanged one tenant for another (paragraphs 20 and 22).

9. The gist of the Appellant's position, expressed in 6 grounds of appeal which I address below, is that the judge was wrong and ended up ordering Barful to do something that was unlawful and beyond that which was necessary to meet the representations made.

10. The gist of the Respondents' position is that the judge was right and the order for assignment was both open to the judge and the only way in which the court could meaningfully give effect to the equity created by the facts found at the April 2016 trial.

The Law

11. There was no genuine dispute between the parties as to the relevant law. It includes that relating to social housing and that concerning proprietary estoppel.

12. Until the Appellant became Barful's landlord, Barful was a secure tenant under the Housing Act 1985. I understand it to be common ground that Barful had been a periodic tenant under the 1985 Act since 1990.

13. Under the 1985 Act, as material, immediately before the time when the Appellant became Barful's landlord:

    (a) Under section 87, a member of her family who was living with Barful in the Property, as that family member's only or principal home and who had lived with Barful for the 12 months prior to her death, would have qualified to succeed Barful on her death.

    (b) Under section 91 of the 1985 Act, although there was a general prohibition on assignment, an assignment could be made to a person who would be qualified to succeed Barful.

14. Once the Appellant became Barful's landlord her tenancy was subject to the Housing Act 1988 and she became an assured tenant. The 1988 Act is relevant in the following respects:

    (a) Under section 17, a spouse, or equivalent, living with Barful on her death would have had the tenancy vested in them but no other person had a similar right (until 1 April 2012 when, subject to other conditions, a person within an express contractual right to succeed could have the tenancy vest in them on the tenant's death).

    (b) Because the Tenancy contained an express provision restricting Barful's right to assign, the statutory restriction on assignment contained in section 15 did not apply, however since 5 November 2013, by section 15A, an assignment in breach of an express or implied term prohibiting assignment would bring the assured tenancy to an end (and so leave whoever was the tenant without any statutory security of tenure).

15. It was common ground between the parties that a transfer in breach of a contractual prohibition would still be effective as an assignment but would make the tenancy susceptible to any remedy the landlord might have arising out of that breach. In addition,

since 5 November 2013 any parting of possession or sub-letting in breach of a contractual term would end the tenancy's status as an assured tenancy for all time.

16. Ms Blackmore's skeleton argument at paragraph 26 did not dispute the summary of the law on proprietary estoppel at paragraphs 43 to 51 of Mr Grundy's skeleton argument. The relevant propositions set out in those paragraphs include:

    (a) [Proprietary estoppel] *describes the equitable jurisdiction by which a court may interfere in cases where the assertion of strict legal rights is found to be unconscionable* (Megarry & Wade (8th ed) para. 16.01).

    (b) An estoppel cannot apply to powers or rights that a person does not have. This was Mr Grundy's own formulation derived from administrative law cases, such as *R v Sec State for the Home Department, ex p. Naheed Ejaz* [1994] QB 496, holding that the secretary of state could not widen the government's power just by representing that it would do something beyond those powers.

    (c) A similar principle was found expressed in *Daejan Properties Ltd v Mahoney* (1996) 28 HLR 498 – although not determinative on the facts: *It is, I think, true that a party cannot achieve by estoppel what he could not achieve by express agreement to the same effect* (Sir Thomas Bingham M.R.). On the facts of that case a landlord was estopped from doing otherwise than treating two tenants *as if* they were statutory joint tenants even though the landlord could not be estopped from asserting that they were not joint tenants[1].

Grounds 1 & 2

17. Ground 1 of the notice of appeal states: *The learned judge erred in law in holding that the court had power, under the doctrine of proprietary estoppel, to order C to transfer her tenancy agreement to D1 in circumstances where C had no unilateral and unfettered right to make such an assignment*.

18. Ground 2 reads: *The* [judge] *erred in law in finding that clause 4.19.1 of* [then tenancy] *applies to a court order made in any proceedings including an order made in application of the doctrine of proprietary estoppel*.

19. It is convenient to discuss both grounds together because they both depend on the proper construction of clause 4.19.1 of the Tenancy:

    You must not transfer the tenancy to anyone else unless: this is necessary because of a court order.

20. It is the Respondents' case that the judge was right in construing this to mean that if the court ordered a transfer of the tenancy then transfer would be permitted because that's what the words say.

21. Consequently, it was no answer on the part of the Appellant to say that Barful could not assign the tenancy without the Appellant's consent because so long as a court was to order the transfer then the transfer was not within the contractual prohibition – the judge's

[1] A feature of the present case is that there is no estoppel alleged against the Appellant landlord nor is any pleaded relief sought against the landlord.

version of this was that consent had necessarily been given. I do not agree with the judge's logic in that respect (clause 4.19 makes no provision for consent by the landlord, it contains a prohibition with recognised exceptions) but my difference of opinion with the judge in this respect makes no material difference in outcome so far as the Respondents' arguments are concerned.

22. The Appellant's case was that properly construed the 4.19.1 restriction only applied to the statutory circumstances which were expressly recognised in the 1985 Act (essentially financial remedy and children proceedings). In argument, I asked Mr Grundy if his case was so limited or whether it was that the statutory circumstances identified in the 1985 Act were examples of a class which was capable of being wider if there were or were to be other equivalent statutory provisions. Mr Grundy accepted that wider restatement of his argument.

23. The starting point is the language of clause 4.19.1. The clause prohibits the tenant doing anything by voluntary action – *You must not transfer* – but recognises an exception to this where a court order makes it *necessary*. I consider that this creates a clear distinction between those circumstances where the law might require, under court order, a person to transfer a tenancy outwith their own consent (which is permitted by the clause) and a person voluntarily doing an act directed at transferring the tenancy (which is not permitted by the clause).

24. Mr Grundy used, as an example of something which would not be permitted, entering into an agreement to assign and then coming to the court and seeking an order for specific performance – the agreement to assign would be a breach of the tenancy and it would be no answer to say that it would not be a breach once a court order was obtained requiring the agreement to be performed. Indeed, the fact that the agreement was made in breach of contract would likely be a bar on obtaining specific performance of the agreement to assign.

25. Mr Grundy also argued that the agreement should be construed in the context of the transfer of a large number of tenants to the Appellant from local authorities. This meant those tenants were moving away from the 1985 Act protections to the more limited protections of the 1988 Act. This was expressly recognised as part of the context to the tenancy in the opening words to clause 5 of the tenancy. I agree with Mr Grundy that this context is relevant to the construction of the clause.

26. Ms Blackmore did not disagree with the transfer providing material context but pointed out that the consequences of the argument – that clause 4.19.1 should necessarily be limited to that which might have been permitted under the 1985 Act – was undermined by the failure of the new tenancy to achieve parity between the statutory tenancy and the assured tenancy in respect of a transfer to a potential statutory successor. I agree with Ms Blackmore to an extent:

    (a) Under the 1985 Act if Aftajan was living with Barful at the time of Barful's death and met the other conditions then Aftajan could have taken over the tenancy and consequently Aftajan could have been assigned the tenancy under section 91(3).

    (b) It is true that the contractual permitted transfer under clause 4.19.3 and 4.34.3 only refers to partners and not wider family members.

(c) It follows that the tenancy is more restricted than would have been the case under the 1985 Act – assuming there was nothing in the terms and conditions, if any, of the earlier tenancy that would have had an impact.

27. However, what I cannot agree with is that this has any consequence to the construction argument about clause 4.19.1. It remains the case that Mr Grundy is correct in identifying that under the 1985 legislation there was express recognition of the court's powers under certain statutes to require a tenancy to be transferred and the argument that clause 4.19.1 was intended to recognise those powers and have similar application is not significantly undermined by identifying a failure to achieve exact equivalence between the 1985 Act position and the 1988 Act position elsewhere.

28. The wider considerations also support Mr Grundy's construction – the construction placed on the clause by the Respondents and the judge has the consequence that there is no significant prohibition on transfer at all. There are no circumstances in which a tenant could not achieve a transfer by entering into an arrangement which could then be made effective by court order. Once the court order was obtained then the transfer would become "necessary" because the court had ordered it.

29. Like Mr Grundy, I consider this circular and an unlikely construction unless it necessarily followed from the words used in the clause. For the reasons given above, it does not necessarily follow from the language – on the contrary the language of the clause prevents the tenant transferring unless it is necessary because of a court order which is consistent with the tenant not being entitled to do anything voluntarily outside being required to do so by order of the court.

30. I also consider the distinction between what is allowed by clause 4.19.1 and what is not is between those circumstances when statute empowers a court to transfer property notwithstanding proprietary rights and when a court's powers are to find and give effect to the parties' proprietary rights. The clause describes the former as an exception to the contractual bar on transfer and the bar on transfer places a contractual restriction on the tenant doing anything to alter the latter.

31. It follows that in the circumstances in this case, it was necessary for the court below to consider the question of what equity might arise in favour of Aftajan and Mahanara from the starting point that it was a breach of contract for Barful to transfer the Tenancy (and for her to promise to do so was a promise to commit a breach of contract).

32. Ms Blackmore stressed the flexibility with which equity could approach this problem and referred me to *Burrows & Burrows v Sharp* (1991) 23 HLR 82. In that case the court of appeal set aside an unworkable order (which would have required the parties to live together and co-operate after relationships had broken down) and replaced it with a requirement on the promisor to repay to the promisees the financial outlay they had incurred in reliance on the proprietary promise made to them: it was right on the facts of that case to remove from the promisees any proprietary remedy and substitute it with a restitutionary one.

33. I note that Dillon LJ says *in general it would, if possible, want to avoid giving the claimant more than he was ever intended to have*. That does not go so far as would be necessary in the present case – which would require equity obliging a defendant to act in breach of contract to satisfy a promise made to a claimant but I do see how the possibility of giving

Aftajan the right to remove Barful could be within Dillon LJ's description (although that of itself does not make it the just solution).

34. The Judge below thought it was the just solution and gave Aftajan and Mahanara more than they were promised and took away from Barful her tenancy. He also imposed on the Appellant a tenant they had not consented to. I have considered whether it was within the broad flexibility than an equitable court might have:

    (a) I do not consider it likely that the court, in exercising an equitable jurisdiction, would require a party to do something which was a breach of her contractual obligations. The starting point for the court is likely to be, and is here, that it will have regard to the parties' contractual position and respect a parties' contractual obligations. This principle is reflected in the quotation from *Daejan Properties Ltd v Mahoney* (1996) 28 HLR 498 above.

    (b) Moreover, I consider that the order made by the judge below, because it compelled Barful to act in breach of contract, would have had the consequence – were it acted upon – that the tenancy would have lost its statutory protection because of s15A of the 1988 Act. It follows that the very thing that the judge wanted to avoid (Aftajan not having security of tenure) would have been brought about by Barful complying with his order.

35. I also consider that the judge was right in paragraph 26 of his April 2016 judgment when he recognised the limitations on Barful's ability to provide secure accommodation to Aftajan. The judge said: *…the Claimant has no absolute right to remain in occupation…I am entitled to infer that she was saying "you can live here as long as I am able to allow you to live here by means of my own right" i.e. so long as I am entitled to live here, so can you. Although I accept that the Claimant also represented that she would do whatever was necessary to make the First Defendant a tenant, this was an outcome not strictly in her power*.

36. I consider the judge lost sight of this restriction on Barful's power in his later judgment on remedy. In doing so and bolstered by his construction of clause 4.19.1, he ordered Barful to do something which was not within her power and in so doing went wrong. Ground 1 is made out.

37. For the reasons I have given above regarding clause 4.19.1, the appeal succeeds on Ground 2 also.

Ground 3

38. Ground 3 reads (in part): *The* [judge] *erred in the exercise of his equitable discretion in failing to have regard to the fact that the representations that he had found that* [Barful] *had made to induce* [Aftajan] *to move to* [the Property] *to live with her were mutually inconsistent*.

39. Like Ms Blackmore I had difficulty with the potential width of this ground but in discussion with Mr Grundy it became clear that the focus of the ground was on the actual representations found by the judge and their consequence for the order made on the remedy hearing not an appeal by the back-door of the order made following the April trial.

40. The representations found are set out at paragraph 5 (a) above. I do not agree that they are necessarily inconsistent but I do agree that the second representation – to put Aftajan on the tenancy – is potentially ambiguous – does it mean try to transfer the tenancy to Aftajan, so giving Aftajan the right to exclude Barful or does it mean try and make the tenancy joint.

41. The first representation found by the judge gives the answer to any ambiguity – Aftajan would be able to *live with Barful* [my emphasis]. It follows that the second representation could only reasonably refer to a joint tenancy because a transfer of tenancy would be inconsistent with mother and daughter living in the Property together.

42. It follows that the only reasonable construction of both representations together would lead – at most – to both Barful and Aftajan being on the tenancy.

43. The judge did not like a conclusion that led to that result because of his view that Barful was likely to take steps to terminate the joint tenancy out of spite. For that reason, the judge found that there should be an outright transfer because it was the only way to give Aftajan the protection which he considered she expected and which, in the judge's mind, she deserved because she had given up her rights to local authority accommodation in Tower Hamlets.

44. I consider that in doing this the judge went beyond what was available as a matter of estoppel and gave Aftajan a better bargain than she had been promised by Barful. I would allow the appeal on this ground also.

45. The reasonable meaning of the representations made was that (a) Barful would allow Aftajan and family to share the Property for so long as Aftajan wished to do so for no payment (i.e. an unlimited licence) and (b) Barful would do what she could to have Aftajan become a joint tenant. The latter did not create or promise any proprietary interest – the grant of a proprietary interest in the Property was not in the gift of Barful – it would require the consent of the Appellant. It was a promise to try and could have been nothing more.

Ground 4

46. Ground 4 reads: *The* [judge] *erred…in finding that the minimum relief necessary to do justice was an order requiring* [Barful] *to transfer her tenancy to* [Aftajan] *in her sole name…*

47. Essentially, because of the way in which I have approached ground 3, this is a repeat of the same ground. I would allow the appeal on this ground for the same reasons.

Grounds 5 & 6

48. Ground 5 refers to the social housing nature of the tenancy and the Appellant having a tenant they did not choose foisted on them, who has resided at the Property without paying rent. Ground 6 in a catch-all which does not take the matter any further of itself.

49. I agree with Ms Blackmore that if the other grounds of appeal had failed then neither of these grounds would add anything – if the tenancy allowed a transfer to Aftajan because of an estoppel and court order then the Appellant cannot complain of a consequence of its own contractual arrangements. Aftajan's non-payment of rent is neither here nor there

at present – she has no obligation to make rent payments unless she becomes a tenant. It would be consistent with Barful's representations that Aftajan is not obliged to contribute towards her occupation (but of course the judge's solution, which made Aftajan a tenant, would have the consequence that she and not Barful would have the rent liability).

Relief

50. I will set aside the order of 29 September 2016.

51. Given my reasoning above and on the court below's findings in April 2016 as to the actual representations made (and having regard to the statements of case) there is little doubt about what the form of relief should be: Aftajan has a personal right as against Barful to occupy the Property without payment for so long as she wishes.

52. There is no further requirement for equitable relief arising out of proprietary estoppel. Although it has been found that Barful represented that she would put Aftajan on the tenancy this was not something that was within her power to do – it would require the agreement of the Appellant or would be a breach of contract and would remove Barful's statutory protection (if a joint tenancy) or give Aftajan a periodic tenancy with no statutory protection (if a transfer to Aftajan as sole tenant). It follows that there is no proprietary interest arising out of Barful's representations to which the court can give effect.

53. I recognise that I have not been addressed by the parties on relief and I am open to hearing further argument if that be necessary.

His Honour Judge Parfitt

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