Neutral Citation Number: [2017] EWCA Civ 1934

Case No: B5/2015/1166

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CANTERBURY COUNTY COURT
(Sitting at Brighton County Court)
HIS HONOUR JUDGE SIMPKISS
Claim No 3 CT 00725

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2017

Before :

LORD BRIGGS OF WESTBOURNE
SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
and
LORD JUSTICE SALES

- -

Between :

DECLAN AHERN	**Appellant**
- and -	
SOUTHERN HOUSING GROUP LIMITED	**Respondent**

- -
- -

Mr Martin Westgate QC and Ms Tina Conlan (instructed by Kingsford Solicitors LLP) for the Appellant
Mr Ranjit Bhose QC and Mr Dean Underwood (instructed by Lewis Silkin LLP) for the Respondent

Hearing date : 1 December 2016

- -

Approved Judgment

Sir James Munby, President of the Family Division :

1. This is an appeal, pursuant to permission granted by Sir Colin Rimer on 16 July 2015, from an order of His Honour Judge Simpkiss dated 10 March 2015. The judge was sitting in the County Court hearing a landlord and tenant dispute. He gave judgment for the landlord, Southern Housing Group Limited, and made a possession order. The judgment was handed down on 5 February 2015. The tenant, Declan Ahern, appeals.

2. The tenancy was a "starter" or probationary assured shorthold tenancy dated 5 April 2012 and commencing on 9 April 2012 of a flat in a property in Canterbury. The landlord extended the term once, for 6 months, and then, on 6 June 2013, decided to serve notice in accordance with section 21 of the Housing Act 1988 as amended. The notice was actually served on 18 July 2013. The proceedings were issued on 3 October 2013. Mr Martin Westgate QC and Ms Tina Conlan, who appeared before us on behalf of Mr Ahern, identify the sole question for us as being whether the Judge was entitled to find that the notice had been validly served. They explicitly accepted that the notice complied with the formal statutory requirements of section 21. Their case was that the notice was void because of public law errors committed by the landlord that pre-dated and bore upon its decision to serve it. Mr Ranjit Bhose QC and Mr Dean Underwood asserted that the notice was good and that the Judge had been right to make the order for possession.

3. At the end of the hearing we made an order dismissing the appeal and removing the stay on execution of the possession order. We now give our reasons.

4. The dispute before us turned on the proper application, in the particular circumstances of this case, of the principle, articulated in a long line of authorities to which we were taken, including at the highest level, that Mr Ahern was entitled in the County Court to challenge the landlord's decision to serve the notice on traditional public law grounds. It was common ground before us, as at the trial, that (i) the landlord was obliged to follow its own policies, save where there was good reason not to, (ii) there was no need for Mr Ahern to establish a legitimate expectation that the landlord would do so, and (iii) if there had been a breach of policy, the question for the court was whether the breach was material to the decision to serve the notice.

5. Mr Bhose and Mr Underwood expressly accepted and adopted the following summary of the law in Mr Westgate and Ms Conlan's skeleton arguments:

> "A public body is under a duty to follow its own policies except where there is a good reason not to do so. Although this has previously been explained as a type of legitimate expectation it is now recognised that the duty arises because of a related principle of good administration: public bodies must act consistently and straightforwardly in what they do … So in the absence of a good reason to depart from the policy the position now is:
>
> > "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute."

> This does not require the court to ask as a further question whether the authority has acted in such a way as to amount to an abuse of power in not following its policy. That question may arise when the court has to evaluate whether or not there is a good reason to depart from a policy. It has no place where the decision-maker does not assert such a reason but simply fails to apply a policy or argues that the facts of a particular case do not fall within it. So, in *Mandalia* [*Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546] the Supreme Court recorded (§31) that the Respondent did not argue that there were good reasons to depart. It allowed the appeal because properly understood the policy in question did require a caseworker to give the appellant an opportunity to repair the deficit in the evidence provided in support of his visa extension application (§36). Once it was established that the facts fell within the policy and it was not applied then no further enquiry was needed."

6. Mr Bhose and Mr Underwood accepted that the Judge had misdirected himself when (judgment, para 58) he had identified the issue for the court as being "whether [the landlord's] conduct of this case, having regard to the background and the policies, amounts to an abuse of power or that it has conducted itself in a way that no reasonable housing association could have." But, they submit, the Judge was plainly right to conclude that the decision to serve the notice was lawful.

7. This is in some ways a very sad case. The fundamental reality is that Mr Ahern is a very vulnerable alcoholic whose drunken, anti-social and on occasions lewd conduct, whether he can control it or not, has disturbed and on occasions greatly upset his neighbours, also tenants of the landlord, and others. The details are set out by the Judge in his judgment (paras 5-7, 11-12, 14-17) and need not be rehearsed again in full here.

8. It suffices to note that in May 2012 a complaint was received from the Parish Council of Mr Ahern's drunken and lewd behaviour in the town centre; that on 12 June 2012 he was arrested outside the property for being drunk and disorderly, a complaint being received from a neighbour, Mr S; that on 9 August 2012 while drunk Mr Ahern threatened and intimidated another neighbour, Ms W, saying "I want to fuck you" and later the same evening threatened to kill her boyfriend (for this he was prosecuted and convicted of harassment, receiving a 12 month community order); that on 7 September 2012 he again threatened Ms W; that on 4 December 2012 he was reported to have been drunk and disorderly on a bus; that on 30 December 2012 and again in January 2013 there had been incidents giving rise to complaints from Mr B (the occupant of the flat above Mr Ahern's), including in relation to noise nuisance by loud music; that there were further complaints from Mr B relating to incidents on 12 February 2013, 18 February 2013, 5 March 2013 and 6 March 2013 involving loud music and, on one occasion, criminal damage to Mr B's front door and threats to damage his property; that Mr B alleged that on 26 April 2013 Mr Ahern had made threats to kill him (threatening to cut off his head with a saw), shouted homophobic abuse, and thrown a chair at Mr B's window (the Judge records Mr Ahern's acknowledgment that he had sworn at Mr B, using, as the Judge put it, every expletive in the book); and that on 27 April 2013 there was another incident (for which Mr Ahern was arrested) involving alleged threats

to kill Mr B. It is only fair to record, as did the Judge, that when the incidents which had allegedly happened in April 2013 came to trial, Mr B did not attend and the case against Mr Ahern was accordingly dropped.

9. The landlord's policies are spread across a number of documents running to some dozens of pages. We were taken through all this material, as was the Judge. At the forefront of the argument before the Judge (judgment, para 23) was the allegation that the landlord was in breach of paragraph 9 of its 'Policy Statement – Starter Tenancies':

> "Where a breach is identified, our Starter Tenancy review will ensure;
>
> - All tenancy conduct to date is reviewed
> - The resident is contacted by phone, letter and/or in person
> - Vulnerabilities and support needs are taken into account
> - Possession action is a last resort."

In relation to paragraph 9, as the Judge put it, the case:

> "raised the following failures by the [landlord] in breach of paragraph 9 of its policy entitled Starter Tenancies:
>
> - Failed to use possession as a last resort;
> - Failed to enquire about the impact of eviction on the Claimant;
> - Failed to liaise with support agencies to develop alternative strategies;
> - Failed to consider other options."

10. The Judge also (judgment, para 24) set out the following alleged breaches of various policies:

> "• failed to identify and address his support needs for mental health or alcohol dependence;
>
> • failed to interview him about his support needs or allegations about his behaviour after the probationary period of his tenancy had been extended;
>
> • served the s.21 notice and issued the claim without evidence of a serious breach of his tenancy;
>
> • fettered its discretion because there was not provision to review the proceedings, alternative failing to review the proceedings;

> • failing to postpone the appeal against the section 21 notice [this was a reference to the appeal process provided by the landlord]."

11. The Judge drew attention (judgment, para 37) to three particular points:

> "Firstly, expressly included in the group of vulnerable persons are those with mental health problems such as depression and those with alcohol or substance abuse problems. Secondly, the policy requires the [landlord] to interview the vulnerable person in order to identify need and the establish whether they are at greater risk; record an action plan on a "support needs form"; contact other agencies to determine what support is being provided and whether more action needs to be taken; and, carry out an assessment of the risk to the vulnerable person's health. Support is to be offered to vulnerable residents, regardless of whether they are alleged victim or perpetrator."

12. He recorded (judgment, para 38) that termination of the tenancy during the first 12 months was to be considered when there was a "serious breach" of the tenancy agreement, and set out (para 43) when a breach would be considered serious:

> "The Group will consider a breach of tenancy serious where two or more of the following apply:
>
> • the breach is made persistently
>
> • the resident has failed to respond to repeated requests to desist/correct the breaches
>
> • the tenant has not engaged in offers of support from the Group/support agencies to redress the breach
>
> • the breach(es) have a serious negative impact on the Group's interests such as the property, its staff and/or its agents or scheme."

Addressing the question of whether the breaches were "serious", the Judge concluded, unsurprisingly, that they were (judgment, paras 39-44).

13. The Judge considered the alleged breaches in turn and rejected them all (judgment, paras 45-66 and, in relation to the appeal process, paras 68-74).

14. The Judge carefully chronicled (judgment, paras 8-10, 18-21, 46-47, 49-51, 54, 56-57, 60-62, 64-65) the many and various steps taken by the landlord, including reviews of his case and meetings with Mr Ahern, both before and after the decision was taken to serve the section 21 notice.

15. Before us the primary focus of the case as presented by Mr Westgate and Ms Conlan was on events *before* the service of the section 21 notice because, they submitted, the Judge had been wrong to hold (judgment, para 34), on the authority of the decision of this court in *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834,

[2012] PTSR 56, that matters could be cured retrospectively – a submission disputed by Mr Bhose and Mr Underwood.

16. Apart from the two grounds of complaint which I have already referred to (paragraphs 6 and 15 above), that the Judge erred in law, the essential thrust of the appeal is that the Judge failed to make adequate findings as to whether or not the section 21 notice was invalid and wrongly concluded that the landlord had not been in breach of its public law duty when it served the notice. Mr Westgate and Ms Conlan rightly accept – see *R (Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45, [2014] 1 WLR 3538, para 47 – that not every departure from the strict wording of a policy will involve an error of law, because, as they accept, policies must be subjected to a "purposive and pragmatic construction." But, they nonetheless submit, the landlord was in material breach of its policies.

17. In relation to this, four matters are relied upon. It is submitted that the landlord:

    i) Failed to follow its policy (Policy Statement – Starter Tenancies, paragraph 3) in relation to "identifying any support needs or vulnerabilities throughout the tenancy".

    ii) Failed to follow its policy (Policy Statement – Starter Tenancies, paragraph 5) in relation to taking those needs into account and failed to address whether support could be put in place.

    iii) Failed to take into account Mr Ahern's vulnerability or properly to review his case before issuing the section 21 notice and, in particular, failed to make inquiries at that stage into the impact eviction would have on him.

    iv) Failed to follow its policy (Policy Statement – Starter Tenancies, paragraphs 5 and 9) by failing to contact Mr Ahern and carry out review visits before taking enforcement action.

18. The landlord's riposte can be summarised as follows:

    i) The landlord was well aware of Mr Ahern's vulnerabilities: one of the terms of the community order he had received in 2012 required him to attend an alcohol treatment programme, but although he had successfully complied with the order he had, as the landlord was aware following its investigation of the incidents in April 2013, nonetheless continued drinking.

    ii) By then Mr Ahern was on bail and subject to a condition not to return to the flat. The landlord was unable to locate and contact him, and its attempts to contact his probation worker in May 2013, most recently on 31 May 2013, proved fruitless.

    iii) The landlord, having reviewed Mr Ahern's case twice, decided on 6 June 2013 to serve the section 21 notice. On 13 June 2013 (judgment, para 17), Mr Ahern was arrested and then remanded in custody pending his trial on 18 September 2013, when he pleaded guilty to affray.

    iv) In relation to the likely effect on Mr Ahern of being evicted, the Judge rightly found (judgment, para 65) that the landlord was aware of these matters without

any further interview. Moreover, that is a conclusion which stands to reason: the landlord was aware of Mr Ahern's circumstances and, as a registered provider of social housing, would be well aware of the potential implications of its decision.

v) Mr Ahern had, and the landlord repeatedly assured itself that he had, the support needed to address the root cause of his anti-social behaviour: his drinking. As the Judge had rightly found (judgment, para 65), "it is clear that his needs were being met (if not successfully) by the mental health services and alcohol treatment programme." What more could the landlord reasonably be expected to do?

vi) As Mr Bhose and Mr Underwood ask rhetorically, is it really suggested that the landlord's policies obliged it to continue referring and signposting Mr Ahern to support agencies despite his whereabouts being unknown and his being remanded in custody? If so, they submit, he stretches the construction of the policy obligations far beyond the "purposive and pragmatic."

19. By the end of the argument on this part of the appeal it had become clear that it would not succeed. It therefore became unnecessary to go in any detail into the questions which would arise were Mr Ahern to establish a breach of public law duty as at the date of service of the section 21 notice (including the issue in relation to the Judge's reliance on *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834, [2012] PTSR 56); nor was it necessary to explore the other issues arising on the respondent's notice. I say no more about any of that, except to record that, very properly, the landlord continued to keep the matter under review even after it had served the section 21 notice.

20. Mr Ahern complains (paragraph 6 above) that the Judge misdirected himself in law and (paragraph 16 above) failed to make adequate findings. As to the first complaint, it is conceded. In relation to the second I am sceptical. But, at the end of the day, this is really all beside the point. The simple fact is that we are in just as good a position as the Judge was to evaluate the documentary record and, applying what is agreed to be the proper approach, to come to our own conclusions.

21. We were taken very carefully, both in the skeleton arguments and then in oral submissions, through all the relevant materials documenting the history of the landlord's engagement with Mr Ahern throughout the whole of the period leading up to the service of the section 21 notice. No purpose would be served by any further analysis of this material. This appeal, in the event, raises no point of principle. It turns on the facts. Our task, evaluating what happened, is to ask ourselves whether the landlord was in material breach of its policies, always bearing in mind that we have to look at the relevant history as a whole and that we are entitled to adopt a sensible approach.

22. My own conclusion is clear. The appeal must be dismissed, essentially for the reasons articulated by Mr Bhose and Mr Underwood.

Lord Justice Sales :

23. I agree.

Lord Briggs of Westbourne :

24. I also agree.