



Neutral Citation Number: [2019] EWCA Civ 1331

Case No: B5/2018/1809

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour John Hand QC (sitting as a Deputy Circuit Judge)
Case C01EC947

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2019

Before:

LORD JUSTICE HAMBLÉN
LORD JUSTICE NEWY
and
LADY JUSTICE SIMLER

Between:

YAVUZ YILDIZ **Appellant**
- and -
LONDON BOROUGH OF HACKNEY **Respondent**

Mr Edward Fitzpatrick and Mr Stephen Marsh (instructed by Hodge Jones & Allen LLP)
for the Appellant
Mr Adrian Davis and Miss Miriam Shalom (instructed by Hackney Legal Services) for the
Respondent

Hearing date: 10 July 2019

Approved Judgment

Lord Justice Newey:

1. Until he died on 4 September 2014, the appellant’s father, Mr Kemal Yildiz, occupied a four-bedroom house at 35 Victorian Grove, Yorkshire Grove Estate in London under a secure tenancy granted by the respondent, the London Borough of Hackney (“the Council”). Following the death, the appellant, Mr Yavuz Yildiz (“Mr Yildiz”), succeeded to his father’s tenancy pursuant to section 89 of the Housing Act 1985 (“the 1985 Act”). On 28 January 2015, however, the Council informed Mr Yildiz that he was under-occupying the property and so would be required to move to alternative accommodation. In the event, Mr Yildiz not having accepted one or more offers of one-bedroom accommodation, the Council served on him a “notice of seeking possession” dated 23 June 2015. The notice, which referred in its heading to section 83 of the 1985 Act, stated that the Council intended to apply to the Court for an order requiring Mr Yildiz to give up possession of 35 Victorian Grove. It was explained that possession would be sought on ground 15A of schedule 2 to the 1985 Act and that Court proceedings would not be begun until after 20 July 2015. At the end of the notice, this was said:

“After this date [i.e. 20 July 2015], court proceedings may be begun at once or at any time during the following twelve months. Once the twelve months are up this Notice will lapse and a new Notice must be served before possession can be sought.”

2. As a result, it seems, of a clerical error, the Council did not in fact issue possession proceedings in respect of 35 Victorian Grove until 8 August 2016, a few weeks more than 12 months after 20 July 2015. As a result, Mr Yildiz defended the claim on the basis that the notice of 23 June 2015 had lapsed as well as on other grounds. The Council responded by applying for an order pursuant to section 83(1)(b) of the 1985 Act dispensing with the requirement of a notice of seeking possession. The matter came before Deputy District Judge Harris in the County Court at Clerkenwell & Shoreditch on 5 December 2016. He concluded that it was just and equitable to dispense with the requirement to serve a notice and so ordered. Mr Yildiz appealed, but his appeal was dismissed by His Honour John Hand QC, sitting as a Deputy Circuit Judge, on 13 July 2018. Mr Yildiz now challenges that decision in this Court.
3. In general, a secure tenancy cannot be brought to an end unless the landlord has both served a notice pursuant to section 83 of the 1985 Act and established one or more of the grounds set out in schedule 2 to the Act (see in this respect section 84). The ground relied on in the present case is ground 15A, which reads:

“The dwelling-house is in England, the accommodation afforded by it is more extensive than is reasonably required by the tenant and—

- (a) the tenancy vested in the tenant by virtue of section 89 (succession to periodic tenancy) or 90 (devolution of term certain) in a case where the tenant was not the previous tenant's spouse or civil partner, and

(b) notice of the proceedings for possession was served under section 83 (or, where no such notice was served, the proceedings for possession were begun) more than six months but less than twelve months after the relevant date.

For this purpose ‘*the relevant date*’ is—

- (a) the date of the previous tenant’s death, or
- (b) if the court so directs, the date on which, in the opinion of the court, the landlord (or, in the case of joint landlords, any one of them) became aware of the previous tenant’s death.

The matters to be taken into account by the court in determining whether it is reasonable to make an order on this ground include—

- (a) the age of the tenant,
- (b) the period (if any) during which the tenant has occupied the dwelling-house as the tenant's only or principal home, and
- (c) any financial or other support given by the tenant to the previous tenant.”

Section 83, so far as relevant, is in these terms:

“(A1) This section applies in relation to proceedings for an order mentioned in section 82(1A) [i.e. for, among others, an order for possession] other than—

(a) proceedings for possession of a dwelling-house under section 84A (absolute ground for possession for anti-social behaviour), including proceedings where possession is also sought on one or more of the grounds set out in Schedule 2, or

(b) proceedings for possession of a dwelling-house under section 107D (recovery of possession on expiry of flexible tenancy).

(1) The court shall not entertain proceedings to which this section applies unless—

(a) the landlord has served a notice on the tenant complying with the provisions of this section, or

(b) the court considers it just and equitable to dispense with the requirement of such a notice.

(2) A notice under this section shall—

(a) be in a form prescribed by regulations made by the Secretary of State,

(b) specify the ground on which the court will be asked to make the order, and

(c) give particulars of that ground.

...

(4) Where the tenancy is a periodic tenancy and Ground 2 in Schedule 2 is not specified in the notice, the notice—

(a) shall also specify the date after which proceedings for the possession of the dwelling-house may be begun, and

(b) ceases to be in force twelve months after the date so specified.

...

(5) The date specified in accordance with subsection (3), (4) or (4A) must not be earlier than the date on which the tenancy could, apart from this Part, be brought to an end by notice to quit given by the landlord on the same date as the notice under this section.

...

(7) Regulations under this section shall be made by statutory instrument and may make different provision with respect to different cases or descriptions of case, including different provision for different areas.”

4. The form that a notice under section 83 of the 1985 Act must take is prescribed by the Secure Tenancies (Notices) Regulations 1987, made under section 83. A notice is required by the Regulations to include the wording quoted at the end of paragraph 1 above.

5. The origins of both section 83 of the 1985 Act and its ground 15A can be traced back to the Housing Act 1980 (“the 1980 Act”), which first introduced the concept of a “secure tenant”. The current section 85 and ground 15A can be compared with respectively section 33 of the 1980 Act and ground 13 of schedule 4 to that Act. Taking those in reverse order, the 1980 Act’s ground 13 was in these terms:

“The accommodation afforded by the dwelling-house is more extensive than is reasonably required by the tenant and-

(a) the tenancy vested in the tenant, by virtue of section 30 of this Act, on the death of the previous tenant;

- (b) the tenant was qualified to succeed by virtue of subsection (2)(b) of the section; and
- (c) notice of the proceedings for possession was served under section 33 of this Act more than six months, but less than twelve months, after the previous tenant's death."

As for section 33 of the 1980 Act, that stipulated that the Court should not entertain possession proceedings unless the landlord had served a notice complying with provisions of the section and, in the case of a periodic tenancy, the notice was still in force at the time the proceedings were begun (see section 33(1)). Unlike section 83 of the 1985 Act, however, section 33 of the 1980 Act did not confer a power to dispense with the notice requirement.

6. When section 83 of the 1985 Act replaced section 33 of the 1980 Act, it initially, like its predecessor, contained no power of dispensation. With regard to the 1980 Act's ground 13, that was succeeded by ground 16 of schedule 2 to the 1985 Act. As originally enacted, ground 16 read:

"The accommodation afforded by the dwelling-house is more extensive than is reasonably required by the tenant and—

- (a) the tenancy vested in the tenant by virtue of section 89 (succession to periodic tenancy), the tenant being qualified to succeed by virtue of section 87(b) (members of family other than spouse), and
- (b) notice of the proceedings for possession was served under section 83 more than six months but less than twelve months after the date of the previous tenant's death...."

7. Amendments to the 1985 Act were effected by section 147 of the Housing Act 1996 ("the 1996 Act"). Section 147(1) of the 1996 Act provided for a new section 83 of the 1985 Act incorporating a subsection (1) along the lines of the present-day section 83(1), with a power to dispense with a notice complying with the section. Section 147(3) stated that the phrase "(or, where no such notice was served, the proceedings for possession were begun)" was to be inserted into the 1985 Act's ground 16 after "notice of the proceedings for possession was served under section 83" (so that ground 16 was to apply where "notice of the proceedings for possession was served under section 83 (or, where no such notice was served, the proceedings for possession were begun) more than six months but less than twelve months after the date of the previous tenant's death").

8. The 1985 Act's ground 16 was further amended by the Localism Act 2011. In the first place, the notice required by ground 16(b) was now to be served, or the proceedings begun, less than 12 months after *either* the date of the previous tenant's death *or*, if the Court so directed, the date on which the landlord became aware of the death. Secondly, ground 16 was in future to be applicable only to properties in Wales, with ground 15A, which is in similar terms, being introduced into the 1985 Act to deal with properties in England.

9. Mr Edward Fitzpatrick, who appeared for Mr Yildiz with Mr Stephen Marsh, submitted that the approach adopted in the present case by the Courts below would drive the proverbial coach and horses through ground 15A. If, he said, it were open to a landlord to invoke ground 15A where proceedings had been brought neither during the currency of a notice under section 83 of the 1985 Act nor within 12 months of the previous tenant's death or the landlord learning of it, there would no longer be any ultimate longstop. Since the landlord could ask the Court to dispense with the requirement of a notice under section 83(1)(b), it could potentially invoke ground 15A years later. That, Mr Fitzpatrick argued, was not what Parliament intended. The true position, so he suggested, is that where, as here, no section 83 notice is in force when proceedings are begun, ground 15A will necessarily be inapplicable unless the date of issue is less than 12 months after the "relevant date" (i.e. the date of the previous tenant's death or, if the Court so directs, that on which the landlord became aware of the death). That, he said, follows from the requirement in ground 15A(b) that:

"notice of the proceedings for possession was served under section 83 (or, where no such notice was served, the proceedings for possession were begun) more than six months but less than twelve months after the relevant date".

10. Mr Fitzpatrick sought support for his submissions in the decision of the Court of Appeal in *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 WLR 1884. It was the *Newport* case that led to ground 16(b) being amended, and ground 15A(b) framed, so that the 12-month period could potentially run from the date on which the landlord became aware of the previous tenant's death rather than the death itself. In *Newport*, the defendant had succeeded to his mother's secure tenancy when she died in 2003 but the housing authority issued proceedings only in 2007 and without having served any section 83 notice. The explanation for this was that the defendant had concealed his mother's death with the result that the authority had not learned of it until some three years later. The landlord contended that a proprietary estoppel operated to prevent the defendant from denying that the time for service of a section 83 notice or the commencement of proceedings ran from the date it learned of the death, but without success. While expressing the hope that the legislature might find an early opportunity to alleviate the difficulty, Laws LJ, with whom Longmore and Richards LJ agreed, concluded that the doctrine of proprietary estoppel could not apply.
11. Mr Fitzpatrick argued that, had dispensation from the requirement to serve a notice under section 83 of the 1985 Act allowed a landlord to rely on ground 15A or 16, it would have been sought and granted in the *Newport* case and the housing authority would not have needed to run its unsuccessful proprietary estoppel case. He also referred us to Laws LJ's observation (in paragraph 20) that the time provisions in ground 16 are "there to ensure that the relative is not disturbed too early after the death: hence the six months; nor so much later that he is settled into the property as his own long-term home after the death of the previous tenant: hence the 12 months". He relied, too, on what Laws LJ said about the second of six grounds put forward by counsel for the defendant, viz, that "[t]he county court judge was wrong to hold that in the absence of a section 83 notice or at the commencement of proceedings within the stipulated time limit the court had jurisdiction to make a possession order" (see paragraph 10). As to this, Laws LJ said (at paragraph 12):

“The second ground is correct as stated if it is taken in isolation. It is entirely right that in the absence of a section 83 notice or the commencement of proceedings within the time limit there is no jurisdiction to make a possession order unless of course the position can—I use the word with no intended gloss at this stage—be cured by the operation of an estoppel.”

12. Mr Fitzpatrick also took us to a passage from Luba, Madge, McConnell, Gallagher and Madge-Wyld, “Defending possession proceedings”, 8th ed., at paragraphs 3.342 to 3.343. The passage in question reads:

“Ground 15A and the amended ground 16 provide that the notice may now either be served within one month after the death of the tenant or, if the court so directs, the date on which, in the opinion of the court, the landlord became aware of the previous tenant’s death. This reverses the decision of the Court of Appeal in *Newport CC v Charles*. The court held that the notice had to be given within 12 months of the tenant’s death irrespective of when the landlord learnt of it.

In the event that the landlord still serves the notice out of time, the requirement cannot be avoided by the landlord inviting the court to dispense with a notice altogether because the grounds provide that where no notice is served, the proceedings for possession must still have been commenced within the same six-month ‘window’.”

Mr Fitzpatrick stressed the last sentence.

13. In attractively presented submissions, Mr Adrian Davis, who appeared for Hackney with Miss Miriam Shalom, drew a distinction between, on the one hand, a case in which a landlord had served a section 83 notice which, however, had lapsed before proceedings were issued and, on the other hand, one in which no valid notice had ever been served. Mr Davis accepted that, where no notice at all had been served within a year of the “relevant date”, there could be no question of the landlord successfully invoking ground 15A unless proceedings had been brought within the period; absent either a notice or proceedings, ground 15A(b) could not be satisfied. He argued, however, that the position was different where a notice had been served less than 12 months after the “relevant date”. Since ground 15A(b) requires no more than that “notice of the proceedings for possession was served under section 83 ... less than twelve months after the relevant date”, it would have been complied with regardless of whether proceedings were issued while the notice was still in force. If proceedings were not issued until after the notice had expired, the landlord’s problem would be section 83 rather than ground 15A. The Court would not entertain possession proceedings unless it considered it just and equitable to dispense with the requirement for a notice under section 83(1)(b).
14. Mr Davis submitted that there is good reason to treat a situation in which a notice has been served but allowed to lapse differently from one in which there has been no notice at all since in a case of the former kind the tenant will have been warned of the landlord’s desire to recover possession. Mr Davis further suggested that a landlord

would not in practice be able to seek possession under ground 15A long after the “relevant date” as the Court would not in such circumstances consider it just and equitable to dispense with the notice requirement under section 83(1). Mr Davis maintained that neither “Defending possession proceedings” nor *Newport City Council v Charles* presents any obstacle to his case. The authors of “Defending possession proceedings” were, Mr Davis said, commenting on the position where *no* notice is served before the deadline, not that in which a notice is served but expires. Similarly, *Newport City Council v Charles* is distinguishable because it was a case where “no section 83 notice was given” (see paragraph 4 of Laws LJ’s judgment), on top of which, Mr Davis argued, it can be seen from paragraph 21 of his judgment that Laws LJ regarded the “compulsory time limit” as “ancillary” rather than “central”. With regard to the amendment to ground 16 made by section 147(3) of the 1996 Act, Mr Davis ventured that this, like section 147(1), was meant to liberalise the law, giving a landlord the option of starting proceedings without having served a notice if it could obtain dispensation from the notice requirement under section 83(1).

15. On the other hand:

- i) I find it difficult to see why Parliament should have wished a landlord to be able to claim possession under ground 15A (or ground 16) where a notice has been served and allowed to expire but not where no notice has been served. A notice warns the tenant that proceedings may be begun “during the following twelve months” after the specified date and states in terms that, once the twelve months are up, the notice will lapse and a new notice must be served before possession can be sought. A notice cannot, therefore, be regarded as containing a warning that it might enable the landlord to bring possession proceedings more than a year after the specified date;
- ii) Were Mr Davis’ construction of ground 15A correct, it would seem that a landlord which had served a notice less than 12 months after the “relevant date” could invoke the ground any number of years later without obtaining any dispensation under section 83(1)(b). There would appear to be nothing to prevent a landlord satisfying section 83 by serving a further notice and issuing proceedings before that later notice ceased to be in force. It would then be able to say that it had satisfied both ground 15A(b) (by serving a notice within the prescribed window) and section 83 (by launching proceedings during the currency of the second notice). There would be no need to ask the Court to dispense with the notice requirement;
- iii) Mr Davis’ explanation of section 147(3) of the 1996 Act does not strike me as compelling. A landlord which was in a position to begin proceedings within 12 months of the “relevant date” would presumably also be in a position to serve a notice within that period. Why then should Parliament have thought that it would be of benefit to landlords to allow them to bring proceedings without a prior notice “less than twelve months after the relevant date”? It is more probable, in my view, that section 147(3) was designed to ensure that, now that the re-cast section 83 was to make it possible to dispense with the need for a notice, ground 16 was still subject to a longstop. The idea, in other words, is likely to have been to impose on landlords a requirement that, absent a notice (in particular, because the requirement for one had been dispensed with under

the new section 83), proceedings based on ground 16 had to be brought within a year of the “relevant date”.

16. In the end, I am unable to accept Mr Davis’ approach to ground 15A. Ground 15A(b) requires that:

“notice of the proceedings for possession was served under section 83 (or, where no such notice was served, the proceedings for possession were begun) more than six months but less than twelve months after the relevant date”.

Where a landlord brings proceedings for possession relying on ground 15A, notice of those proceedings must, as I see it, have been served under section 83 less than 12 months after the “relevant date”. Section 83 provides, however, for a notice to cease to be in force 12 months after the date specified in it. The better view, I think, is that that means that a notice cannot constitute notice of proceedings begun more than 12 months later than the specified date. In other words, it is not good enough that the landlord at some stage, however long ago, served a notice which, pursuant to both its own terms and those of section 83, is now spent. A notice must still be current if a landlord is to issue possession proceedings on the strength of it. In the absence of a relevant notice (because either none was ever served or any notice that was served had expired), a claim for possession based on ground 15A will be possible only if the proceedings were begun less than 12 months after the “relevant date”.

17. This interpretation of ground 15A accords with the fact that the time provisions in ground 16 (and now ground 15A) are there “to ensure that the relative is not disturbed ... so much later [than the death] that he is settled into the property as his own long-term home” (to quote from Laws LJ in the *Newport* case). It avoids, too, any question of a landlord being able to invoke ground 15A on the basis that he had served a lapsed notice within 12 months of the “relevant date” and a second one complying with section 83 later.
18. In the present case, the proceedings were issued neither within 12 months of the “relevant date” nor while the 23 June 2015 notice was in force. In the circumstances, I respectfully take a different view from His Honour John Hand QC. It seems to me that Hackney was not entitled to rely on ground 15A and that the appeal should be allowed.

Lady Justice Simler:

19. I agree.

Lord Justice Hamblen:

20. I also agree.