

## Public

# There's no place like home

Tracey Bloom & Kate Markus report on the complexities of eviction action & the obligation to house minors

## IN BRIEF

- *McGlynn v Welwyn Hatfield DC*: considers whether there was a seriously arguable case that the decision of the council to issue possession proceedings against a non-secure tenant was untenable as a matter of public law.
- *R (G) v London Borough of Southwark*: it is not open to local authorities to conclude that no s 20 Children Act 1989 duty is owed to a 16- or 17-year-old child because he could be accommodated under the Housing Act 1996.

In *McGlynn v Welwyn Hatfield DC* [2009] EWCA Civ 285, [2009] All ER (D) 26 (Apr), the appellant occupied the premises under a non-secure tenancy which had been granted pursuant to the council's homelessness functions under Pt 7 of the Housing Act 1996 (HA 1996). The tenancy was terminable by service of notice to quit.

For some time one neighbour had complained about the appellant's behaviour. She had been rehoused. Relying on this one witness, the council had served a notice to quit on 30 April 2004. The council wrote to the appellant at the same time regarding his behaviour and requesting that he return the keys.

The appellant's key worker wrote to the council on 20 May 2004 disputing the allegations. The council responded on 2 June 2004: "The Local Authority does not take action against a person's tenancy unless they are satisfied that there has been a significant breach that has caused a nuisance or annoyance to other residents in the locality. If we do not receive any further complaints of anti-social behaviour that can be linked to Mr McGlynn or his property we will consider granting him a further non-secure tenancy with an option to him being re-housed in a smaller property as requested. However, if the complaints continue, we will have no option but to continue with the legal action required to repossess 20 Kingscroft."

There were further complaints and in

April 2005 proceedings for possession were issued on the basis of nuisance and rent arrears. The matter proceeded on the basis that there would be a contested hearing at which witnesses, including the appellant, would give evidence about the allegations of nuisance. At a hearing in November 2005, it was decided that the matter could proceed solely on the basis that a valid notice to quit had been served. At the first instance hearing in December 2005, the district judge held that he was bound to

**“ The House of Lords considered that there could be cases when a 16- or 17-year-old child did not need to be looked after ”**

order possession as there was no defence to the claim. An appeal to a circuit judge succeeded as *Kay v Lambeth LBC* [2006] AC 465, [2006] All ER (D) 120 (Mar) had been decided in the House of Lords in the interim, permitting public law defences to be raised in limited circumstances.

The circuit judge held that it was seriously arguable in the light of the assurances in the letter of 2 June 2004 that the council had acted in a way that was an improper use of power which no reasonable authority would consider justifiable. He directed that a defence and further evidence be filed. The judge observed that there was a lack of evidence as to how the council had satisfied

itself that it was reasonable to seek possession and what opportunity had been given to the appellant to make representations. Despite the directions to file evidence, none was filed by the council on these points. At the subsequent hearing, the district judge held that the case was not seriously arguable and ordered possession. The matter was appealed to the Court of Appeal.

## Court of Appeal

Before the appeal was heard, judgment had been given in *Doherty v Birmingham City Council* [2008] 3 WLR 636, [2009] 1 All ER 653 and *Doran v Liverpool CC* [2009] EWCA Civ 146, [2009] All ER (D) 28 (Mar). In *Doherty*, the House of Lords sought to explain *Kay* and expand on it in the light of the European Court of Human Rights' (ECtHR's) decision in *McCann v UK* [2008] HLR 40, [2008] All ER (D) 146 (May). In *Doran*, the Court of Appeal sought to clarify the current state of the law. It held that:

- There was no formulaic or formulaic restriction of the factors that could be relied in support of an argument that the decision to serve a notice to quit and

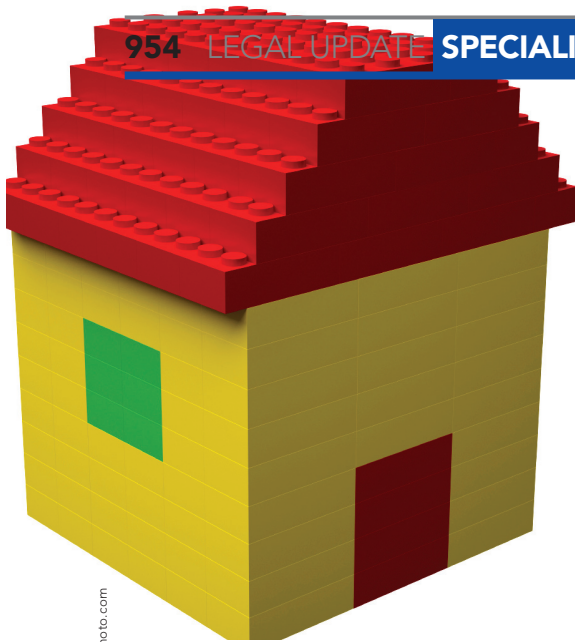
seek possession was one no reasonable council could have taken.

- The rationality of the council's decision is to be decided by the application of public law principles as developed by the common law and not through the lens of the European Convention.

The Court of Appeal had no difficulty in finding that the district judge had taken an over narrow view of the letter of 2 June 2004

## Statement of policy

Lord Justice Toulson held that the letter contained a statement of policy that the council did not take action to evict



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unless there was a significant breach causing nuisance. He continued: “In view of the lapse of time after service of the notice to quit and before the issue of possession proceedings, it seems to me seriously arguable that a reasonable council would not have issued those proceedings unless satisfied that there had been some significant further breach by the appellant. In order to be satisfied about that, I do not consider that the council must have conducted the equivalent of a judicial investigation. However, the question is whether it is seriously arguable that the council did not do enough to satisfy itself that there had been some significant further breach.”

He went on to point out that the council had entirely failed to address the matters that would be expected of it in their evidence: “We do not know, for example, whether it is correct that they [the complaints] all came from a single person and ceased when that person was re-housed. We do not know whether it was assumed that the possession proceedings would give the appellant an opportunity of answering them.” The appeal was allowed and the matter remitted.

### Comment

This case is one of a handful in which the courts have had to consider the issue of public law defences in the county court in the light of the House of Lords’ judgment in *Doherty*. It is an unusual case given the letter of 2 June 2004 and it is perhaps not surprising that the Court of Appeal had no difficulty in considering that there was a seriously arguable case. However, it does shed some light on the approach to these cases. Of note the court accepted that there was no need for a quasi-judicial inquiry but that the council was not absolved from taking any steps to ensure that the claim was properly brought.

### Kay v UK

*Kay v UK* is currently before the ECtHR. The applicant is arguing that the House of Lords in *Doherty* has still not brought UK domestic law in line with ECtHR jurisprudence in *McCann v UK*. The approach of the ECtHR in *McCann* has subsequently been confirmed in *Cosic v Croatia* (App No 28261/06).

The judgment in *Kay* may lead the House of Lords to readdress the issue. Otherwise, legislative change will be required to ensure that a person facing eviction by a public authority can have the proportionality of the decision to evict considered by a court. Lord Justice Jackson’s Preliminary Report in his Review of Civil Litigation Costs (at p 271) proposes a pre-action protocol which will apply in any possession claim by a public authority. This merits serious consideration.

### Accommodating children

Local authorities have a number of powers and duties enabling them to provide accommodation to children.

The principal duty is that contained in s 20 of the Children Act 1989 (ChA 1989), which obliges a social services authority to “provide accommodation for any child in need within their area who appears to them to require accommodation as a result of a) there being no person who has parental responsibility for him; b) his being lost or having been abandoned; or c) the person who has been caring for him being prevented (whether or not permanently and for whatever reason) from providing him with suitable accommodation or care”.

A “child in need” is defined in s 17(10) ChA 1989 as a person under the age of 18 a) who is “unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part; b) whose health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or c) who is disabled”.

### General duty

ChA 1989 also imposes a general duty upon social services authorities, under s 17(1) (a) “to safeguard and promote the welfare of children within their area who are in need; and b) so far as is consistent with that duty, to promote the upbringing of such children by their families”. Section 17(6) states that services under that section may include providing accommodation.

### Housing Act framework

HA 1996, Pt 7 creates a framework for the provision of accommodation to homeless persons who are in “priority need”. Article 3 of The Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051) provides that the categories of those who are in priority need includes any person aged 16 or 17 who is not a relevant child for the purposes of s 23A of ChA 1989, and to whom the local authority does not owe a duty under s 20 of that Act.

### Relevant child

A “relevant child” is defined principally by ChA 1989 s 23A as a child aged 16 or 17 who is not being looked after by any local authority but who had been looked after by a local authority for a period of at least 13 weeks since the age of 14 and ending after the age of 16, but also includes other categories as set out in reg 4 of the Children (Leaving Care) (England) Regulations 2001 (SI 2001/2874).

### Advantages

There are considerable advantages to a child being accommodated pursuant to the duty in s 20 rather than either of the other provisions:

- First the House of Lords held in *R (G) v LB Barnet* [2003] 3 WLR 1194 that the duty under s 17 of the Children Act is a “target” duty rather than a duty which is enforceable by any individual child. In contrast, s 20 creates an individually enforceable duty.
- Second, the duty under HA 1996 is limited to the provision of accommodation and so does not enable any other needs of a vulnerable child to be met. The duty under ChA 1989, s 20 carries with it a number of other obligations designed to meet the needs of vulnerable children. Thus the authority must safeguard and promote the child’s welfare and, as far as reasonably practicable, ascertain and give due consideration to the wishes and feelings of the child, his parents or other relevant people.

Of particular significance is that a child who is provided with accommodation under s 20 (but not under s 17) is a “looked after child”, which status triggers the obligations created by the Children (Leaving Care) Act 2000. As the title of that Act suggests, it gives rise to important additional powers and duties towards young people who leave local authority care. See for instance the definition

of “relevant child” above. The potential overlap between duties under ss 17 and 20 of ChA 1989 and under Pt 7 of HA 1996 has given rise to litigation over the last few years, culminating in the decision of the House of Lords in *R (G) v LB Barnet*.

### *R (G) v London Borough of Southwark*

In the recent case of *R (G) v London Borough of Southwark* [2009] UKHL 26, [2009] All ER (D) 178 (May) the appellant was 17 years old when his relationship with his mother broke down and he was excluded from the family home. Having spent some time sleeping on the sofas of friends or in cars, he presented himself to the children’s services department with a letter from his solicitors requesting assistance under s 17 ChA 1989 and accommodation under s 20.

Social services provided him with bed and breakfast accommodation but told his solicitors that accommodation would be provided under HA 1996. They completed an assessment of his needs under ChA 1989 which concluded that his primary needs related to housing and education. It recommended a referral to the homeless persons unit, and also to its own social

workers for ongoing social work support. The authority wrote to the appellant’s solicitors that “section 20 is not appropriate as A has no identified need for social services support, and his needs can be satisfactorily met through provision of housing and referrals to other support agencies...he is not in need of s 20 accommodation; he simply requires ‘help with accommodation’”.

The appellant continued to be provided with the original bed and breakfast accommodation, which the authority maintained was provided under HA 1996. By the time the appellant sought judicial review, he was 18 years old. He was not eligible for assistance as a relevant child unless the accommodation had been provided under s 20 so that he had been a looked-after child before his 18th birthday.

### House of Lords

The House of Lords held that it is not open to an authority to conclude that no s 20 duty is owed to a homeless 16- or 17-year-old child because he could be accommodated under HA 1996. If the criteria for s 20 support are all met, then the s 20 duty arises. In this case, all the s 20 criteria were assessed as having been met

by the appellant’s situation. Therefore he had become a relevant child. The House of Lords considered that there could be cases when a 16- or 17-year-old child did not need to be looked after and could be assisted under the HA 1996, for instance because the child has been in work and living independently but then lost his accommodation and became homeless. However, to the extent that Local Authority Circular (2003) 13 suggests that, even though the s 20(1) criteria are met, the authority has a choice between s 17 and s 20 which is based upon whether the child needs to be “looked after”, it is incorrect. Section 20 involves an evaluative judgment but not a discretion.

The duty on a housing authority, in s 27 of the ChA 1989, to co-operate with the social services authority does not entitle it to pass the buck to the housing authority, but does enable the housing authority to assist the social services authority, for instance by making some accommodation available for the discharge of the s 20 duty. NLJ

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