

B2/2016/2501-B2/2016/2501(B)-B2/2016/2501(C)

Neutral Citation Number: [2016] EWCA Civ 1029  
IN THE SUPREME COURT OF JUDICATURE  
IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE  
(HHJ WORSTER)

Royal Courts of Justice  
Strand  
London, WC2

Tuesday, 27th September 2016

B E F O R E:

LORD JUSTICE MOORE-BICK

LORD JUSTICE LEWISON

BIRMINGHAM CITY COUNCIL

**Claimant/Applicant**

v

VALIN STEPHENSON

**Defendant/Respondent**

(Digital Audio Transcript of  
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**Ms Z Nabi** (instructed by Community Law Partnership) appeared on behalf of the Applicant

**Mr C Baker & Ms A Robins** (instructed by Birmingham CC) appeared on behalf of the Respondent

**J U D G M E N T**

(Approved)

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1. LORD JUSTICE LEWISON: 1. Mr Stephenson is the tenant of a flat in Birmingham. The city council is his landlord. The tenancy is an introductory tenancy which gives no security of tenure.
2. The council received complaints about Mr Stephenson's behaviour at the end of 2014. The complaints mainly came from one of Mr Stephenson's neighbours who lives in the downstairs flat below and the complaints related principally to noise. Mr Stephenson's flat, I should add, has an uncarpeted floor. The noise emanated from various sources including loud music and television, arguments, the moving of furniture at night and so on. Some of the arguments seem to have taken place outside the flat but most of the noise came from within the flat itself.
3. After making contact with Mr Stephenson on a number of occasions the council decided to terminate his tenancy and seek possession. The council thus served notice of seeking possession on 1st May 2015. Mr Stephenson requested a review of that decision, as he is entitled to do, but the decision was upheld on review.
4. The important feature of the case is that Mr Stephenson suffers from paranoid schizophrenia, whose symptoms can be alleviated, though not completely cured, by anti-psychotic medication regularly taken.
5. The council issued a claim form on 24th September 2015. The particulars of claim pleaded the fact of the introductory tenancy and the council's decision to terminate it. It pleaded little else. But the particulars of the claim were accompanied by a witness statement from Ms Julie Burrows, an assistant housing officer employed by the council. She described the history of the complaints of noise nuisance. She also acknowledged that Mr Stephenson has what she described as "mental health issues" but asserted that although there was support for him he had failed to keep appointments for his medication. She said that Mr Stephenson had been told how important it was to keep his appointments to receive medication. The council's case was also supported by a witness statement made by Mr Stephenson's neighbour who gave evidence about the various incidents and produced a detailed written record of them.
6. The case came before Deputy District Judge Fowler in the County Court at Birmingham on 2nd November 2015. Mr Stephenson was represented by a duty solicitor. The judge adjourned the case to 13th January 2016 and directed that Mr Stephenson should use his best endeavours to file a defence in time for that hearing. The case duly came back to court on 13th January 2016 before Deputy District Judge O'Connell. This time Mr Stephenson was represented by a solicitor, Mr Gilmore. Mr Stephenson himself was not present at that hearing.

7. Ms Robins of counsel, for the council, accepted that Mr Stephenson was disabled for the purposes of the Equality Act but said that there were no substantial grounds for defending the claim and that the council's action in terminating the tenancy was a proportionate means of achieving a legitimate aim. Mr Gilmore explained to the Deputy District Judge that he had only been able to see Mr Stephenson on the Friday before the hearing when he was able to take initial instructions. He asked for a short adjournment in order to file and serve a fully pleaded defence. What he said was this:

i. "Now given that he is a vulnerable person, my understanding (under the Code of Guidance) is that Birmingham should liaise with social services before issuing this claim and I do ask whether there is any evidence in the papers of that liaison.

ii. Also, sir, I refer to the circular, No 2/97, with regard to the Housing Act 1996 and introductory tenancies. It says there is at number 10: 'Landlords should ensure that introductory tenancies can never be used as a weapon against a vulnerable individual and ensure there are safeguards to protect such tenants.'

iii. This is not a straightforward case. It is accepted by the other side that the Equality Act applies. Also, Article 8 of the Human Rights applies and proportionality."

8. He then referred to a letter from the council which said that Mr Stephenson's rent account was clear and that no recent complaints of anti-social behaviour had been made about him. He then continued:

i. "There is a lot to this case, sir, and it would be totally disproportionate, we would submit, to make a possession order today without giving the Defendant the opportunity (now that he has actually made contact with us) to file and serve a defence. We have not been able to take full instructions from him to be able to do that, having only seen him on Friday."

9. The Deputy District Judge gave a short judgment in which he refused the adjournment and made an order for possession. In essence his reasoning was that on what he had heard there was no more than a tenuous possibility of a defence but nothing concrete and there is plenty from the council about the difficulties that they had had with this tenant. He took the view that Mr Stephenson had had ample time to seek advice from solicitors and put in some form of defence but he thought Mr Gilmore had no real argument to advance.
10. Mr Stephenson appealed to the circuit judge, who dismissed the appeal on the ground that the decision to refuse an adjournment was within the area of discretion available to the Deputy District Judge.
11. With the permission of Burnett LJ Mr Stephenson appeals again. Since this is a second appeal and the intermediate appeal was dismissed, the focus must be and has been on whether the first instance decision was wrong.
12. Procedure in possession claims is governed by CPR Part 55. For present purposes the important rules are CPR 55.7 and CPR 55.8. CPR 55.7 says that an acknowledgement of service is not required and by sub-rule (3) that where the defendant does not file a defence within the time specified in rule 15(4) he may take part in any hearing. The court may take his failure to do so into account when deciding what order to make about costs. That rule also provides that no default judgment can be obtained in a possession case. CPR 55.8 reads, so far as material, as follows:
  - i. "(1) At the hearing fixed in accordance with rule 55.5(1) or at any adjournment of that hearing, the court may –
    - (b) decide the claim; or
    - (c) give case management directions
  - i. (2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated."
13. The rules thus envisage that at the time of the first hearing, or indeed at a subsequent hearing, the tenant may well not have served the defence and that judgment should not be

entered in default of defence. Rule 55.8 also envisages that the court may decide the claim without a full trial but it is also right to say that the existence of what appears to be a genuine dispute on substantial grounds is not a precondition to the giving of case management directions under rule 55.8(1)(b).

14. As I have said the Deputy District Judge took the view that Mr Stephenson had had ample time in which to consult solicitors and give them instructions. Had Mr Stephenson been a well-resourced individual, with no mental disability, that view might well have been sustainable. But the fact is that the council's own evidence showed that Mr Stephenson was living on benefits and that he had been seen begging in the local shopping parade. The Deputy District Judge's view also, in my judgment, took no account of Mr Stephenson's mental health problems. Mr Gilmore had only seen Mr Stephenson some two working days before the hearing and had only taken preliminary instructions. It was unrealistic to have expected him to have formulated a full defence by the time of the hearing.
15. Mr Baker, on behalf of the council, emphasised the duty on the parties to help the court further the overriding objective and said in effect that if Mr Gilmore could not formulate the defence that would be advanced there was no part of the function of the Deputy District Judge to do so, and he was justified in refusing the adjournment.
16. It is true that the points raised in the course of the hearing were discursive but, in my judgment, the opening remarks by Ms Robins explaining the basic framework of the law and Mr Gilmore's repeated references to "proportionality" ought to have alerted the Deputy District Judge to the real possibility of at least a pleadable defence under the Equality Act.
17. In Aster Communities Limited Ltd v Akerman-Livingstone [2015] UKSC 15, [2015] AC 1399, the Supreme Court outlined the correct approach to a case in which the defendant seeks to resist an order for possession on the ground that he is disabled. Unfortunately neither that case nor the propositions for which it stood were drawn to the attention of the Deputy District Judge. Lady Hale discussed the question of proportionality at paragraph [27]. She quoted from Mummery LJ in R v (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 as follows:
  - i. "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no
  - ii. more than is necessary to accomplish the objective?"

18. At paragraph [31] Lady Hale said this:

- i. "The structured approach to proportionality asks whether there is any lesser measure which might achieve the landlord's aims. It also requires a
- ii. balance to be struck between the seriousness of the impact upon the tenant and the importance of the landlord's aims. People with disabilities are
- iii. 'entitled to have due allowance made for the consequences of their disability.'"

(b) At paragraph [32] she said:

- i. "When a disability discrimination defence is raised, the question is not simply whether the social landlord is entitled to recover the property in
- ii. order to fulfil its or the local authority's public housing functions, but also whether the landlord or the local authority has done all that can reasonably
- iii. be expected of it to accommodate the consequences of the disabled person's disability and whether, at the end of the day, the 'twin aims' are sufficient to
- iv. outweigh the effect upon the disabled person."

19. She also pointed out that the burden of proof in establishing proportionality rests on the landlord; and at paragraph [34] she said:

- i. "If it is a claim of disability discrimination under section 15, then the landlord would have to show that there was no less drastic means of solving the problem and that the effect upon the occupier was outweighed by the advantages."

20. 18. Lord Neuberger, who also discussed the question of proportionality, pointed out at [56] that the landlord may be required to explain why it is not securing alternative accommodation to such cases. He then referred to the question of summary disposal. At paragraph [59] he said:

- i. "That does not, however, mean that a landlord whose possession claim is met with a defence to the effect that possession is being sought 'because of
- ii. something arising in consequence of [the defendant's] disability', cannot
- iii. seek or obtain summary judgment for possession. Possession could be ordered summarily if the landlord could establish that (i) the defendant had
- iv. no real prospect of establishing that he was under a disability, (ii) in any event, it was plain that possession was not being sought 'because of
- v. something arising in consequence of [the] disability', or (iii) in any event
- vi. the claim and its enforcement plainly represented 'a proportionate means of achieving a legitimate aim.'"

21. 19. He thought that such cases would be "relatively rare". Lady Hale agreed with Lord Neuberger though she thought that cases would be "rare" rather than "relatively rare".

22. 20. Understandably the Deputy District Judge in this case did not approach the question in the structured way laid down by the Supreme Court. Had he done so he would, in my judgment, have reached the following conclusions at least at the summary stage. First, as was common ground, Mr Stephenson was disabled. Second, based on Ms Burrows' evidence it was at least arguable that there was a sufficient causal link between his mental

disability and the conduct on which the decision to evict him was based. That was enough to raise a prima facie case of discrimination on the ground of disability. The burden would then shift to the council to establish that evicting Mr Stephenson was a proportionate means of achieving a legitimate aim. It must not be forgotten that the Deputy District Judge was told that in Mr Stephenson's case eviction meant that he would be homeless. The Deputy District Judge did not mention the question of proportionality at all. By a respondent's notice the council argued that the case on proportionality both was and is overwhelming and seeks to rely on further instances of noise nuisance. Mr Baker said that the fact of the anti-social behaviour was not contested. Mr Stephenson had simply apologised. In view of his medical condition he said it was unlikely that the behaviour would abate. He argued that the nature of the anti-social behaviour was so serious and prolonged and had had such a serious effect on Mr Stephenson's neighbour that eviction was the only real solution. He may turn out to be right. Since the burden was on the council to show that no less drastic action would be appropriate, it is in my view incumbent on the council to at least show that alternatives have been considered and reasons given for their rejection. Thus, in my judgment, the flaw in both the Deputy District Judge's approach and the council's respondent's notice is to treat the question of proportionality as a binary choice between eviction, on the one hand, and doing nothing on the other hand. Clearly something must be done for the well being of Mr Stephenson's neighbour. However there may well be intermediate steps that could be taken short of throwing Mr Stephenson out on the street. For example, he could be given support from Social Services in reminding him of appointments that have been made for him to receive medication. He might be given support from mental health professionals. His medication could be changed or its dosage increased. Sound attenuation measures could be installed in his flat. There could be specific agreement on permitted hours for the playing of music rather than the general prohibition on anti-social behaviour contained in the tenancy conditions. The council might seek an injunction prohibiting the anti-social behaviour under the Anti-social Behaviour Crime and Policing Act which would require supervised compliance. Or the council might provide him with more suitable alternative accommodation.

23. 21. I do not say that all or indeed any of these steps are feasible. However, in my judgment, they cannot be summarily ruled out. It will be for the council to show that nothing less than eviction will do. I do not consider that it is so obvious that Mr Stephenson should be deprived of the opportunity to defend the claim.
24. 22. As I have said, I do not consider that the existence of a dispute on substantial grounds is a precondition on the making of case management directions. I do not therefore say that once a defence has been filed it will inevitably result in a full trial. There is always the possibility even once the defence has been filed that the claim may be summarily decided. But it is right to note that both Lord Neuberger and Lady Hale thought that



such cases would be "relatively rare" or "rare".

25. 23. I recognise that a decision whether or not to adjourn a case is a discretionary case management decision. However, in my judgment either the Deputy District Judge did not consider the question of proportionality at all or, if he did, he must have taken the view that there was a binary choice between eviction and doing nothing. Either way, in my judgment, that was wrong in law.

26. 24. I would decline the invitation to this court to decide the question of proportionality. It is a nuanced question and I am not confident that we have all the necessary material to decide it. Moreover to decide the question at this level would deprive Mr Stephenson of any real possibility of an appeal and if on fuller consideration the District Judge were to rule against him. I would therefore allow the appeal and remit the case to the County Court to give further directions.

27. LORD JUSTICE MOORE-BICK: I agree and there is nothing I wish to add.

28. So the appeal will be allowed and the matter will be remitted to the County Court.