IN SOUTHEND COUNTY COURT

Case No: ISS00302

Tylers House
Tylers Avenue
Southend-on-Sea
Essex SS1 2AW

Monday, 12th March 2012

Before:
RECORDER DAVIES

BETWEEN:

SOUTHEND-ON-SEA BOROUGH COUNCIL

and

ROBERT ARMOUR

Transcript from a recording by Ubiqus
Cliffords Inn, Fetter Lane, London EC4A 1LD
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JUDGMENT
(Approved)

RECORDER DAVIES:

1. This is an application for possession of 35 Bewley Court, Whittingham Avenue, Southend-on-Sea. The claimant let the property to the defendant on the basis of an introductory tenancy. Introductory tenancies are governed by sections 124 to 129 of The 1996 Housing Act. Section 125 sets out that an introductory tenancy lasts for 12 months and if it has not been terminated it would then convert to an ordinary Local Authority tenancy with all the consequences. Section 127 sets out that an introductory tenancy can be brought to an end by a court order for possession. Section 128 sets out the procedure for serving notice of possession, a service notice setting out the reasons and the opportunity for the tenant to seek a review of the decision. Section 129 sets out the review procedure and that if the review confirms the decision that matters must then proceed through the County Court.

2. The introductory tenancy review regulations 1997 set out the procedure for the review process and in clause 5.2 they set out, amongst other things, that the tenant should be given an opportunity to attend the review, to be represented, to ask questions of any person who gives evidences.

3. Circular 2/97 issued under part five of The Housing Act explains the thinking behind introductory tenancies. In paragraphs three and four [inaudible] which reads as follows,

> 'Each introductory tenancy will last for 12 months after which the tenancy becomes secure unless the landlord has gained possession of the dwelling or [inaudible]. The eviction process for an introductory tenant is different from that of a secure tenant in that no grounds for possession have to be made to the Court. A tenant will however have the right to a review by the landlord of any decision to evict and the introductory tenants review regulations 1997 make provision for the conduct of that review.'

Clause four,

> 'Introductory tenancies are designed to help in the fight against antisocial behaviour by making it easier for landlords to evict those tenants who persistently engage in neighbour nuisance before they achieve security of tenure. Such tenancies can form part of an authorities [inaudible] dealing with nuisance neighbours. The Secretaries of State envisage that in the vast majority of cases an introductory tenancy will become a secure tenancy at the end of the 12-month period.'

Paragraph 19 of the circular notes that most possession applications relate to persistent anti-social behaviour or rent arrears.

> 'It is envisaged that the majority of possession cases for introductory tenants will relate to persistent antisocial behaviour or rent arrears. In considering whether to seek possession landlords will wish to bear in mind the type of breach used as grounds for the eviction of secure tenants. Landlords should have fair and rigorous procedures in place to investigate complaints against tenants. [Inaudible] possession cases, for example, the gathering and testing of evidence should be handled with the same rigour that is applied to possession cases involving secure tenants.'

4. There are some recent decisions in the Supreme Court to which I have been referred. These confirm in summary that when hearing a case for possession of an introductory tenancy Article 8 of the ECHR applies, that is the Court must have respect to the private and family life of the tenant and any interference with that right must be necessary and proportionate.

5. In the case of *Manchester City Council v Pinnock (2011) UKSC 6,* which is a case dealing not with introductory tenancies but with demotion decisions, it was held amongst other things that, first of all, in order for domestic law to be compatible with Article 8 a Court which was asked to make an order for possession of a person's home at the suit of a Local Authority had to have the power to assess the proportionality of making the order, and in making that assessment to resolve any relevant dispute of facts. That although an introductory [inaudible] section 143D2 of the 1996 Act [inaudible] did not [inaudible] if it considered it would be disproportionate to do so. Section seven of The Human Rights Act conferred the necessary jurisdiction that the County Court to consider a defence based on an alleged breach of the tenant's Article 8 rights. Consequently the Court's powers of judicial review could in an appropriate case be extended to allow it to consider whether it was proportionate to make the order sought and to investigate and determine any issues of fact relevant for the purpose of that exercise. Secondly, when a [inaudible] possession against a demoted tenant the Local Authority was not limited to relying on matters which amounted

to breaches of the tenancy in question but was entitled to take into account all [inaudible] at the relevant time. Both the tenant and the [inaudible] could rely on events which had occurred after the Local Authority had served a notice.

6. In the case of *Hounslow v. Powell (2011) UKSC 8* and that was a case involving introductory tenancies. [Inaudible] of a property which constituted a person's home for the purposes of Article 8 the Court asked to order possession had the power to consider whether the order would be necessary in a democratic society. Although [inaudible] sufficient and continuing links to the place to show it was his home in most cases it can be taken for granted a claim by a person who is in lawful occupation would attract the protection of Article 8.

7. When [inaudible] the person in possession had to be given the reasons for the Authority's actions and he could if so minded attempt to raise a proportionality challenge. The Court would only [inaudible] the making of a possession order was proportionate if the issue had been raised by the occupier, and if it had crossed the high threshold of being seriously arguable. Such a case the Court has to give a reasoned decision as to whether or not a fair balance would be struck by making the order.

8. Where [inaudible] was passed the proportionality of making the order for possession would be supported by the fact that making the order would both serve to vindicate the Local Authority's ownership rights and enable the Authority to comply with its public duties in relation to the allocation and management of its housing stock. In the [inaudible] Local Authority to explain or justify to the Court its reasons for seeking a possession order it can be assumed the Authority is entitled to possession. The Court need [inaudible] circumstances any factual objections raised and whether making the order for possession would be lawful and proportionate.

9. Further it was held that nothing in the homelessness provisions of the 1996 Act expressly or

by implication prevent the Court from refusing[?] an order for possession if it considered it would not be proportionate to do so. Accordingly the question for the Court in a homelessness case would be whether the making of an order for possession would be legitimate and proportionate.

10. Then finally, the [inaudible] of the 1996 Act indicated its purpose was to ensure [inaudible] County Court should do no more than check whether the statutory procedure had been followed before making an order for possession against an introductory tenant [inaudible] as an inherent requirement to the procedure. It is open to the Court to consider whether the procedure had been lawfully followed having regard to the Article 8 rights.

11. Section 127 could be read compatibly with Article 8 rights and given effect so to enable a Judge in the County Court to deal with a defence which relied on an alleged breach of Article 8. The Court's powers of review could in an appropriate case extend to reconsidering for itself the facts found by a Local Authority or to consider in facts which had arisen since the issue of proceedings by hearing evidence and forming its own view.

12. I turn then to the facts of the case before me. The defendant was born on the 17th of February 1974 and he is now aged 38. His antecedents show that he had been before criminal courts on 24 occasions. He had been convicted of 92 offences, including 11 offences against a person, two of using offensive weapons, five public order offences. He has been in contact with the Probation Service and Connections, who are the youth and community service for about 20 odd years. Both Probation and Connections have written letters in support of the defendant. The defendant has a daughter, Elise[?], who was born on the 15th of April 1996 so she is 15, nearly 16. She is studying for her GCSEs. He has a former girlfriend, Louise Ward, who took injunction proceedings against him on the grounds of domestic violence. He was sentenced for breaching the injunction. The family was known to MARAC, the multi-agency organisation that deals with families where there

has been persistent domestic violence. The defendant has a sister who is a regular visitor to his home. I am told that the defendant cannot read or write.

13. On the 1st of December 2011 a GP, Dr Mario Marasco, who had only acted as his GP from the 12th of September 2011 to the 24th of October 2011 signed a certificate setting out that the defendant lacks capacity to conduct proceedings within the meaning of The Mental Capacity Act, 2005. The certificate, which is at pages 32 to 35 of the trial bundle, sets out that he has an impairment of the mind or brain due to Asperger's syndrome, an autistic spectrum disorder, and he suffers from depression. The GP assessed retrospectively that these had been present since birth. He has a limited understanding of the surrounding world, including the possession proceedings. His memory does not allow him to be able to retain any orally given information. His ability to use information given orally is limited due to his underlying condition and lack of formal education. He might be able to discuss some aspects of the proceedings but not in depth and with limited understanding. He might become frustrated and aggressive.

14. As a result of this certificate Louise Ward was appointed as his litigation friend. He did not attend the trial. He is not here today either. He had made a sworn statement on the 3rd of August 2011. Neither his probation officer nor his Connections worker gave any indication in their letters in July 2011 that he had any difficulty in understanding what the case was about. I must however proceed on the basis that as at the date the GP saw him the certificate was accurate and that since September 2011 he has lacked capacity to conduct the litigation.

15. The claimant, Southend Borough Council, granted an introductory tenancy to the defendant on the 25th of January 2011. The tenancy agreement is in the trial bundle at pages 44 to 47. An explanatory booklet is at pages 48 to 95. Both of these documents include an offer to a tenant to ask for the information in a different format, including for example, on a CD. The

form that was completed at the time the tenancy was entered into, a tenancy signing checklist record is at page 177 to 192 of the bundle. This includes information that can only have been given by the defendant, for example, details of his GP, the name and address of his next of kin and emergency contact name and address. There is a tick against the box seeking a grant for furnishing but not against any other issues, for example, asking for support for learning difficulties, asking for support or assistance with completing forms or reading and writing. There is no tick against the box for mental health impairment or support, and that is at page 184 of the trial bundle. He did not give authority for anybody else to discuss the tenancy on his behalf.

16. Louise Ward said in oral evidence that she went with the defendant to sign up for the tenancy but she did not go in with him. She said she waited outside the building. She said she knew he could not read or write. She said she did not read the tenancy information to him when he came out of the meeting. She said she had been a tenant of the claimant Authority herself and she knew what the terms of the agreement were.

17. Clause 16 of the tenancy agreement included a requirement that the tenant does not behave in a way that causes nuisance, harassment, annoyance or offence and examples of that are given, including swearing, being threatening or being abusive. Clause 18 of the agreement sets out that the tenant must not behave in an insulting, aggressive, abusive, intimidating or threatening way towards members of the claimant's staff.

18. The defendant moved into the property on the 25th of January 2011. At page 131 of the trial bundle there is a schedule of the contact that took place between the claimant and the defendant. On the 29th of January 2011 a complaint was received from another resident in the block that the defendant had been abusive, threatening and intimidating. On the 31st of January 2011 a letter was sent to him setting up a four weekly visit. On the 4th of February 2011 a letter was sent to the defendant about the first complaint and that included a

warning. On the 14th of February and on the 21st of February an arrears letter was sent to him (as I understand it that probably related to delays getting his benefit sorted out because arrears do not feature as a matter in this case).

19. On the 1st of March 2011 an attempted visit was undertaken but entry was not possible. On the 3rd of March 2011 the defendant made a telephone call to the claimant in which the defendant was rude and abusive and the contents of that are recorded at page 161, paragraph two and at page 162. The relevant parts of page 161 read as follows. This is the statement by Francesca Sacchi[?], who is an employee of the claimant. Paragraph two,

> 'I was contacted on the morning of the 3rd of March by Mr Armour's sister. She advised that her brother had sent her a text asking if she could rearrange the scheduled appointment for that morning to the afternoon because he needed to sign on. We agreed it would be best for me to ring Mr Armour directly to arrange. I rang Mr Armour, he confirmed he needed to rearrange the appointment and refuted that he had not allowed access the previous day for another scheduled appointment. There was a discussion about works to do with the boiler. Mr Armour confirmed he had to sign on.'

Paragraph four,

> 'Following another conversation about the boiler I rang Mr Armour back to advise him we would be able to attend tomorrow morning. Mr Armour seemed to be growing increasingly agitated and wanted to know whether they were coming to put it right. He said he knew the boiler had not been serviced, it was illegal, the council are illegally renting the property because the boiler hadn't been serviced. I advised contractors were due to attend in the morning. They should be able to sort out any problems. Mr Armour was not happy with this and said, "What happens if it blows up in my face in the meantime, are you liable for it, yeah?" I replied I didn't think it would blow up which seemed to make Mr Armour angry. He shouted at me demanding to know, "Are you a plumber?" He went on to claim in a raised voice that the boiler had not been serviced for over a year and boilers should be serviced annually. I tried to reply that I'm not a plumber. Mr Armour wasn't really listening, continued to state aggressively that the boiler should be serviced annually, he knows what he's talking about because he's a builder. I tried to interject by saying, "Can I just interrupt you, Mr Armour?" He shouted at me, "No I'll just interrupt you." He went on to state still shouting that he lives in the property with his 14-year-old daughter and that her and himself are priority and then Mr Armour hung up.'

She concludes,

> 'Through my dealings with Mr Armour I found him to be very rude and aggressive and my conversations with him left me feeling quite upset and abused verbally, and

> Mr Armour had made the statements aggressively and made me feel personally responsible.'

That was the 3rd of March.

20. Following that call a letter and a warning was sent to the defendant and that is at page 131. On the 31st of March boiler repairmen went to the flat. During their attempt to repair the boiler the defendant was abusive, aggressive and threatening. Somehow electricity, which the workmen believe they had disconnected, came to be switched on again. The defendant was saying in the course of the conversations or aggressive and abusive and threatening discussions that he wanted to watch television, he also wanted to have a bath. The upshot of this was that the workmen were not prepared to complete the work because of the defendant's behaviour and they left the premises. A decision was taken by senior officers that day in consultation that notice should be given to terminate the tenancy. On the same day, the 31st of March, notice of possession proceedings was served on the defendant. On the same day, the 31st of March, the defendant's sister phoned the claimant and said to the claimant that the defendant had not turned the electricity on. The next day, the 1st of April, the sister made another telephone call on the defendant's behalf.

21. On the 5th of April the defendant filed a response seeking a review of the decision. On the 21st of April 2011 a review took place. The defendant was represented by Pauline Tanikulan, who was another tenant. Neither his sister nor Louise Ward attended the review hearing with him. The notes taken at the review are at page 220. The defendant admitted he had anger management issues. The defendant was able to understand the proceedings and to take part. He had sufficient recollection to say that he denied switching the electricity on. The review panel having heard the evidence made a recommendation that his appeal should be dismissed. Their decision is at page 170. They had some doubt about how the electricity came to be switched on but nevertheless confirmed the decision to seek

possession in all the circumstances.

22. A matter that has been raised this morning was whether or not the defendant during that review proceedings did admit the abuse. The evidence that was given by the claimant's witness, Mr Chidgey, was that in the course of the review the defendant did concede the abuse but he did not admit switching the electivity on.

23. A claim for possession was issued on the 7th of June. A defence was filed on the 3rd of August. There have been four interlocutory hearings. This matter should have been fully resolved in July or August 2011, but because of the interlocutory hearings it was finally listed for trial on the 2nd of March 2012. On the afternoon of 27th February 2012 an amended defence was faxed to the claimant. As a preliminary matter at the start of the trial I had to decide whether to permit the amendment at such a late stage. In reality the amendment set out the arguments about judicial review and Article 8 of the ECHR. The claimant was able to deal with these without an adjournment and so I permitted the amendment. I disallowed some very late witness statements.

24. In hearing the case I have heard counsel for each party. I have read the trial bundle and the bundle of authorities. I have read a skeleton argument from the defendant's counsel and I have read written submissions from both counsel. I heard oral evidence from David Chidgey, who is the tenancy services officer on behalf of the claimant, and he took me through the procedure. I accepted his evidence was given fairly and fully and frankly. Both counsel agreed that I did not need to rehear the evidence that had been given at the review hearing. I heard oral evidence from Louise Ward. I have concluded that Louise Ward has found herself in an extremely difficult position of trying to defend her former partner's behaviour. She has exaggerated his lack of ability to read and write. I note that he is capable and able to send text messages. I note the speed at which phone calls were made on the 31st of March when notice seeking possession was served on him. I note that his

daughter, who lives with him, is more than capable of reading and writing.

25. I reject the evidence that the defendant had no idea that complaints had been made about his behaviour on the first and second occasions. I note that in the spring and summer of 2011 he was capable in taking a full part in the review proceedings with the help of another tenant and at that stage he had a full understanding of what was at issue. I note that he signed a witness statement on the 3rd of August 2011, and I am satisfied that his solicitor would not have permitted him to sign a document that he did not understand and clearly the contents of that statement is information that have come from the defendant. It is accepted that that witness statement accurately reflects his case. His lack of capacity from September 2011 did not impact on the procedure up to that point.

26. The issues I have to decide in effect are as follows. First of all, if the procedure was properly followed there is normally no defence to a claim for position of an introductory tenancy. Following the Supreme Court decisions already referred to I must ensure that possession, which is an interference with the defendant's private and family life, is necessary and proportionate. When I am considering this I can take into account the personal circumstances of the defendant and any information that has come to light since the decision to seek possession and since the review process.

27. I find first of all that the claimant acted procedurally, accurately and lawfully and complied with all requirements in, first of all, granting the tenancy in the first place. The forms were appropriately drafted. The defendant, nor his family, nor the Probation Service, nor the Connections worker notified the claimant that the defendant had any particular vulnerabilities that needed additional care when granting the tenancy. Secondly, I find that the defendant's abusive and aggressive conduct on the 29th of January, the 3rd of March and the 31st of March were sufficient grounds to enable the claimant to serve notice. Thirdly, I find that the review panel considered all the matters properly and took a decision not to

include the allegation concerning the switching on of the electricity, but nonetheless concluded that the aggressive, abusive and intimidatory behaviour was sufficient grounds to terminate the tenancy. Fourth, I am satisfied that the decision was a reasonable decision to make on the basis of the information before the officer and before the review panel.

28. At the time the claim for possession was filed I find there was in reality no defence to the claim. The only live question is therefore whether there are any personal circumstances that mean the decision now, in March 2012, whether now it is a disproportionate or unnecessary decision to make.

29. In the course of the morning there was reference to information given to the claimant by the police earlier in February 2012 which suggested that the defendant had been convicted of three more offences during the course of the tenancy. After investigation the claimant concluded that this information was inaccurate and they do not rely on it. I am satisfied that that was the appropriate action to take.

30. The information about the defendant's capacity to conduct litigation has come to light since the decision was made and since the review panel decision so I must ask, has the claimant taken proper account of the fact that the defendant has been diagnosed with depression and with Asperger's syndrome? I have heard no evidence that the conduct complained of is as a result of depression nor that it is a likely consequence of the diagnosis of Asperger's. I note from the probation officer's letter and the Connections worker letter, both written in July 2011, they note that the defendant's behaviour has changed significantly for the better in recent years. The Connections worker states that the defendant assured him that he will ensure that there will be no cause for concern in the future if he is allowed to keep his home. I am satisfied the letters from the two workers who have known the defendant for 17 years in the one case and 20 years in the other are as helpful as the analysis from the GP. The diagnosis does not therefore assist in explaining the defendant's conduct. I find that the

claimant has considered the evidence and that the decision to proceed was an appropriate decision for the claimant to take.

31. I am asked to consider the impact on the defendant's 15-year-old daughter. At an earlier hearing a District Judge asked the claimant to notify Social Services that the defendant was lacking in mental capacity as he had the primary care for his daughter. I have had no information as to the actions they have taken. I have heard from Louise Ward, Elise's mother, who is clearly on good terms with her. I accept that Elise might find it difficult to share a room with a younger sister if she moved back to her mother's home, but I do not find that to be such an important matter that it indicates it would be disproportionate to grant a possession order.

32. I have to take into account when I am deciding if a possession order is a proportionate order to make I have to balance the duty and the obligations of the claimant towards its tenants, its prospective tenants and to the community it serves.

33. These factors lead to the conclusion at that stage that the Local Authority's decision was appropriate. The one factor that has caused me difficulty in deciding whether or not a possession order is **now** proportionate is that since the 31st of March 2011 there has been no further trouble. I am now giving judgment on the 12th of March 2012, 11 and a half months later. It appears that notwithstanding his mental capacity issues the defendant has managed to comply with the terms of his tenancy for almost a year. If I refuse to make the possession order the introductory tenancy would be transformed into a formal tenancy on the same terms. That tenancy would be at risk if he engaged in any antisocial behaviour, if he was abusive, intimidating or threatening to other residents or to members of staff. I accept that the defendant wants to retain this tenancy. I accept that he is supported in that wish by his probation officer, by his Connections worker, by his sister, by his ex-girlfriend and by his GP.

34. I have gone back and reread those passages from the circular that I read out at the beginning of this judgment, in particular, paragraph four,

> 'Introductory tenancies are designed to help in the fight against antisocial behaviour by making it easier for landlords to evict those tenants who persistently engage in neighbourhood nuisance before they achieve security of tenure.'

It was envisaged that in the vast majority of cases an introductory tenancy will become a secure tenancy at the end of the 12 month period. I have reminded myself of paragraph 19, 'It is envisaged that the majority of possession cases for introductory tenants will relate to persistent antisocial behaviour.' I have reread those parts of the *Manchester City Council v Pinnock (2011) UKSC 6* case and the *Hounslow v Powell (2011) UKSC 8* case that deal with the responsibility of the Court to take into account information that has come to light subsequent to the decision having been made.

35. I have concluded that although the decision to seek possession was appropriate, proportionate and lawful and that it has remained an appropriate decision to take, because the defendant has in fact managed to comply fully with all the terms of the tenancy for just short of 12 months I have come to the conclusion that as at today, the 12th of March 2012, it is no longer a proportionate decision to take. There has been no continuing antisocial behaviour, and although it appeared in February and March 2011 this antisocial behaviour that the defendant was engaging in was persistent it stopped as soon as he was served with notice of possession.

36. Therefore with no criticism at all of the actions of the claimant I have come to the conclusion that I will dismiss this application for possession. However that is on the basis that those who put them selves forward as as supporters of the defendant must realise that there will be a continuing duty and obligation to comply with the terms of the tenancy. Therefore he must be told by them that any breach is likely to lead to the claimant issuing proceedings for possession in the future. Those who are supporters of his must realise that

the defendant has not been given a carte blanche to behave again in the way that he behaved in February and March 2011. That is my judgment.

MR STRELITZ: I'm grateful.

RECORDER DAVIES: Are there any other matters in which I need deal with?

MR PENNINGTON-LEGH[?]: I was just going to say in terms of costs, Your Honour, given the findings you've made, in particular, where you say, well the whole of your judgment and in particular the last bit where you say you're not making any criticism of the claimant at all I'm not seeking an order. I don't think it's something that you would countenance [inaudible] assessment of the defendant's costs.

MR STRELITZ: Yes. There are actually two matters. Notwithstanding your dismissal of this appeal the claimant could in fact ask for its costs and it does so on this case. I'll come to that in a moment. [Inaudible] perhaps one of the decisions of a County Court which could become a landmark decision of a County Court. The reasons I say that is that if one reads the Popular Housing Press what one discovers is that everybody is trying to grapple with the effect of the negativity on the one hand, in which *Powell* is expressed in the Supreme Court and the positivity in which *Pinnock* is put. And trying to grapple with what do you do as a matter of fact when you're sitting, [there's the good sense that the County Court has to prevail on these matters as those cases tell us, with exactly the sort of case that you've got here. Had this case have been heard eight months ago it would have been proportionate to make an order and we probably wouldn't be here having had the argument that we have done and your decision would have been different to what it is today.

The thing that has swayed you in your decision making process is the passage of time that has elapsed and that has impacted upon the proportionality and that's your decision. Now the question for a higher Court in my submission is whether or not that is an appropriate

factor to be considering on a proportionality argument or whether one has to look at the proportionality as at the time the decisions were made. There are it seems to me, and I'm sure others as well who will follow this area very closely, important decisions to be taken on cases like this that must be taken with some further guidance from the higher Courts, and so I urge you to grant permission to appeal on that basis.

RECORDER DAVIES: The Claimant has requested permission to appeal this decision. I will refuse permission on the following basis: My decision takes account of the fact that I accept that this is a difficult area of law and I accept that the authors of the Popular Housing Press, if such a thing exists, would like to have some clearer definition of how Local Authorities are supposed to proceed in these cases. On the basis that the decision I have come to is "fact" based I have come to the conclusion that the prospects of succeeding on an appeal in this case are such that it is not appropriate for permission to appeal to be granted, so I refuse that permission.

MR STRELITZ: Thank you. And in relation to-

RECORDER DAVIES: Costs.

MR STRELITZ: -costs, the fact of the matter is the only issue that has swayed you has been the passage of time, which is a matter totally out of control of the claimant [inaudible] determined to all factual matters in relation to this case in the claimant's favour. You have determined that the claimant acted entirely properly at all stages of the proceedings here, and as I say it is only because of the successive number of adjournments of this case that the decision has gone the way that it has done today. In the circumstances the grounds for the making of an order for possession were made out properly by the claimant and in consequence of that I say that ought to entitle to us to an order in respect of our costs. The fact of the matter is the defendant has no money and unless he were to win the lottery the reality is it makes no difference, but as a matter of proper accounting in my submission it

would be entirely appropriate on the basis of your findings to make an order in fact in favour of the claimant.

RECORDER DAVIES: Mr Pennington-Legh, do you want to respond to that?

MR PENNINGTON-LEGH: Well very briefly, Your Honour. Yes obviously the starting point as set out in CPR is-

RECORDER DAVIES: Excuse me, somebody at the back is sending a text-

UNKNOWN FEMALE: No I'm not, sorry.

RECORDER DAVIES: -message. Okay.

MR PENNINGTON-LEGH: Sorry. The starting point at CPR is that costs [inaudible] we have been successful. I accept what your findings have been. In terms of my learned friend referring to successive number of adjournments that's simply something that has occurred largely due to the fact that there were capacity problems which needed to be properly dealt with, and it did take some time to deal with those as we found out at the last hearing. Equally, Your Honour, although it's right that you found that the claimant has acted properly you have found that the decision they've come to in recent months, if I can put it that way, is disproportionate so they've acted properly but come to the wrong decision. And in my submission that must be reflected in the costs order because leading up to, if I can draw an arbitrary line and talk about 2012, if we talk about 2012 at that time we've had many, since the beginning of [inaudible] we've had many months of good behaviour and that is something that they should take into account in my submission and didn't in making their decision. So they may have acted properly but they've come to the wrong decision, and in my submission it can't be right in those circumstances for the Court to order that the defendant should pay those costs. It is open to the Court to say the defendant should pay costs up to a certain point and beyond that point the claimant should pay the defendant's costs. But in my submission that would be a fairly arbitrary way to

proceed, in particular, given that we've got Local Authority on one side and a public funded person with no money on the other side and [inaudible] the order therefore is no order as to costs save for public funding assessment of my costs.

The second point I want to make, Your Honour, is obviously that my client is legally aided and therefore has the benefit of Section 11 cost protection. He has had legal help since the start of July and then public funding for four representations to the beginning of November and so the rule is that any costs order that you make must take that into account. In other words that if he is ordered to pay the claimant's costs to the extent that those costs follow the beginning of legal help those are not to enforce without permission of the Court in the usual way. As to what happens to the costs incurred by the claimant before July then those technically are at large.

MR STRELITZ: I make it plain we're not seeking to actually recover those costs on the immediate basis, so I treat everything as covered by Section 11 if that assists my learned friend.

MR PENNINGTON-LEGH: Yes I'm grateful for that. But in any order that you make, Your Honour, would have to contain those words, never mind what my learned friend says which I'm grateful, but any order you make in respect of the defendant I would seek that wording in there.

MR STRELITZ: That wouldn't be opposed and we wouldn't oppose it. As I say the whole of the costs we're not seeking to try and recover, physically recover costs prior to the period of time when a full representative certificate was granted.

RECORDER DAVIES: Yes. Well [inaudible] conceded that he would not be entitled to his costs, although technically he has succeeded in fighting possession. So far as the claimant is concerned he seeks costs on the basis that I have made no criticism whatsoever of their actions throughout and therefore they technically regard their actions as having been exonerated. The defendant is legally aided and has been legally aided now since the

autumn and was in receipt of legal help before that. Any order for costs that I made would not be enforced without permission of the Court. I have come to the pragmatic decision in this case that any order for costs I make is not actually going to be enforceable against him; he has no income and no capital of his own, any application against the legal aid fund would require further court proceedings which would add costs to both sides. The pragmatic decision is to make no order for costs save for detailed assessment of the public funding costs for the defendant.

MR STRELITZ: I'm grateful.

MR PENNINGTON-LEGH: Thank you very much.

Approved as amended

Lindsay Davies

Recorder

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