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## **The Holy Grail As an Empty Chalice? Proportionality Review in Possession Proceedings after *Pinnock* and *Powell***

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Housing law practitioners and academics who had hoped to see the Supreme Court accept that Art 8 of Sch.1 of the Human Rights Act required a trial court in residential possession proceedings to be satisfied that it was proportionate to make an order were no doubt heartened by the judgments in *Manchester City Council v Pinnock*<sup>1</sup> and *LB Hounslow v Powell*.<sup>2</sup> In both cases, a unanimous Supreme Court<sup>3</sup> finally accepted that: firstly Art 8 ECHR required proportionality evaluation to apply in all possession cases involving a person's home;<sup>4</sup> and secondly that Art 8 of Sch. 1 of the HRA 1998 should bear the same meaning in this context in domestic law as Art 8 ECHR bears in international law.<sup>5</sup>

But while the abstract principle was clearly accepted, the practical implications of the principle remained (necessarily one might think) very uncertain. The more astute observers of those cases would however have thought both that *Pinnock* and *Powell* really do not tell us what proportionality actually means, and that establishing the applicability of the principle will not count for very much if what proportionality means is no or little more than that a decision to grant a possession order would not be *Wednesbury* irrational in the core substantive sense.<sup>6</sup>

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<sup>1</sup> [2010] UKSC 45; [2011] 2 A.C. 104.

<sup>2</sup> [2011] UKSC 8; [2011] 2 A.C. 186.

<sup>3</sup> Lord Neuberger gave the sole judgment in *Pinnock*. One of the concerns raised by earlier judgments, especially *Birmingham CC v Doherty* [2008] UKHL 57; [2009] 1 A.C. 697, was that all members of the court had issued opinions, which made it very difficult to identify precisely just what the ratio of the case was.

<sup>4</sup> [2010] UKSC 45; [2011] 2 A.C. 104 at para 45.

<sup>5</sup> *Ibid* at paras 46-49.

<sup>6</sup> If that test is properly applied, it is almost inconceivable that a decision would be unlawful. The remarkably loose nature of the test articulated by Lord Greene MR in *Wednesbury* is perhaps sometimes forgotten, namely was the outcome reached: 'something *so absurd* that no sensible person could ever *dream* that it lay within the powers of the authority'; [1948] 1 KB 223 at 229; emphases added. Lord Diplock's modern formulation in *GCHQ* is equally expansive: ". . . [*S*]o outrageous in its defiance of logic or of accepted moral standards that no sensible person who had

Although we lack any clear empirical data on the point, it seems safe to assume that HRA issues will not arise in most possession proceedings. For most secure (local authority) and assured (housing association) tenants, the trial court's statutory jurisdiction to act as primary decisionmaker on all matters both of law and fact far exceeds what would be required by even a very expansive understanding of proportionality. The issue is significant only for assured or secure tenants who face proceedings brought on so-called mandatory grounds (ie where the court's presumptive reasonableness jurisdiction has been ousted by the relevant statutory scheme),<sup>7</sup> tenants who lack such statutory protection, such as demoted, introductory or assured shorthold tenants, or for defendants who have never been tenants, such as family members of deceased tenants who have no rights to succeed to the tenancy. We have really no idea at all of the quantitative significance of such cases within the county courts' overall caseload.<sup>8</sup>

For constitutional lawyers, the courts' traditional reluctance to embrace proportionality as a ground of judicial review is explicable by the triple presumptions that: firstly, such a ground would require courts to engage in a far more rigorous assessment of the moral merits of a government body's decision than is allowed under the irrationality principle; secondly, that such assessment looks suspiciously like an appellate jurisdiction; and thirdly, therefore only Parliament is constitutionally competent to introduce it.<sup>9</sup> In possession cases, this constitutional rationale manifests itself in a fear that accepting a proportionality jurisdiction would in effect mean that the courts would be extending something akin to the statutory reasonableness defences available to regulated, secure and assured tenants to defendants who fell outside those statutory schemes.

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applied his mind to the question to be decided could have arrived at it"; [1985] AC 374 at 410–411, HL; emphasis added.

<sup>7</sup> The obvious examples being a landlord's entitlement to a possession order under Housing Act 1988 s.21 in respect of assured shorthold tenancies as long as it/he/she has served the correct notice, and the so-called 'ground 8' claim where an assured tenant owes more than 8 weeks of rent arrears.

<sup>8</sup> See the comment at footnote 66 in A. Latham (2011) 'Talking Without Speaking, Hearing Without Listening? Evictions, the Law Lords and the European Court of Human Rights' *Public Law* 730.

"In the course of argument in *Manchester CC v Pinnock* [2010] UKSC 45, Lord Mance asked counsel if they could provide statistics on the proportion of possession claims involving public landlords that are brought on grounds which do not allow the court to assess whether it would be reasonable to make a possession order. None were able to do so. In the author's personal experience (as a county court duty representative) the numbers of such claims are very small in comparison with the scores of cases heard in a typical county court every week in which the issue of reasonableness is determined in a five-minute hearing".

<sup>9</sup> The antipathy expressed by Lords Ackner and Lowry to the concept in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 being perhaps the best example of this position.

The application of an expansive notion of proportionality to possession proceedings would likely mean many claims which could not be defeated on a *Wednesbury* basis would fail. Yet in *Pinnock* and *Powell* the Supreme Court suggests that it would only be an ‘exceptional’ case which would be resolved differently as result of the proportionality jurisdiction,<sup>10</sup> a position which also seems to be endorsed by the ECtHR.<sup>11</sup> The obvious implication is that very few defences would cross this threshold, which might lead one to wonder why, if proportionality is to have such an insignificant effect on our housing law, the House of Lords/Supreme Court took so long to embrace it?<sup>12</sup>

It does seem clear that *Pinnock* proportionality is a statutory rather than common law concept. In two earlier judgments, *LB Lambeth v Kay*<sup>13</sup> and *Birmingham City Council v Doherty*<sup>14</sup> the House of Lords had (through its multiple concurring and dissenting - in various parts - judgments) suggested that that orthodox common law principles of judicial review sufficed to meet the proportionality requirement of Art 8, or - if they did not - that it was proper to view the HRA 1998 as a source of inspiration to nudge those common law principles a little way towards a more intensive notion of *Wednesbury* scrutiny. Whatever the Supreme Court has done in *Pinnock* and *Powell*, therefore, it has done because Parliament (in the HRA 1998) told it to do so.

The Supreme Court in *Pinnock* was at least explicit in declining to be explicit about what proportionality might mean. In a passage which future years will likely feature prominently in critiques of judicial abdications of constitutional responsibility, Lord Neuberger’s sole judgment told us:

“57...the court's obligation under article 8(2), to consider the proportionality of making the order sought, does represent a potential new obstacle to the making of an order for possession. The wide implications of this obligation will have to be worked out. As in many situations, that is best left to the good sense and experience of judges sitting in the County Court”.

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<sup>10</sup> Cf. *Pinnock* at [54]: “...in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate...”.

<sup>11</sup> See especially *McCann v United Kingdom* (2008) 47 E.H.R.R. 40; [2008] H.L.R. 40:

54. The court does not accept that the grant of the right to the occupier to raise an issue under Article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in *Kay* observed, it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings

<sup>12</sup> One of the more insightful critiques is offered by Latham *op. cit.*

<sup>13</sup> [2006] UKHL 10; [2006] 2 A.C. 465.

<sup>14</sup> [2008] UKHL 57; [2009] 1 A.C. 697.

The only precise guidance that *Pinnock* offered as to when a case might be ‘exceptional’ comes in para 64, and implies that trial courts should be concerned primarily with assessing if eviction would have severely adverse consequences on a defendant because of her state of health:

“64. Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue "in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty", and that "the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases" seem to us well made”.

The substantive tests – or lack thereof – identified in *Pinnock* and *Powell* must be viewed in conjunction with an important procedural consideration. The civil procedure rules (CPR 55.8) dealing with possession claims provide for what is in effect a summary grant of an order at first hearing unless the claim can be: ‘genuinely disputed on grounds which appear to be substantial’. The policy underlying the provision is - given the very large number of possession claims made – to allow for cheap and speedy resolution of most possession litigation.

The CPR does not however tell us what is meant by ‘grounds which appear to be substantial’. The only detailed judicial consideration of CPR 55.8 seems to be that of Warren J in *Forcelux v Binnie*,<sup>15</sup> in which he suggests that CPR 55.8 has much in common with the strike out procedure under CPR 24. The test under that provision is whether a party has: ‘no real prospect of succeeding/successfully defending’. The guidance in the White Book suggests that a case would have to be hopeless to be disposed of in this way:

“In order to defeat the application for summary judgment it is sufficient for the respondent to show some “prospect”, i.e. some chance of success. That prospect must be “real”, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word “real” means that the respondent has to have a case which is better than merely arguable (*International Finance Corp v Utafrica Sprl* [2001] C.L.C. 1361 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472). The respondent is not required to show that their case will probably succeed at trial. A case may be held to have a “real prospect” of success even if it is improbable”.

*Pinnock* offers yet another form of words in respect of summary disposal of Art 8 defences:

“61...[I]f an article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed. Only if the court is satisfied that it could affect the order that the court might make should the point be further entertained”.

What the court did not say in *Pinnock* however was whether this result should be achieved through CPR 24. Furthermore, the *Pinnock* court expressly declined to explore the inter-relationship between the formula laid out in para 61 and the provisions of CPR 55.8

“--.....And some of the provisions of CPR 55, which appear to mandate a summary procedure in some types of possession claim, may present difficulties in relation to cases where article 8

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<sup>15</sup> [2010] EWCA Civ 854 [2010] HLR 20.

claims are raised. Again, we say no more on the point, since these aspects were not canvassed on the present appeal to any significant extent”

A year or so on, we now have a handful of appellate judgments which begin to ‘work out’ (per *Pinnock* para 57) those implications. The judgements are briefly discussed and analysed below. As matters currently stand, it seems that the impact of Art 8 on what would otherwise be hopeless defences is proving rather slight.

### **Art 8 in the domestic courts: claimants 4 – 1 defendants**

Five judgments merit attention: the joined cases of *Corby Borough Council v Scott; West Kent Housing Association Ltd v Haycraft*;<sup>16</sup> *Holmes v Westminster City Council*;<sup>17</sup> *Birmingham City Council v Lloyd*;<sup>18</sup> *Thurrock BC v West*<sup>19</sup> and *Southend-on-Sea BC v Armour*.<sup>20</sup> Only one of those five could readily be regarded as a success from a defendant’s perspective.

#### *Corby BC v Scott and West Kent Housing Association v Haycraft*

Corby BC had granted Ms Scott an introductory tenancy in 2009. Ms Scott failed to pay her rent regularly, with the result that Corby began possession proceedings against her in the Northampton County Court. Shortly stated, the introductory tenant scheme requires the council to issue a reasoned notice seeking possession, and then to afford the tenant an opportunity to challenge that decision in an internal review, before proceedings are initiated. Ms Scott did not ask for an internal review, continued to accumulate rent arrears and – for good measure – started to cause a nuisance to her neighbours. She pleaded an Art 8 defence, and with her mother’s assistance cleared the arrears the day before the case came on to trial.

Ms Scott’s Art 8 defence rooted her claim to ‘exceptionality’ in two factors. Firstly that she had cleared all of her rent arrears and secondly – and certainly unusually – that she had recently been the victim of attempted murder. The trial judge concluded that it would in such circumstances be disproportionate to make an order. The legal

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<sup>16</sup> Case Nos: B5/2011/2708, B5/2011/0676; Court of Appeal (Civil Division) 13 March 2012; [2012] EWCA Civ 276.

<sup>17</sup> 2011 WL 5077823; Case No: QB/2010/0774; [2011] EWHC 2857 (QB).

<sup>18</sup> [2012] EWCA Civ 969; 2012 WL 2500010.

<sup>19</sup> [2012] EWCA Civ 1435.

<sup>20</sup> [2012] EWHC 3361 (QB). For detailed analysis see the discussion on the Nearly Legal website: <http://nearlylegal.co.uk/blog/2012/10/proportionality-between-claim-and-hearing/>; and the posting on the website of the chambers of Jan Luba QC (counsel for Mr Armour) at:

[http://www.gardencourtchambers.co.uk/news/news\\_detail.cfm?iNewsID=779](http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=779)

consequence of the dismissal of the claim would be that Ms Scott would become a secure tenant of her home

Mr Haycraft occupied his housing association home as a 'starter tenant'. 'Starter tenancies' are assured shorthold tenancies which are then re-granted as assured tenancies if the tenant has behaved properly for the first year.<sup>21</sup> Mr Haycraft's landlord served a s.21 notice on him during the first year following various allegations against him of anti-social behaviour. Mr Haycraft ran an Art 8 defence on the basis that he had not committed some of the alleged anti-social behaviour, that he had behaved acceptably for the past year, that he had some health difficulties, and that he now occupied his home with a new partner and their child. The defence was rejected summarily by HHJ Simpkins as not being seriously arguable.

The Court of Appeal - with Lord Neuberger giving the only opinion - upheld the judgment in *Haycraft* and reversed the trial court's decision in *Corby*. The court saw no force in either of the defences. That Ms Scott had been the victim of an attempted murder was not per se relevant to the question of whether it was 'necessary' for her to be evicted. It became relevant only insofar as it might have left her in a physical or mental state that rendered her 'vulnerable' in a *Pinnock* sense. But as the case had been pleaded and argued, then

"[24]...There was no suggestion in the judgment, or even in the evidence, that the attack resulted in mental or physical injury which would render it particularly harmful to Ms Scott to be evicted".

The phrase 'particularly harmful to be evicted' is likely to be seized upon as the key element of *Scott/Haycraft*. The idea obviously assumes that being evicted from one's home is almost always going to be 'harmful'. The task being set for defendants is to present a compelling evidential case that losing their homes would have an especially detrimental effect upon them. On this view, the fact that Ms Scott cleared her arrears the day before the trial was insignificant.

The Court of Appeal saw similarly little merit in Mr Haycraft's defence. In large part, this was because the matters he raised were little more than averrals with no credible evidential underpinning. Were any clarification on the point need, it is now obvious that a defendant faces a heavy evidential burden if she is to satisfy a court that hers is an 'exceptional' case because of here personal circumstances.

The Court of Appeal did however seem to take care to limit the precedential value of its conclusion (emphasis added):

34 In terms of the wider lessons to be learnt from these two cases, there is a limited amount that can be said so far as substantive issues are concerned. It is inevitable that, when a tenant against whom possession is sought raises an Article 8 argument, the prospects of the argument succeeding are very much dependent on the facts of the particular case. *Accordingly, any one decision can be only of very limited assistance in terms of giving any sort of general guidance.*

35 Nonetheless, I consider that *Corby BC v Scott* emphasises that, in such a case, a judge (i) should be rigorous in ensuring that only relevant matters are taken into account on the proportionality issue, and (ii) should not let understandable sympathy for a particular tenant have the effect of lowering the threshold identified by Lord Hope in [Powell \[2011\] 2 AC 186](#), paras 33 and 35. As for *West Kent HA v Haycraft*, it seems to me to emphasise the significance of the height of that threshold, or, to put it another way, how exceptional the facts relied on by any residential occupier must be, before an Article 8 case can have a real prospect of success

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<sup>21</sup> Housing Act 1988 ss.19A – 21.

It is perhaps worthy of note that *Corby* (and indeed *Pinnock* and *Powell*) do not engage with what we might mean by 'exceptional' in a quantitative sense. The concept is of course quite meaningless if we do not define in relation to what is 'unexceptional'. The observation may sound trite, but it is important. We have no idea at all as to how many claims which could be met only by an Art 8 defence are not defended at all. We should be able safely to assume that in defended cases where the occupant has the benefit of public funding from the Legal Services Commission then both her solicitor and her counsel have considered the matter seriously arguable. Again we have no idea at all of the percentage of defences which the occupants' legal advisers have not thought to merit funding. Nor do we know how many such argued defences lead to a pre-hearing settlement. We are similarly in the dark as to how many Art 8 defences are actually run in county courts. That empirical vacuum is perhaps a further reason for giving *Corby* only a limited precedential value.

### *Westminster City Council v Holmes*

Mr Holmes had been granted a non-secure tenancy by Westminster in discharge of its duties towards him under the homelessness legislation. It was not in dispute that he was a 'vulnerable' person within the meaning of that Act.<sup>22</sup> The council began possession proceedings against Mr Holmes when he failed to co-operate with housing officers, which allegedly culminated in him assaulting two council employees. His Art 8 defence was dismissed on a summary basis at trial. The nub of his defence appeared to be that the assault had not actually occurred. Unfortunately however this was not pleaded in either a clear or timely fashion. Consequently, the trial judge proceeded on the basis that if there was a properly pleaded claim and credible evidence before him that an assault had occurred - ie the witness statements of the officers - it could not be seriously argued that eviction would be disproportionate. It was not considered necessary for there to be a full hearing with oral evidence and cross-examination to establish which version of events was correct.

Eady J upheld that conclusion on appeal. The judgment does demand quite careful reading. There is little scope to doubt that if the trial court was satisfied that Mr Holmes had assaulted the officers then it could have properly concluded that eviction was proportionate. Conversely, of course, if the court had concluded there was no such assault, the grant of an order would have likely been disproportionate. Eady J was obviously alert to this point. He expressly cited<sup>23</sup> for example the following passage from *Powell* (per Lord Phillips):

"114....Sometimes the authority will be reacting to the behaviour, or perceived behaviour of the tenant. In the latter event the authority may be proceeding on the basis of a factual assumption that is unsound. If the only reason that the authority is seeking possession is that the tenant has been guilty of bad behaviour, obtaining possession will not further the legitimate aims of the authority if that factual premise is unsound".

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<sup>22</sup> "2. Mr Holmes is in his early fifties and has a history of mental health problems. He has from time to time been diagnosed with severe anxiety, obsessional behaviour, depression, paranoid personality disorder, seasonal affective disorder, alcohol dependent syndrome and possibly also post traumatic stress disorder"; per Eady J.

<sup>23</sup> At para 32.

One would generally expect that in circumstances where a crucial ‘factual assumption’ was contested there would have to be a trial so that the court could make detailed findings on the evidence. That did not happen at trial in Mr Holmes’ case. It may therefore be that the best way to read Eady J’s judgment is that it says little more than that it is proportionate for a trial judge to dispose of a case on a summary CPR 55.8 basis if the defendant and/or his lawyers have failed to put the core of his eventual defence in a properly pleaded form.

*Birmingham City Council v Lloyd*

The defendant in *Birmingham City Council v Lloyd*<sup>24</sup> had pursued what seems a rather bizarre course of action. Mr Lloyd was a secure tenant of the council, as was his brother, a Mr Gibb. Evidently Mr Lloyd much preferred Mr Gibb’s flat to his own, because when Mr Gibb died Mr Lloyd decamped from his own home and moved into Mr Gibb’s property. He did not receive or even seek permission to do this from the council. The immediate effect of this in legal terms would of course be that his own tenancy would no longer be secure,<sup>25</sup> and that he had entered and subsequently occupied Mr Gibb’s flat as a trespasser.

Mr Lloyd informed the council of what he had done some months later when he tried to claim housing benefit for the new flat. The council told him quite clearly that it would not grant him a tenancy of the new flat, invited him to appeal against that refusal if he wished to do so, and advised him to return to his former home. He stayed put, however, served a notice to quit in respect of his own flat and unsuccessfully appealed against the council’s refusal to grant him a tenancy of his brother’s home. The council then began proceedings against him in respect of Mr Gibb’s flat.

Perhaps surprisingly, at trial in Birmingham County Court the Recorder accepted that while Mr Lloyd had entered the property as a trespasser it was his home and it would be disproportionate to evict him. He was led to this conclusion primarily by Mr Lloyd’s assertion that he had a depressive illness which would be exacerbated by eviction, that Mr Lloyd was under the impression that if he gave up his own tenancy he would be granted a tenancy of the other flat, and that he had occupied the premises without causing any nuisance to his neighbours.

The Court of Appeal overturned that conclusion. Interestingly, the Court did not expressly invoke the *Corby* ‘particular hardship test’. It did however note that there was no adequate evidential base to support the conclusion that Mr Lloyd’s depression was serious nor that it would worsen if he was evicted. Neither was there any basis to think that Mr Lloyd had anything approaching a legitimate expectation that he would be granted a tenancy of his dead brother’s flat. That he had behaved in a tenant-like fashion in his new home was of no significance.<sup>26</sup>

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<sup>24</sup> [2012] EWCA Civ 969; 2012 WL 2500010.

<sup>25</sup> Per Housing Act 1985 s.81 (the so-called ‘tenant condition’) the tenancy is secure only while the tenant occupies the premises as her ‘only or principal home’. If she does not meet this condition, the tenancy exists only at common law and the landlord can determine it by issuing a valid notice to quit. A notice to quit has no effect while a tenancy is secure.

What was of some significance - though not at all helpful to Mr Lloyd – was that he had entered the premises as a trespasser. That factor could properly be taken to undermine the cogency of any Art 8 defence:

“18 It would, I accept, be wrong to say that it could never be right for the court to permit a person, who had never been more than a trespasser, to invoke Article 8 as a defence against an order for possession. But such a person seeking to raise an Article 8 argument would face a very uphill task indeed, and, while exceptionality is rarely a helpful test, it seems to me that it would be require the most extraordinarily exceptional circumstances”.<sup>27</sup>

*Thurrock BC v West*

The defendant in *Thurrock BC v West*<sup>28</sup> was the grandson of joint secure tenants of a three bedroom council house. Mr West moved into the premises in 2007, and was joined there by his partner and their son. When Mr West’s grandfather died in 2008, the tenancy passed through the doctrine of survivorship to Mr West’s grandmother qua surviving tenant. Mr West’s grandmother subsequently died in 2010.<sup>29</sup>

Under the scheme of the Housing Act 1985, no further succession to the tenancy on the part of Mr West was provided for. Had his grandmother been a tenant de novo, Mr West would have been entitled to succeed by virtue of being a resident family member per Housing Act 1985 ss.87 and 113. Once the council had issued a notice to quit to the public trustee to determine his grandmother’s tenancy,<sup>30</sup> Mr West became a trespasser in his home and the council prima facie had an unqualified right to possession.

The council had however indicated that it would rehouse Mr West (and his family) as a secure tenant in a 2 bedroom property. That might be though a generous position to adopt, given that even if Mr West had been a first successor the scheme of the Act (under Schedule 2 ground 16) envisages that a person in his circumstances could be required to move to another property if she under-occupied the existing premises. Mr West nonetheless sought to defend the claim because he wanted to stay in his current home.

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<sup>26</sup> R Kelly (2012) ‘Trespassers and the Limits on the Application of Article 8: *Birmingham City Council v Lloyd*’ 16 *Landlord & Tenant Review* 232.

<sup>27</sup> Per Lord Neuberger.

<sup>28</sup> [2012] EWCA Civ 1435.

<sup>29</sup> The doctrine applies even in circumstances where the surviving joint tenant has long ago abandoned both the premises and the remaining partner; see *Solihull MBC v Hickin* [2012] UKSC 39, the Court reaching that conclusion by a 3-2 majority. See for comment Note (2012) ‘Supreme Court Backs Rights of Absent Joint Tenant to Council House’ *Solicitors Journal* 1<sup>st</sup> August; S. Gerlis (2012) ‘Death of One Joint Tenant - Succession or Not?’ [2012] 22 October *Busy Solicitors Digest*.

<sup>30</sup> Since his grandmother was dead, she could not fulfil the ‘tenant condition’ of the Housing Act 1985 s.81 that she occupy the premises as her ‘only or principal home’. The tenancy she left as part of her estate thus existed only at common law and could be determined by the landlord by issue of a valid notice to quit.

Mr West's counsel had not tried to raise a broader challenge to the compatibility *per se* of the secure tenancy succession scheme with Art 8. Such attacks on a rule of law itself, rather than on the application of a valid rule, are generally styled as 'Kay gateway A' defences.<sup>31</sup> The 'gateway A' defence perhaps arising here is rooted in Art 14 of Sch.1 of the HRA 1998, and turns on the *prima facie* bizarre difference of treatment that the scheme affords to people who 'lose' their partners through relationship breakdown and death. A person who becomes a sole tenant through judicial assignment on relationship breakdown takes as a tenant *de novo*, while a person who becomes a sole tenant on widowhood takes as a successor. There is no obviously good reason for such differential treatment.<sup>32</sup>

Mr West thus relied solely on a proportionality defence *vis a vis* his eviction from the premises. The case was pleaded skimpily, on the limited basis that he had lived in the premises for four years, and that his partner and son also lived there and that he had occupied the premises in a tenant like manner since his grandmother's death.

The matter was disposed of on a summary basis by a District Judge. Mr West was represented by counsel but the council (rather surprisingly) had not instructed a barrister. The District Judge seemed to conduct a rough and ready balancing exercise on the detailed merits of the case, and found that the scales weighed in Mr West's favour:

18. It does seem to me that he is over-housed.... The local authority is a substantial provider of accommodation, having many properties, but I am told has a huge waiting list and I have no doubt that is the case. In these difficult times there are many people seeking accommodation and the local authority has an obligation to manage its housing stock.....

19. However, on balance and exercising the test for proportionality, it seems to me that to evict this small family and this young child from this property to re-house them in another property which is one bedroom smaller, against all the background of the connection would be disproportionate.

20. Lord Neuberger clearly highlighted that people who might suffer physical and mental difficulties might well fall into a special category. It seems to me that families with young children fall into a similar situation and although they are not expressly included in that paragraph, it seems to me that it is another factor which in this case is of particular weight here. For these reasons, I find that the Article 8 defence succeeds."

The Court of Appeal considered this decision quite misconceived. Nothing about the facts of the case lent Mr West's circumstances an exceptional character. There was certainly nothing that could mark him out as vulnerable in a *Pinnock* sense. More broadly, the Court of Appeal observed that the trial court had in effect deployed Art 8 as an oblique means to override the policy values which Parliament had enacted in the statutory scheme of succession and to undermine in the widest sense the council power to allocate its stock in accordance with the statutory scheme:

36....In effect, the Court has assumed for itself the power Parliament has conferred on the Council to select the most suitable property for the numerous and various persons who have a legal right to social housing. This has been done without any knowledge on the Court's part as to

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<sup>31</sup> See the speech of Lord Scott in *LB Lambeth v Kay* [2006] UKHL 10 ; [2006] 2 A.C. 465 esp. at para 110.

<sup>32</sup> I have elaborated this argument in I. Loveland (2012) 'Second Successions to Secure Tenancies' *Conveyancer and Property Lawyer* 453.

who are those other people who have an equal, or possibly better, claim to be housed and for whom the Property would be as suitable or possibly more suitable than the respondent and his family. On the basis that it would be wrong for the Council to permit the respondent to remain in the Property without payment of rent and other conditions, the effect of the order is to compel the Council to grant the respondent a new tenancy of the Property to which he has no legal right.<sup>33</sup>

The Court of Appeal's judgment does not necessarily mean that there can never be cases in which a proportionality defence might prove effective for a putative 'second successor'. If Mr West had lived in the property for his entire life, if he and his family did not under-occupy the premises at all, if he or a family member had cogent health reasons for not being evicted and so on it may have been that the grant of an order would have been disproportionate. It should be recalled however that Mr West per se never had any formal legal status qua occupier vis a vis the council. His presence in his home was as a bare licensee of his grandparents, and his expectations as to his continued occupancy could have stretched no further than having their continued permission to live there.

#### *Southend-on-Sea BC v Armour*

The sole successful post-*Pinnock* Art 8 defence in the higher courts was argued before Cranston J. Mr Armour was granted an introductory tenancy in January 2011 by Southend, which the council wished to end because of persistent anti-social behaviour on Mr Armour's part. The most significant of these actions was an allegation that Mr Armour had deliberately turned on his flat's electricity supply while electricians were conducting works on the premises and caused the workmen to suffer an electric shock.

In accordance with the introductory tenancy scheme, Mr Armour challenged the council's decision to begin proceedings through an internal review. The council rejected his review request in June 2011. However the matter did not actually come on for trial until over 9 months later. In the intervening period, Mr Armour had apparently behaved impeccably.

By the time of the hearing, Mr Armour (who seemed to have had the benefit of a good deal of assistance from voluntary agencies) had marshalled sufficient expert medical evidence to convince the Recorder that he suffered from severe depression and Asperger's syndrome to the extent that he was not legally competent to conduct proceedings on his own behalf. Mr Armour also introduced evidence from his probation officer which suggested that eviction from his home would likely have very undesirable consequences for his capacity to stay out of trouble in future. Although the trial judge concluded that it was entirely proportionate for the council to have issued proceedings, she also took the view that the emergence of further information as to Mr Armour's circumstances at the time of trial, coupled with his on-going good behaviour, made the grant of a possession at that point disproportionate. The effect of this conclusion, which involved dismissing the proceedings, was to convert Mr Armour's former introductory tenancy into a secure tenancy.<sup>34</sup>

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<sup>33</sup> Per Etherton LJ.

<sup>34</sup> Per Housing 1996 s.130; subject however to the judgment being overturned on appeal.

Cranston J. upheld that conclusion on appeal. His judgment gave a clear indication of the limited precedential value that might be attached to cases such as *Corby* and *Lloyd*, and will no doubt feature very prominently in the rhetorical toolbox of legal advisers acting for occupants in Art 8 cases. *Lloyd*, for example, might be regarded as wholly *sui generis* in relation to defendants who had entered premises unlawfully:

“22 To my mind, *Lloyd* is an exceptional case and certainly not relevant in the consideration of Mr Armour's case. It was not a case of an introductory tenancy. It was a case of a trespasser who had taken unlawful and unauthorised occupation of a council flat without the council's knowledge...”

Nor – and this is perhaps the point of wider significance – should *Corby* be read as authority for the proposition that periods of good behaviour following previous anti-social behaviour could not be weighted in the Art 8 balance:

“The [council's] first contention, that good behaviour subsequent to the initial complaint cannot be a relevant consideration, falls at the first hurdle. The authorities I have quoted are clear that it is possible for a court to take this into account. The overriding principle is that the consideration by the court is dependent on the facts of a particular case, as was underlined in *Corby* at paragraph 34. The Court of Appeal in *Corby* also highlighted that a court must be rigorous in ensuring that only relevant matters are taken into account in relation to proportionality. However, it is clear from the passages that I have quoted from *Pinnock* (paras [57], [124] and [125]) and from *Powell* (para [53]) that subsequent behaviour, even good behaviour, may be a relevant consideration.”

## Conclusion

Notwithstanding Cranston J's judgment in *Armour*, for local authorities and housing associations the current weight of post-*Pinnock* authority on the significance of Art 8 will provide no doubt welcome confirmation that the Human Rights Act has not yet had a revolutionary impact on the outcome of possession proceedings. It is clear that the Act is prompting some spirited defences to be made in what would previously have been regarded as hopeless cases, and that – albeit to a lesser extent – the failure of those defences may owe more to deficiencies in pleading and evidence gathering than to the necessary narrowness of the *Pinnock* principle. We have yet to see any obvious acknowledgement by the higher courts that the defendants who might most properly benefit from the application of that principle will also be the most likely to bring their cases promptly and informedly to the attention of competent solicitors. Those courts which routinely deal with track poorly prepared and pleaded cases through the CPR 55.8 summary disposal route are perhaps lending Art 8 a much lesser effect than courts which routinely adjourn such cases at first hearing and set them down for trial at a date which makes it practicable for the best possible case to be marshalled. That might be thought a less than fully satisfactory state of affairs. Nor do we have much idea of how many cases are not pursued by claimants when a well-drafted and evidenced defence is put forward in a timely fashion. It may be that much Art 8 ‘law’ in the possession proceedings context in county courts is effectively invisible, its conduct and outcome known only to participants in the litigation and their immediate colleagues. As matters currently stand, the position is perhaps no

better put than by the lady who acted as Mr Armour's litigation friend (in a posting on the *Nearly Legal* website):<sup>35</sup>

Louise Ward on 22/10/2012 at 2:15 pm said:

I am the litigation friend involved in this case! It was a massive concern that on an introductory tenancy that you have very few legal rights! A massive thank you to Naz at Law, Hurst and Taylor Solicitors for believing in Robert and to Racheal at Law, Hurst and Taylor who assisted with the appeal! We had an excellent barrister and QC in the high courts! This may help others in this situation and all I can say is if you believe you are in the right you have to fight! We had the odds stacked against us on a huge scale and we never gave up and won! Again thank you to all involved!

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<sup>35</sup> <http://nearlylegal.co.uk/blog/2012/10/proportionality-between-claim-and-hearing/>