Supplied by Smith Bernal Reporting Ltd for Lawtel

IN THE SUPREME COURT OF JUDICATURE NO: B3/2000/0289

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WILLESDEN COUNTY COURT
(HIS HONOUR JUDGE ROUNTREE)

Royal Courts of Justice
Strand
London WC2

Monday, 20th November 2000

B e f o r e :

LORD JUSTICE OTTON

and

LORD JUSTICE KEENE

- - - - - - - -

THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF HAMMERSMITH AND FULHAM

- v -

ANDREW CLARKE and DONNA CLARKE

- - - - - - - -

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
180 Fleet Street, London EC4A 2HD
Telephone No: 0171-421 4040 Fax No: 0171-831 8838
(Official Shorthand Writers to the Court)

- - - - - - - -

MR J WRAGG (instructed by Legal Services Division, London Borough of Hammersmith and Fulham, King Street, London W6 9JU) appeared on behalf of the Appellant
MISS B HARRIS (instructed by White Ryland, 54 Goldhawk Rd, London W12 2BR) appeared on behalf of the Respondent

- - - - - - - -

J U D G M E N T
(APPROVED)

- - - - - - - -

JUDGMENT

1. LORD JUSTICE OTTON: I ask Lord Justice Keene to give the first judgment.

2. LORD JUSTICE KEENE: On 27th October 1999 at Willesden County Court Judge Rountree dismissed a claim by the present appellant for a possession order against the respondents. The London Borough of Hammersmith and Fulham (“the council”) now appeals against that

decision. There is no doubt that the respondents were living at the house in question, 11 Bryony Road, London, W12, with the consent of Mrs Joyce Clarke, the first respondent's grandmother. The second respondent is the wife of the first respondent.

3. Mrs Joyce Clarke had been the contractual tenant of the premises and had occupied them as her home since about March 1981. However, in 1996 she suffered a severe stroke. She spent nearly five months in a nursing home in 1997. At some date the respondents moved into the premises. Mrs Joyce Clarke returned to live there in early October 1997, together with the two respondents. She was then cared for there by the second respondent.

4. On 29th August 1998, she was admitted to Birdsgrove Nursing Home in Bracknell for respite care. That seems to have lasted for about four weeks, after which she returned home to Bryony Road once again. But by November 1998 problems had developed to the extent that she was re-admitted to Birdsgrove Nursing Home on 27th November. A report by the Council's Social Services Department around that time indicates that she was suffering not only from a number of physical difficulties but also from depression. For reasons to which I shall come, the Council formed the view early in the new year that she had decided to live permanently in the nursing home and to give up occupying 11 Bryony Road as her home.

5. Consequently, by letter dated 9th February 1999 it served notice to quit on her on the basis that she was not occupying the dwelling as her principal home as required by the terms of her tenancy agreement. That notice to quit expired on 15th March 1999. However, the respondents did not vacate the dwelling and proceedings for possession were begun by the council on 2nd September that year. They were resisted on the basis that Mrs Joyce Clarke had always intended to return home to 11 Bryony Road and was therefore a secure tenant. That, in effect, is what the learned county court judge concluded.

6. At this stage it is necessary to deal with the statutory provisions which are of relevance in this case. Section 79(1) of the Housing Act 1985, provides as follows:

> "A tenancy under which a dwelling house is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied."

7. The landlord's condition was met in this case because the landlord was a local authority. The tenant condition is defined by section 81 of that Act. Insofar as it is relevant for present purposes that provision states:

> "The tenant condition is that the tenant is an individual and occupies the

dwelling-house as his only or principal home;"

8. I need not read the remaining part of that section.

9. There was of course no doubt that Mrs Joyce Clarke was an individual as required by section 81. The issue in the county court was whether she occupied the dwelling house as her only or principal home.

10. There is unhappily no transcript of the judgment in the county court but there is a note of it taken by the person who was representing the council at the hearing. It is quite brief and reads as follows:

> "After having read the documentary evidence provided by the Claimants and listened to the oral evidence of Mrs Joyce Clarke, who has proved to be a most sensible and credible witness in these proceedings.
>
> The tenant has made it quite clear that while in the Nursing Home it was always her intention to return home to 11 Bryony Road to a place where she has said she has fond memories of.
>
> She states that at the time she did not intend to return 11 Bryony Road but as she stated under oath 'that was a long time ago'.
>
> It can be seen as coincidental that Mrs Joyce Clarke has now returned to the property and that she attends the hearing today. Nevertheless Mrs Joyce Clarke who has occupied the nursing home as a result of a stroke had every intention of returning to 11 Bryony Road.
>
> Therefore I must dismiss the Claimant's application."

11. The judge has been unable to agree that note because he no longer has the relevant papers and could not recall the details of the case, but he has emphasised that he accepted the evidence of Mrs Clarke and in broad terms his recollections do not differ significantly from the council's note. He does indicate that he accepted her explanation for what he describes as a remark to a housing officer while she was in the nursing home. That seems to be a reference to the contents of one of the documents put before the county court judge.

12. There are a number of documents originating in the period between 17th November 1998 and 23rd March 1999 which show that various officers of the council understood that Mrs Clarke wished to remain permanently at the nursing home. She was, for example, given a permanent placement at the home. But the only document emanating from her around this time was a note written by her social worker, Mr Martin Chainani and signed by her. It concerned an earlier application she had made, apparently with her grandson, to purchase 11 Bryony Road under the statutory right to buy provisions. Mr Chainani had visited her at the nursing home on 14th January

1999 and discussed her application with her. He wrote the note for her because she was unable to write because of the stroke which she had suffered, and then she signed it. The note reads:

> "I have decided, following my 6 week review at Bird's Grove Nursing Home, Warfield Road, Bracknell, Berks, to become a permanent resident of the above establishment.
>
> When I originally made my application for the right to buy, my intention was to live at 11 Bryony Road but this is now not my choice."

13. Then it is signed by her.

14. It seems that not only is that note what the learned judge was referring to when he speaks about a remark made by her to a housing officer but that note also appears to be relevant to the judge's comment in his judgment that Mrs Clarke had stated at the time she did not intend to return to 11 Bryony Road. "At the time" it would seem, therefore, is a reference to 14th January 1999.

15. There is a note of the evidence given by Mrs Clarke in the county court, which is largely, although not wholly, agreed between the parties. It reveals that Mrs Clarke was asked about the note which she had signed on 14th January 1999 and that she replied:

16. "... that she remembered telling Martin (the Social Worker) that 'at that time I was in the nursing home and I wanted to stay there'".

17. According to the respondents she then said, "I want to go home to die". According to the appellant she said, "but that was some time ago". The agreed part of the note then continues:

> "She also said with regard to the note, 'I was very depressed at the time and they had just got my medication sorted out.'"

18. She then went on to say:

> " ... in the beginning I wanted to be at Birdsgrove so I could go back to Bryony gradually and when everything is right I want to be at Bryony but go to Birdsgrove for respite."

19. Later on the agreed note records that the learned judge asked whether she had been home since going into the nursing home and Mrs Clarke had replied "yes, a couple of times".

20. On behalf of the appellant council, Mr Wragg submits that the question of whether Mrs Clarke was occupying this dwelling at Bryony Road as her only or principal home had to be determined as of the date when the contractual tenancy determined as a result of the notice to quit. If she did not have a secure tenancy at that date, then it could not have been resurrected by any

subsequent occupation by her of the premises. He relies for that on the Court of Appeal decision in Hussey v London Borough of Camden [1994] 27 HLR 5 at page 7 where Leggatt LJ referred to section 79 and the other provisions in the 1985 Act and stated:

> "It follows from those provisions that the tenant condition need not be fulfilled from time to time without loss of a secure tenancy, provided that it is fulfilled at the time when the notice to quit expires."

21. It is the proviso in that statement to which Mr Wragg draws attention. It is submitted that the judge did not apply the test as at the relevant date; alternatively, that if he did, the only answer could have been that Mrs Clarke no longer occupied the house by that date as her only or principal home. Mr Wragg contends that there was no evidence to show that Mrs Clarke had changed her mind after signing the note of 14th January 1999 and before the notice to quit expired. Reliance is placed on this Court's decision in Brickfield Properties Ltd v Hughes, [1988] 20 HLR 108 where at page 113 Neill LJ set out some guidelines derived from previous case law, the first two of which read as follows:

> "(1) Where the tenant's absence is more prolonged than is to be explained by holiday or ordinary business reasons, and is un-intermittent, the onus lies on the tenant seeking the protection of the Rent Act 1977 to establish an intention to return.
>
> (2) An inward intention is not enough; it must be accompanied by some outward and visible sign of the tenant's intention; the continued occupation by a caretaker or relative or the continued presence of furniture may be sufficient, but in each case the question is whether or not the person or furniture can be regarded as a genuine symbol of his intention to return 'home'."

22. Reference is also made on behalf of the appellant to the decision in Crawley Borough council v Sawyer [1988] 20 HLR 98.

23. Mr Wragg then refers to two reports from November 1998 which refer to Mrs Clarke requesting a permanent placement at the nursing home, to the note signed by her on 14th January 1999 and to the fact that she required 24-hour nursing care. Whatever she herself may have said in the witness box about her intentions, the objective evidence, he says, points to her having had no intention to return.

24. On behalf of the respondents Miss Harris emphasises that there was no bar to Mrs Clarke returning home, such as a subletting, which features in some of the cases on this subject. She had a continuing physical presence at home, consistent with her continued occupation, in the shape of her close family members being there and the fact that the premises were adapted for her use. It was against that background that the note signed by Mrs Clarke had to be read and evaluated. The note

of 14th January 1999 could not be taken at its face value, given the somewhat formal language used in it which was clearly not language which Mrs Clarke herself would have volunteered. The judge heard from her as a witness and heard that her intentions had been more complex than indicated in that note. Miss Harris submits that the judge directed himself properly and had asked himself whether she had an intention to return.

25. The law applicable to this issue is not really in dispute nor is it, in my judgment, unclear. The words in section 81 “occupies the dwelling house as his only or principal home”, are not further defined in the Act but they have been the subject of considerable judicial consideration. For my part, I accept that this Court in Crawley Borough Council v Sawyer set out the appropriate approach. That was a case where a tenant of the premises had gone to live with his girlfriend in 1985. The electricity to those premises had been cut off in June 1985 and the gas cut off in 1986. He had however visited the premises once a month, paid the rent and rates, and he had spent a week there at some date. In July 1986 he told the local authority that he was living with his girlfriend and that they intended to purchase her home. However, his evidence was that he had not abandoned the premises and had every intention of returning to them.

26. The judge at first instance accepted that and found that the premises were his principal home. That decision was upheld by the Court of Appeal which emphasised that premises may remain a person’s home even though he is away from them for months at a time. Reference was made, as it frequently is in cases on this topic, to Lord Denning MR’s example of a sea captain in Herbert v Byrne [1964] 1 All ER 882 at 886.

27. In the Crawley case Parker LJ identified what he described as a “common principle” of the authorities, namely:

> “... that in order to occupy premises as a home, first, there must be signs of occupation -- that is to say, there must be furniture and so forth so that the house can be occupied as a home -- and, secondly, there must be an intention, if not physically present, to return to it.”

28. The relevance of intention has been emphasised in other cases including that of Ujima Housing Association v Ansah [1997] 30 HLR 831, though it was made clear there that what the court is concerned with is an objective assessment of the tenant’s actions and intentions, rather than his or her subjective intention (see page 843).

29. However, intention is undoubtedly of great importance since it may be the only way of distinguishing between a dwelling which has in effect been abandoned by the person as his only or principal home and a dwelling which has not. When the court refers to an objective approach, it is

only emphasising that one has to look at all the evidence in order to ascertain intention and not merely what the tenant says in the witness box his or her intention was.

30. For my part I accept that the position has to be considered as at the date of the termination of the contractual tenancy. However, insofar as the court is concerned to make a finding as to the tenant's intention at that date, evidence relating to the period both before and after that date may well be relevant. When considering the issue of whether a person occupied premises as his or her only or principal home, even though not physically present there, the court will focus not on fleeting changes of mind but on the enduring intention of that person. That must particularly be so in cases such as the present where Mrs Clarke was an old lady in poor health whose intentions in the nursing home may well have fluctuated from time to time and even from day to day.

31. That seems to me to have been the approach adopted here by the learned judge, insofar as one can rely on the very brief note taken of his judgment. He seems to have found, in effect, that despite Mrs Clarke's statement, as embodied in the note of 14th January 1999 it was always her intention to return home to 11 Bryony Road. That finding only reads in a consistent way with the rest of the judgment if he were regarding the note of 14th January 1999 as reflecting merely a very short lived intention on her part, one which did not reflect her more general and enduring intent. If that is so, then the judge was not falling into the trap of looking at her intention simply as at the date of trial, as Mr Wragg contends. Indeed, it is impossible to accept that contention, given the judge's finding that Mrs Clarke always intended to return.

32. Consequently, I, for my part, do not accept that the judge adopted the wrong approach or applied the test at the wrong date.

33. Was there then no evidence on which he could have come to the conclusion which he did? Certainly there was evidence pointing towards an intention to remain in the nursing home. Mrs Clarke had a permanent placement there. She did sign the note of 14th January and she did spend the vast majority of her time between then and the trial at the nursing home. On the other hand, her grandson and his wife continued occupying the premises as they had previously done with her. They would undoubtedly have allowed her back, as indeed they did from time to time, so there was no impediment to her return. It does seem probable, as Mr Wragg conceded at one point, that her furniture remained there. Certainly there was no evidence that it had been moved elsewhere. She was, after all, back living there at the date of the trial, so it seems that her furniture was probably there. That is not only relevant to occupation generally but it may also assist on the issue of intention.

Supplied by Smith Bernal Reporting Ltd for Lawtel

34. Above all the judge had to bear in mind that being in hospital or in a care home may be different from a situation where possession of a dwelling is relinquished to someone else. The physical and mental condition of the person may fluctuate. The individual in question may get better, and one should therefore be slow to place too much reliance on particular comments made at any one time. Especially must that be so when there is evidence that the person was very depressed and on medication at the time in question. In those circumstances the judge here was entitled to accept, as he did, Mrs Clarke's explanation for that note of January 1999.

35. He also had her evidence that in the beginning she wanted to be at the nursing home so that she could go back to Bryony gradually. That was evidence suggesting an enduring intention to return, whatever her day-to-day moods. The judge had to decide what weight to attach to the note, to Mrs Clarke's evidence before him and to all the other circumstances, including the continuing presence of close family members at the property and the fact that there was equipment there appropriate to someone in her physical condition.

36. I have come to the conclusion that the judge did have evidence before him on which he could properly make the finding of fact as to her intention which he did. Having made that finding, his decision that Mrs Clarke met the tenant condition as set out in section 81 cannot be said to have been wrong. I would dismiss this appeal.

37. LORD JUSTICE OTTON: I agree.

(Appeal dismissed; appellant to pay respondent's costs; legal aid taxation)