Court considers transfer of tenancy on separation

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Family analysis: Katherine Dunseath, deputy head of the family team at 3 Paper Buildings, discusses the Court of Appeal's recent decision in a dispute between two former cohabitants over a joint secure tenancy.

Original news

Guerroudj v Rymarczyk [2015] EWCA Civ 743, [2015] All ER (D) 152 (Jul)

The parties had entered into a joint tenancy of a local authority flat prior to the breakdown of their relationship. The Court of Appeal, Civil Division, in dismissing the appellant's appeal against an order transferring the tenancy into the sole name of the respondent, held that the judge had had to make a difficult decision on the balance of hardship and there had been no error of law in the way that he had struck the balance.

What were the key features of this case?

The appellant, G, and the respondent, R, had cohabited at a property in Oxfordshire having entered into a joint tenancy from the local authority. G was unable to work due to long-term back problems and when the relationship ended he applied for a transfer of the tenancy under the Family Law Act 1996, s 53.

The matter was listed for final hearing and after hearing oral evidence the judge made the order in G's favour. In the order the judge also made provision for liberty to apply:

> 'In the event that either party obtains evidence of an alternative to this order being implemented, he or she shall apply on 72 hours notice before the 11 July 2014 to the court for an urgent hearing...'

It is also of note that in the first judgment the judge stated:

> 'I would suggest to both parties that they should, if they have not done so already, approach the housing officer to see whether there is an alternative to that order being made...It may be there is, in which case either party would have permission to bring the matter back to me.'

R then relied on this provision and applied back to court. Her application for liberty to apply was based on a letter she had written to court which made reference to having made enquiries with a number of different agencies. She stated that she had spoken with someone from Shelter and had been informed that G would be able to establish a priority need for housing and be owed a duty under the Housing Act 1996, Pt 7 (HA 1996) to be accommodated by the local authority.

On the basis of this evidence the court listed the matter again for another contested hearing and stayed the previous order in the interim. At this second contested hearing, again after hearing the same oral evidence bar this new letter from R the judge came to a completely different conclusion and transferred the tenancy to R.

Although the only new information before the court was the letter written by R, the court's determination regarding the transfer of tenancy was completely contrary to the first decision. Further, in the second judgment, the judge was satisfied that if G was made homeless as a result of the transfer of tenancy, the authority would owe him a duty to provide him with accommodation and he would be a priority need, having regard to his disability. It is of note that at this hearing the provisions of HA 1996 were not put before the judge, the only reference to it was made in R's letter to court on her application for liberty to apply.

What were the main grounds of appeal?

The main grounds of appeal were as follows:

- the judge should not have allowed for a further hearing at all on the basis of R's letter alone which amounted

to a statement in very generalised terms
- in the alternative, if the judge was entitled to entertain this application he should have refused to list it for further contest as the letter contained nothing to justify changing the assessment he had made at the first hearing
- in the alternative, even if the material was allowed in this did not constitute reliable evidence justifying the judge's conclusion that G would be re-housed by the council on account of his disability

Are there any particular points of interest in respect of this judgment?

In my opinion the judgment highlights the difficulty that the court had in determining this appeal. For example, while Underhill LJ accepted that orders should be final and liberty to apply strictly construed the Lord Justices also did not think it right to read the provisions of the first order regarding the liberty to apply element too literally.

In relation to the material before the court, Underhill LJ also found that in this matter the judge had (just) enough to go on.

The final paragraph of the judgment is also of interest where Underhill LJ states:

> 'The one criticism that I would, with respect, make is that it would have been better--if, as he evidently did, he felt that justice required a fuller exploration of the possibilities of alternative accommodation--if he had simply adjourned the hearing and kept his counsel as to any provisional conclusion that he might have reached...'

What is the significance of this case?

There are some important lessons to be learnt from this case:

- after determination at a contested hearing if the judge wishes to have provision in the order for liberty to apply the specific reasons and limitations for this need to be fully identified
- if the other party then applies back and it is considered to be outside of the ambit of this provision objection should be taken at having the matter relisted at the first possible opportunity
- even if unsuccessful on the above, any further evidence and/or law to counter those newly asserted points should be obtained and further time requested if it is not possible to obtain this within the timeframe offered. For example, in this case the court should have been referred to further evidence that G would not be rehoused as a priority need and the provisions of HA 1996 should also have been put before the court in order to rebut the arguments asserted
- the final point is this--if you are faced with circumstances similar to this and the court determines that it is in a position to list the matter for a further contested hearing the court should be referred back to its original judgment and reasoning. It should only be if the new evidence fundamentally changes the balance of the pre-existing evidence that the original decision should be altered. In my opinion in this case this new letter was insufficient to do that. Unfortunately the Court of Appeal disagreed

Katherine Dunseath's practice encompasses all areas of family law. She regularly appears in the High Court and Court of Appeal on domestic and international cases. In Guerroudj v Rymarczyk Katherine was counsel for the appellant.

Interviewed by Kate Beaumont.

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