

Neutral Citation Number: [2013] EWCA Civ 12

Case No: B5/2012/0843

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WATFORD COUNTY COURT
DEPUTY DISTRICT JUDGE WOOD
Claim No: OWD03363**

Royal Courts of Justice
Strand, London, WC2A 2LL
24/01/2013

B e f o r e :

**LORD JUSTICE MUMMERY
LORD JUSTICE ETHERTON
and
SIR SCOTT BAKER**

Between:

MICHAEL SIMS	Appellant
- and -	
DACORUM BOROUGH COUNCIL	Respondent

**MR ANDREW ARDEN QC and MR TOBY VANHEGAN (instructed by Arkrights
Solicitors) for the Appellant
MR ANDREW LANE and MR DEAN M UNDERWOOD (instructed by Dacorum BC
Legal, Democratic & Regulatory Department) for the Respondent**

Hearing date: 9th October 2012

Lord Justice Mummery:

Introductory

1. This property dispute broke out on the marriage breakdown of two joint tenants, who were entitled to a secure periodic tenancy of residential property let by a public authority. What is the legal position when only one of two joint tenants, in this case the wife, gives notice to the authority quitting the joint tenancy? Does the other joint tenant, in this case the husband still living in the property, have a right to remain there as a sole tenant?
2. The husband's case on this appeal is that, in order to achieve compatibility with Article 8 of the European Convention on Human Rights (ECHR) and Article 1 of the First Protocol and the Human Rights Act 1998 (the 1998 Act), English law is required to recognise that he has a sole tenancy of the property as his home, following his wife's termination of the periodic secure

joint tenancy by unilateral notice. The ECHR points are taken by the husband in the possession proceedings that the authority has taken against him.

3. In his only remaining defence to a possession order the husband's reliance on the following matters is emphasised. He did not himself give any notice to quit the joint tenancy. He did not concur in the notice given by his wife. He did not receive any prior notice from either his wife or the authority. As the property is still his home, he is entitled to respect for it under Article 8. As the property was one of his possessions, he was entitled to protection from interference with his enjoyment of it under Article 1 of the First Protocol to the ECHR. The recognition of his sole tenancy of the property would give legal and practical effect to his ECHR entitlements.
4. The ECHR points arise in the appeal brought by the husband, Mr Michael Sims, against the order for possession of the former matrimonial home obtained on 16 December 2011 by Dacorum BC (the Council). The property had been let by the Council to Mr Sims and his wife, Sharon, as joint tenants. The possession order was made by Deputy District Judge Wood in the Watford County Court on the basis that Mrs Sims had validly terminated the joint tenancy by notice to the Council. In accordance with well-established principles of contract and property law there was no longer in legal existence any tenancy under which Mr Sims could claim the right to occupy the property as a secure tenant, jointly, solely, or in any other recognised legal capacity.
5. The most striking feature of this appeal is that Mr Andrew Arden QC, who now appears for Mr Sims, agrees that this court must dismiss it. The real contest is whether this court should grant permission to appeal to the Supreme Court and stay the possession order, so that Mr Sims can challenge, under the 1998 Act, the compatibility with the ECHR of the current state of the law on the termination of periodic joint tenancies of residential property. The court has spent a day receiving submissions from both sides.
6. The legal position was settled by the House of Lords in the case of *Hammersmith and Fulham LBC v. Monk* [1992] AC 478 at 483E and 491A per Lord Bridge (*Monk*) before the 1998 Act came into force and it has been followed in cases decided after the 1998 Act came into force. In *Monk* the House of Lords held that, at common law, a periodic joint residential tenancy is terminated automatically, if one joint tenant, without the concurrence of the other joint tenant or tenants, serves a notice to quit on the landlord. The case advanced for Mr Sims is that, according to *Monk*, the notice to quit served by Mrs Sims on the Council has unilaterally deprived him of his legal interest in the property and of his statutory protection against the Council recovering possession of the property lived in by him as his home for the last 10 years or so.
7. Mr Andrew Arden QC says that the law laid down in *Monk*, which he accepts is binding on this court, fails to accord the required respect for the home of Mr Sims and/or is inherently an interference with the enjoyment of his possessions and a deprivation of his property rights. The required compatibility with the ECHR could be achieved, if the notice to quit in such circumstances were treated by the court as a release to Mr Sims of the interest of Mrs Sims in the property. Mr Sims would then be entitled to remain in occupation of his home and to protection as the sole tenant. In that way the law would, as it should, respect his home and protect the enjoyment of his possessions in accordance with the guarantees of the ECHR.
8. How should this court deal with this contested application for permission to appeal to the Supreme Court?
9. It would not, in my view, be right for this court simply to refuse the permission application on the basis that both sides have agreed that the appeal to this court should be dismissed. Nor would it be a judicially responsible procedure for this court simply to grant permission, unless it

was first satisfied that the ECHR points are reasonably arguable, which the Council insists they are not.

10. The appeal comes to this court with permission granted on 12 April 2012 by Aikens LJ. He also stayed the possession order. The appeal from the Deputy District Judge to the county court judge was granted permission, but the appeal was then transferred to this court without any intervening substantive judgement on that appeal. In those circumstances the Supreme Court and the parties are entitled to expect this court to deliver a more fully reasoned judgement than it normally would when refusing or granting an application for permission to appeal to the Supreme Court.
11. This judgement is intended to assist the appellate process by setting out the basic facts, identifying the issues and summarising the legal submissions that are bound to be repeated to the Supreme Court either (a) on an application to it for permission to appeal, if we refuse permission, or (b) on the substantive appeal, if we grant permission.

Basic facts

12. By a written tenancy agreement dated 15 March 2002 the Council granted to Mr & Mrs Sims jointly an introductory tenancy of a 3 bedroom house at 5 Dunny Lane, Chipperfield, Kings Langley, Herts (the property). The tenancy became a joint secure weekly tenancy as from 15 March 2003.
13. The Tenancy Agreement provided that, as regards “Ending joint tenancies”,–

“100. Where either joint tenant wishes to terminate their interest in a tenancy they must terminate the full tenancy as in (92) above.

101. We will then decide whether any of the other joint tenants can remain in the property or be offered more suitable accommodation.”
14. On the break-up of their marriage after, it is alleged, bouts of domestic violence by Mr Sims, his wife left the property in March 2010 with their two youngest children and moved into a women’s refuge. She wrote to the Council to say that she wanted to give up her tenancy. The Council replied suggesting that she serve a notice to quit. On 25 June 2010 she gave notice to the Council purporting to terminate the tenancy to expire on 26 July 2010.
15. By letter dated 19 July 2010 the Council had refused the request by Mr Sims to allow him to remain in the property and to transfer the tenancy into his sole name. He was informed that he had no legal right to stay in the property. The Council upheld its decision on subsequent internal reviews in December 2010 and June 2011. It had already issued possession proceedings against him on 28 October 2010.
16. In the defence it was pleaded, inter alia, that *Monk* was incompatible with the Article 8 rights of Mr Sims and that the court should construe the common law to make it compatible. The plea failed and a possession order was made. Mr Sims appealed on a number of grounds. The only ground now pursued is that the deputy district judge was wrong in law to decide that the service of the notice to quit by one joint tenant was effective to terminate the joint secure tenancy when that state of the law breached the rights of Mr Sims under Article 8 and Article 1 of the First Protocol of the ECHR. The latter ground was added by amendment.

Judgement below

17. In a 32 page handed down judgement the Deputy District Judge concluded that it was lawful and proportionate to make an order for possession. She said:–

- “79. Having reviewed the Council’s decisions to refuse Mr Sims a new tenancy and to bring proceedings seeking possession and the Council’s own reviews of those decisions I am quite satisfied that the Council’s careful decision-making process amply accorded with Article 8.1. I also consider that the decision that the Council made was one to which it could reasonably have come.”
18. On the submission that the rule in *Monk* was incompatible with the Article 8 right to respect for his home and family life, or should be construed compatibly with Article 8, the judge concluded that she was bound by the authorities to hold that, as a matter of law, “where, as here, a notice to quit has been served by one of two joint tenants of his own accord, that notice is effective to determine the joint tenancy.” See [52].

Submissions for Mr Sims

19. Mr Arden QC made very full submissions in support of the application for permission. Most of the original grounds of appeal having been withdrawn, all that is left is an amended ground 1, which reads:
- “The judge was wrong in law in deciding that the service of a notice to quit by one joint tenant was effective to terminate a joint secure tenancy. This breaches the appellant’s rights under Article 8 and/or article 1 of the First Protocol of the European Convention on Human Rights.”
20. Mr Arden QC agrees that the appeal must be dismissed, as this court is bound by the decision in *Monk* and that the common law adjustments proposed by him conflict with existing authority also binding on us: *Burton v. Camden LBC* [2000] 2 AC 399 and *Notting Hill HT v. Brackley* [2001] EWCA Civ 601, [2002] HLR 10, following *Crawley BC v. Ure* [1996] QB 13.
21. However, he submits that the effect of *Monk* is not reconcilable with the trend of authority from the Strasbourg Court on Article 8 and Article 1 of the First Protocol. The common law, “which belongs to the judges”, should evolve as “a living and developing entity” to achieve the result that is most compliant with the ECHR, so that there is no interference or deprivation, by treating the notice to quit as the release of one joint tenant’s interest to the other. Although that course is not open to the Court of Appeal, it was a good ground for granting permission to appeal to the Supreme Court.
22. There is no dispute that, as the claim for possession is by a public authority, the case falls within the scope of the 1998 Act. Mr Arden’s key point on the merits is that the effect of *Monk* is to destroy the legal rights of Mr Sims in the secure tenancy of his home without giving him any opportunity to participate in, or to influence the outcome of, the relevant legal process of service of the notice and its termination of the joint tenancy. The effect of the termination by Mrs Sims was to deprive her husband of his statutory protection in relation to the property.
23. Mr Arden QC developed his propositions by extensive citation from a long line of English and Strasbourg authorities. One could fill many, many pages with legal citations without adding anything of substance to the basic proposition that the private law rules on joint tenancies have to be re-fashioned by the Supreme Court in order to meet the requirements of the ECHR. The cases show, for example, that a “home” can exist without legal rights of occupation, so that a property can still be a “home” within Article 8 after the termination of a tenancy. *Cosic v. Croatia* (2011) 52 EHRR 1098 at [21] states the general proposition that “no legal provision of domestic law should be interpreted and applied in a manner incompatible with [the UK’s] obligations under the Convention.” Mr Arden argued that the termination of a right of occupation may engage Article 8 as being an interference with respect for the home. The Supreme Court has recognised the possibility that a court should be prepared to entertain an Article 8 challenge to the validity of the notice to quit, as well as to a claim for a possession order: *Hounslow LBC v. Powell* [2011] 2 AC 186 at [120] and [122]. However, no case was

cited by Mr Arden for converting a joint tenancy of residential property into a sole tenancy of property contrary to the wishes of the owner of the property.

24. The termination of the joint tenancy was also, Mr Arden submitted, an interference with the peaceable enjoyment of a possession within Article 1 of the First Protocol. The interference must be proportionate. A notice to quit given by one joint tenant to the landlord was incompatible with Article 1 of the First Protocol as interfering with the peaceable enjoyment of possessions: the other joint tenant, in this case Mr Sims, is disturbed in occupation and is threatened with eviction.

Submissions for the Council

25. The Council invites this court, on dismissing the appeal, to refuse permission to appeal to the Supreme Court.
26. As for the common law rule in *Monk*, there is no dispute that it is binding on this court and it has been applied and upheld consistently before and after the 1998 Act. Hence the recourse by Mr Arden QC to the incompatibility argument, which is ill-founded for several reasons.
27. First, the position of the Council in relation to Article 8. The article is not engaged by the rule in *Monk*. The aim of that Article is to protect the citizen from unjustified interference with respect for his home *per se*. The Council has done nothing to interfere with the respect for a home to which Mr Sims is entitled. The notice to quit in this case, which terminated the tenancy, was not given *by* it, but *to* it by Mrs Sims. It is not said that the possession proceedings taken by the Council are in themselves an unjustified interference with respect for the article 8 rights: *McCann v. UK* (2008) 47 EHRR 40 at [47]-[48]. The rights of Mr Sims in relation to those proceedings are adequately safeguarded by the court's assessment of the proportionality of possession orders and eviction.
28. Secondly, the nature of the common law rule on unilateral termination of a joint tenancy. It is not in itself an interference with the rights of Mr Sims within the meaning of Article 8 and is not incompatible with it. A bargain was made when the joint tenancy was entered into between the Council and the tenants and between the tenants themselves. That bargain created legally binding rights and obligations, which were explained to Mr Sims at the commencement of the tenancy. It is not open to Mr Sims to argue that the common law rule on joint tenancies has interfered with his right to respect for his home.
29. Thirdly, Article 1 of the First Protocol. The Council says that the article is not engaged and that there has been no interference with those rights. The termination of the joint tenancy by Mrs Sims was allowed by the nature of the bargain that the parties have made on the letting of the property
30. Fourthly, margin of appreciation. The common law rule falls squarely within the broad margin of appreciation afforded to Member States. It strikes a fair balance between the rights of the landlord and the tenant respectively. The Council entered into the tenancy agreement on the basis that more than one person would be liable under the tenant's covenants contained in it and that each of them could at any stage determine his liabilities as tenant under the agreement. Possible policy objections to a situation in which not all the joint tenants under a secure tenancy occupy the property as their only or principal home should be taken into account.
31. To sum up, the points taken on behalf of Mr Sims are not arguable points of law of general public importance which would justify consideration by the Supreme Court. If the law needs to be reviewed with a view to possible amendment, that is not a matter for the Supreme Court, whose proper constitutional function is to declare and apply the law. It is not so supreme that it can legislate for changes in the law. That is the function of Parliament which has procedures for

more widespread consultation, debate and scrutiny than a court hearing a single case argued only by the parties to it in their own respective interests.

Conclusion

32. My conclusions need only take five short paragraphs. To some extent they overlap by reverting to the same inescapable basic points.
33. First, the compatibility issue. In this appeal from a possession order obtained by the Council, the ECHR challenge is solely about the compatibility of the rule in *Monk* with Article 8 and Article 1 of the First Protocol. It is not about the engagement of those articles by the Council's possession proceedings against Mr Sims nor is it about whether such proceedings are justifiable by the Council.
34. Secondly, the objective of enhancement. It is not the object of this appeal to secure respect for the home lived in by Mr Sims as a joint tenant or even to protect from interference or deprivation the property and contract rights that Mr Sims had acquired (with his wife) from the Council as joint tenants. The sole aim is to enhance property rights conferred by contract by securing for him a sole tenancy of the Council's property without the concurrence of the Council as owner of the property. If Mr Arden is right, Mr Sims would acquire, by force of ECHR law and in the absence of any agreement with the owner of the property, greater and different property and contract rights binding on the Council than he and his wife had originally acquired from the Council by agreement. Stating the matter quite baldly, he is aiming, by use of the ECHR, to obtain a tenancy of a three bedroom family house for himself in place of the joint tenancy of a family home which the Council had originally granted. That seems to me to be more a case of interference with the Council's enjoyment of its possessions than of an interference by the Council with the possessions of Mr Sims.
35. Thirdly, Article 8 is not engaged. *Monk* laid down a substantive rule of property and contract law under which one joint tenant has the right to serve notice unilaterally terminating a periodic joint tenancy. Mrs Sims had that right, as did Mr Sims: its defeasibility by an act of one of them was inherent in the legal nature of the joint tenancy granted to them by the Council. Mrs Sims exercised her right. There is nothing in the legal rule *per se* or in its exercise by Mrs Sims that was an interference by her or by the Council with respect for the home of Mr Sims.
36. Fourthly, Article 1 of the First Protocol is not engaged. As (a) the rule in *Monk* is a proprietary and contractual legal right inherent in the joint tenancy of the property granted by the Council to Mr Sims and Mrs Sims and (b) the notice given by Mrs Sims to the Council was in exercise of her rights as a joint tenant, there was no "interference" by her or by the Council with the enjoyment of the possessions of Mr Sims. His relevant possession was an interest in a joint tenancy that was, in its very nature, terminable unilaterally by Mrs Sims or by him. The Council's role regarding the rule in *Monk* was simply as recipient of the notice given to it by Mrs Sims terminating the joint tenancy. The Council itself did nothing in relation to the termination of the joint tenancy that could possibly be described as an interference by it with the peaceable enjoyment by Mr Sims of the property.
37. Finally, the proposed appeal to the Supreme Court. It is unarguable. There is no incompatibility between the rules of English property and contract law relating to the termination of a joint tenancy by one joint tenant and the ECHR. I cannot think of a sensible purpose that would be served by the expenditure of yet more public funds (on both sides) on a repeat of this debate before five (or even more) Justices of the Supreme Court of the United Kingdom.

Result

38. I would dismiss the appeal. The parties rightly regarded that as inevitable. I would also refuse permission for another appeal. It would be a waste of the publicly funded resources of the Supreme Court.

Lord Justice Etherton:

39. I agree.

Sir Scott Baker:

40. I also agree.