CAMDEN LONDON BOROUGH COUNCIL v GOLDENBERG

Court of Appeal

Nourse, McCowan and Thorpe LJJ

14 March 1996

Property – Tenancy – Secure tenancy – Secure tenant in council accommodation leaving property and assigning tenancy to grandson – Whether grandson having resided with tenant for 12 months prior to tenant's departure – Whether secure tenancy validly assigned – Housing Act 1985, s 87

The appellant's grandmother was granted a secure tenancy of council property in April 1983. In 1985 the appellant moved in with her. He was away between November 1989 and April 1991 and left the property again on his marriage in February 1992 when he and his wife moved into a friend's house to house-sit. In May 1992, having failed to find suitable accommodation, the couple separated and the appellant returned to live with his grandmother. She moved into a nursing home on 18 November 1992 and that day signed a deed assigning all her interest in the property to her grandson. The council did not accept the assignment and issued proceedings for possession. The judge held that the grandson, the burden being upon him, had failed to establish a period of 12 months' residence with his grandmother ending on the date of the assignment on 15 November 1992, and therefore that he had not satisfied the conditions of s 87 of the Housing Act 1985 and could not claim to have succeeded to his grandmother's tenancy. The grandson appealed.

Held – allowing the appeal (McCowan LJ dissenting) – it was clear from the authorities that a period of absence did not necessarily breach the continuity of residence. Regard must be had to the nature and extent of the continuing contact with the premises in dispute throughout the period of absence, and the quality of the intention to return. In the present case, with regard to the first element, the premises had continued to be the appellant's postal address and he had left most of his possessions there. With regard to the second, in the light of the appellant's evidence as to the difficulty of finding suitable alternative accommodation within his means, his intention to return must be characterised as an intention to return unless something unexpected turned up. On that basis there had been no breach in the continuity of his residence.

Statutory provisions considered
Housing Act 1985, ss 87, 88, 91(3)(c)

Cases referred to in judgment
Brickfield Properties Ltd v Hughes (1988) 20 HLR 108, CA
Crawley Borough Council v Sawyer (1988) 20 HLR 98, CA
Edwards v Bairstow [1956] AC 14, [1955] 3 WLR 410, [1955] 3 All ER 48, HL
Governors of Peabody Donation Fund v Grant (1982) 6 HLR 41, CA
Hedgedale Ltd v Hards (1991) 23 HLR 158, CA
Hildebrand v Moon (1990) 22 HLR 1, CA
Middleton v Bull [1951] 2 TLR 1010, CA
Morgan v Murch [1970] 1 WLR 778, [1970] 2 All ER 100, CA

Geraldine More O'Ferrall for the grandson
Christopher Walker for the local authority

Cur adv vult

THORPE LJ:

This is an appeal from the judgment of his Honour Judge Zucker given on 29 November 1994 in an action between the London Borough of Camden and the appellant, Adam Bloom. The case concerned a tenancy of premises in north-west London granted by the council to the defendant's grandmother. The issue in the case was whether the appellant had succeeded his grandmother as a secure tenant of the premises by virtue of the operation of ss 87 and 91(3)(c) of the Housing Act 1985.

There is no great dispute as to the history. On 4 April 1983 the council granted the tenancy to the appellant's grandmother, Mrs Goldenberg. The premises consist of a one-bedroom flat with living room and the usual offices in a block of flats reserved for elderly people. In 1985 the appellant arrived in England from Israel and moved in with his grandmother. Between November 1989 and April 1991 he again lived in Israel. However, on his return in April 1991 he continued to live with his grandmother. By about that date he had formed a relationship with Raya Cohen and it was their desire to live together in a home of their own. However, they had not the means to do so. The appellant was employed as a salesman at a modest salary. Raya was studying to qualify as an osteopath. Subsequently the wages clerk or the accountant responsible for the appellant's wage packet suggested that were he married his net salary after deductions would increase by £50 per month. For the sake of that sum, which in the scale of their economy was significant, the appellant and Raya Cohen went through a ceremony of marriage on 22 February 1992. They regarded it as a prelude to a full-scale family wedding which was planned to take place in Israel in the following year. At that time friends had left for a holiday in New Zealand and their house in Bounds Green was therefore temporarily unoccupied. The house was available until their friends returned from New Zealand on a date towards the end of April or at the beginning of May 1992. When the appellant left his grandmother's flat to live with Raya in Bounds Green his brother Julian took his place in the flat. There was no doubt that the house-sitting arrangement had to end on the owner's return but it was clearly the intention of the appellant and Raya to move to some other independent accommodation if it could be found. In the transcript of evidence there is the following exchange between the judge and the appellant:

> '**Judge**: If you found somewhere suitable you would have continued to live with your wife after the beginning of May 1992?
> **Appellant**: Oh, most definitely.'

On the other hand the young couple faced great practical difficulties. When asked by his counsel to explain the reason that he and Raya had not lived together after the marriage he answered:

> 'We basically couldn't afford to. We were always looking for places and, you know, to find … I mean, there's just some horrible places and we weren't prepared to live in sort of holes for, you know, the amounts of money it was, so we just had to carry on as we were.'

No other opportunity having arisen during the house-sit the appellant and Raya separated at its conclusion and the appellant returned to the premises, his brother moving out on his return. Mrs Goldenberg was in increasing need of care and on 15 November 1992 she moved into a nursing home. On that day she signed a deed in the following terms:

> 'As tenant of [the premises] property by virtue of a tenancy agreement made between myself and the London Borough of Camden and dated 4 April 1983, in consideration of my natural love and affection I hereby assign all my interest in the property to my grandson, Adam Bloom.'

Her signature to this deed was duly witnessed. However, the council did not accept the assignment and on 26 May 1993 issued the proceedings for possession. By their particulars of claim they pleaded:

> '(3) At a date unknown to the plaintiffs but prior to 15 December 1992 the second defendant was allowed into occupation of the property by the first defendant without the licence or consent of the plaintiffs. Thereafter the first defendant vacated the property and ceased to occupy it as her only or principal home …
> (6) The second defendant remains in occupation of the property without the licence or consent of the plaintiffs.'

Although Mrs Goldenberg was joined as first defendant and had subsequently made a number of inconsistent statements, the judge refused an application at the hearing for her evidence to be taken on commission on the grounds of her age and condition. The plaintiffs abandoned their case against her and her solicitor withdrew leaving the single issue between the council and the appellant.

By his defence the appellant had pleaded:

> '6. As at 15 November 1992 the second defendant was a person to whom the first defendant could validly assign the tenancy.
> *Particulars*
>
> (1) the second defendant as the first defendant's grandson was a person who would have been entitled to succeed to the tenancy;
> (2) the second defendant had been living with the first defendant throughout the 12 months preceding the assignments;
> (3) there has been no other assignment or succession to the tenancy.'

Thus at the trial the issue was whether the appellant could establish a valid assignment of his grandmother's secure tenancy by proving that he had satisfied the conditions of s 87 of the Housing Act 1985. Paragraph 6 of the defence was of course drawn from that section. In its application to the present case and by virtue of s 91(3)(c), s 87 effectively provides:

> 'A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's [removal] and either—

(a) he is the tenant's spouse, or
(b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's [removal];

unless in either case the tenant was himself a successor, as defined in section 88.'

It was not alleged that Mrs Goldenberg was herself a successor and therefore the essential question to be decided by the judge was whether the appellant had resided with his grandmother throughout the period of 12 months ending 15 November 1992. The essence of the judge's conclusion on this issue is contained in the last five paragraphs of his judgment. They read as follows:

'All the documents in the bundle addressed to Mr Bloom show his address as [the premises], both those prior to February 1992 and those after that date. His evidence that apart from 2 months he was living at that address is borne out, as far as it can be, by the witnesses Mr Reader and Mr O'Flynn. It is supported by his wife. There is no direct evidence to the contrary and the matters urged upon me by Mr Walker for the local authority, though they do raise – and I say this quite plainly – matters of concern, are not sufficient to persuade me that Mr Bloom has not told me the truth about the periods when he was living at this address, and I therefore find as a fact that he was living there in November 1991, that he moved out at the end of February 1992 and that he moved back in again at the end of April or the beginning of May 1992.

That brings me to what I consider is the most important and the most difficult issue in this case, and that is whether Mr Bloom has satisfied the condition of s 87 of the Housing Act 1985; that is, that he resided with Mrs Goldenberg throughout the period of 12 months ending with the assignment of 15 November 1992. It is quite clear on the authorities that the question whether one person is residing with another is a matter of fact and degree, and each case has to be decided in the light of its own facts. It is equally clear that temporary absences depending upon the circumstances do not necessarily lead to the conclusion that a person is not residing with another person.

The salient facts I have to consider are the reasons why and the circumstances in which Mr Bloom moved out of the premises. He in fact married Miss Raya Cohen on 22 February 1992 and it was following that marriage that together they moved into a friend's house to, as they said, house-sit. Both Mr Bloom and Mrs Bloom (as she now is) gave evidence that this was, in a sense, a marriage for tax reasons. They were both quite poor at the time. Mr Bloom was a salesman; Mrs Bloom was a student seeking to qualify as an osteopath. They had very little money. They looked forward to a more formal family wedding much later ahead and so it was, in a sense, a coincidence that moving into their friend's house coincided with the marriage. When their friends came back, they split up once again and Mr Bloom returned to his grandmother's flat.

But the other important factor is the evidence of Mr Bloom, that when he left his grandmother's flat and started to live with his wife following their marriage, his intention was that they should continue to live together

> if he found anything suitable. In fact, nothing suitable was found at the end of their period of cohabitation and therefore he moved back to live with his grandmother.
> I find this matter very evenly balanced but I have come to the conclusion that by moving out, following his marriage – which is a matter of significance for whatever particular reason the ceremony was undergone at the time – and moving out with the intention of living together and continuing to live together if they could find something suitable does mark a break in the residence with Mrs Goldenberg. If they had found something suitable, Mr Bloom – as he said – would not have moved back. He was living during this period as one of a married couple and would have continued to do so if he had been able to. I have therefore come to the conclusion that the burden being upon Mr Bloom, he has not established a period of 12 months' residence with his grandmother prior to the assignment on 15 November 1992. He cannot therefore claim to have succeeded to his grandmother's secure tenancy, and so I find.'

Miss More O'Ferrall submits that this is a flawed conclusion. She says first that the judge failed to consider and determine the important issues of whether the appellant had remained in occupation despite his absence on what he described as a pseudo-honeymoon and also whether the appellant had the intention to return. Secondly, she submits that the judge misdirected himself in finding that the combination of the house-sit together with the intention to move on to other accommodation if it could be found were sufficient to interrupt residence with Mrs Goldenberg since that conclusion was inconsistent with seven specific factors that had been established in evidence. Mr Walker for the council submitted that the judge had made findings and had drawn proper inferences from those findings which fully supported the conclusion to which he had come. He submitted that they were inferences of fact and that it was not for the appellate court to substitute alternative factual inferences. He relied particularly on the judgments of Somervell and Denning LJJ in the case of *Middleton v Bull* [1951] 2 TLR 1010.

The conclusion reached by the judge is certainly not one that offends common sense. Many lay people would agree that the appellant could not claim to have been resident with his grandmother throughout the period of 12 months ending with her removal since he had voluntarily absented himself for a period of approximately 10 weeks within the course of that final year. However, the question is not whether the conclusion is consistent with common sense but whether it is consistent with authority. Here I have considerable sympathy with the judge. Only three cases were cited to him and two of those authorities were not relied upon by either counsel in this court. However, they have cited to us six authorities in addition to that common to both hearings. Miss More O'Ferrall, in addition to *Crawley Borough Council v Sawyer* (1988) 20 HLR 98 that was in the court below, referred to *Brickfield Properties v Hughes* (1988) 20 HLR 108, *Governors of Peabody Donation Fund v Grant* (1982) 6 HLR 41, *Morgan v Murch* [1970] 1 WLR 778 and *Hildebrand v Moon* (1990) 22 HLR 1. Mr Walker relied upon *Middleton v Bull* and *Hedgedale Ltd v Hards* (1991) 23 HLR 158. None of these cases is precisely parallel. Five consider similar provisions of the Rent Acts. Most are concerned with the quality rather than the duration

of the residence relied upon. *Hedgedale Ltd v Hards* was a case raising the continuity of the period of residence but in that case the issue stemmed from the temporary absence of the tenant and not the claimant. Despite these distinctions, the general principle was succinctly stated by Parker LJ in *Crawley Borough Council v Sawyer* where he said at 102:

> 'Going through the whole thread of these matters is the common principle 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.'

In the Rent Act case of *Brickfield Properties Ltd v Hughes* (1988) 20 HLR 108, 113, Neill LJ extracted the following guidelines:

> (1) Where the tenant's absence is more prolonged than is to be explained by holiday or ordinary business reasons and is unintermittent, the onus lies on the tenant of establishing an intention to return if he seeks the protection of the Act.
> (2) An inward intention, however, 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".
> (3) In addition the tenant must show that there is a "practical possibility" … or a "real possibility" … of the fulfilment of that intention within a reasonable time. What is a reasonable time depends on the circumstances …
> (4) The protection of the Act can be claimed even though the tenant has another home or residence … but the court will look with particular care at two-home cases.

Extending those principles to the present case it is clear that a period of absence does not necessarily break the continuity of residence. In determining whether or not the departure has that consequence regard must be had to:

(1) the nature and extent of the continuing connection with the premises in dispute throughout the period of absence; and
(2) the quality of the intention to return.

As to the first element the premises remained the appellant's postal address and the majority of his possessions were left behind there. As to the second I would say that he intended to return unless something better turned up before his friends returned from New Zealand. The judge put it that he intended not to return if they found something else suitable. This seems to me to be the heart of the present case. The departure for the pseudo-honeymoon simpliciter would surely not have jeopardised continuity of residence. The complicating factor was the intention to take advantage of anything that might turn up during its course. But what was the prospect of

carrying out that intention? Was it an expectation or a mere hope? It seems to me that the reality of this case was that it was a distant prospect sufficient only to qualify, and not to displace, the intention to return.

The judge found the case very evenly balanced. Into one scale he placed 'the salient facts', all of which were indicia in favour of the appellant. In the other scale he placed 'the other important factor' namely 'the evidence of Mr Bloom, that when he left his grandmother's flat and started to live with his wife following their marriage, his intention was that they should continue to live together if he found anything suitable'. On the plaintiff's evidence of the difficulties of finding anything in the private sector on his income this intention must be characterised as an intention to return unless something unexpected turned up. Such a qualification of the intention to return does not in my judgment justify the conclusion to which the judge came. The pan containing 'the salient facts' weighed heavier than the pan containing 'the other important factor'. Nor do I consider that the appellant's marriage in the circumstances of its celebration bears upon the evaluation of the intention to return to any material degree.

For all those reasons I would allow this appeal.

McCOWAN LJ:

I consider first the nature and extent of the appellant's connection with the premises in question during the period from February to May 1992 when he was living in Bounds Green. On his side, reliance is placed on the fact that he left the majority of his belongings at his grandmother's flat during this period. On the other hand, however, there is no suggestion that during this period he spent a night there or could have done since his brother Julian had taken his place in the one-bedroomed flat, or that he performed any function for his grandmother. Moreover, the judge found of this period that the appellant had moved out of his grandmother's flat with the intention of living with his wife and continued during the period in question living with her 'as one of a married couple'.

I turn to the question of the quality of the appellant's intention to return to the premises in question. Thorpe LJ says that his intention 'must be characterised as an intention to return unless something unexpected turned up'. While no doubt it may be characterised as an intention to return if he failed to find accommodation where he and his wife could live together, it can also be characterised, in my judgment, as an intention not to return if he succeeded in finding accommodation where he and his wife could live together.

If either way of looking at the matter is permissible, a helpful method of deciding the right way is to look to see what his preferred option was. About that there can be no doubt. In firm and unequivocal terms in evidence he expressed a preference for continuing to live with his wife rather than return to a one-bedroom flat with his grandmother in a block reserved for elderly people. That preference is only in accordance with what one would expect, however fond he was of his grandmother, as he and his wife were not long married, and the judge accepted that the marriage was 'a matter of significance for whatever particular reason the ceremony was undergone at that time'. Being of that preference, it could reasonably be expected that he would be trying hard to find accommodation for himself and his wife.

The law which the judge had to apply was as follows:

(1) The question whether a person is residing with another is a matter of fact and degree and each case has to be decided in the light of its own facts.
(2) The burden was on the appellant to show that he was residing with his grandmother during the 12 months to 15 November 1992 (the date of the assignment). In this case that meant he had to show that during the period February to May 1992 he had an intention to return into occupation of the premises in question.

The judge held that the appellant had failed to discharge that burden. I see no respect identified in which the judge can be said to have misdirected himself in law. Additionally, there was evidence before him on which he was entitled to find as he did. He saw and heard the witnesses, and this court is in no position to substitute its view of them. In all those circumstances, I cannot see how, had the judge been taken to other authorities, none of them parallel to this one on their facts or indicating his view of the law to be wrong, it can properly or usefully be speculated as to whether he would have come to a different conclusion.

In my judgment, this is a case where the Court of Appeal cannot properly interfere with the judge's decision.

If I am wrong about this and this court is entitled to draw its own inferences from the facts found by the judge, I consider the following facts found by the judge to be the ones from which it is proper for us to draw inferences:

(1) the marriage was a matter of significance;
(2) the appellant left his grandmother's flat in order to live with his wife;
(3) he continued from February to May 1992 living with her as one of a married couple;
(4) his plain preference was thereafter to continue living with his wife rather than returning to his grandmother.

On those facts I draw exactly the same inference as the judge, namely that there was a break in the continuity of his residence with his grandmother. Accordingly, I would conclude as did the judge that the appellant had failed to establish a period of 12 months' residence with his grandmother prior to 15 November 1992.

I would, therefore, dismiss the appeal.

NOURSE LJ:

I agree with the judgment of Thorpe LJ.

In their application to this case, the decisive requirement of ss 87 and 91(3)(c) of the Housing Act 1985 is that the appellant should have resided with his grandmother, Mrs Goldenberg, throughout the period of 12 months ending with her departure from the premises on 15 November 1992.

Residence is a question of fact and degree. Given the application of the correct legal test, such a question becomes one of fact, which may depend not only on the primary facts found or agreed but on the inferences properly to be drawn from them. On such a question the view of the judge at first instance is of prime importance. But, where the appeal is a rehearing, this court is at liberty to substitute its own view for that of the judge. It will not do so in regard to his findings of primary fact unless there is no evidence to

support them or they are against the weight of the evidence as a whole. But in regard to the inferences properly to be drawn from primary facts there is a greater freedom.

This restatement of the principles on which this court acts is made necessary by the reliance of Mr Walker, for the council, on *Middleton v Bull* [1951] 2 TLR 1010, where it was held that because the inference drawn by the county court judge from the primary facts was a conclusion of fact and not of law this court would not interfere with his decision. It must, however, be remembered that it was not until the enactment of ss 109 and 110 of the County Courts Act 1959 that there was any right of appeal from a county court on a question of fact; see now the general right of appeal on both law and fact conferred by s 77(1) of the County Courts Act 1984. So in *Middleton v Bull*, unlike the present case, this court was not conducting a rehearing. It was performing a function similar to that performed by the High Court on an appeal by way of case stated; see, for example, *Edwards v Bairstow* [1956] AC 14.

The real value of *Middleton v Bull* lies in Denning LJ's observations on the test to be applied in determining whether one person has resided with another. At 1012, he said:

> 'A son may be "residing with" his mother even though he is not physically present, as in the case of a sailor son away on a voyage, or a soldier on national service. A daughter may be "residing with" her mother even though she is training as a probationer nurse or is away on holiday. Conversely, even the mother need not necessarily be at home for all the time. If she were away ill in hospital for the last six months before her death, a son or daughter might still be held to be "residing with" her. These illustrations show that mere absence from home for some part, or even for the whole, of the six months is not decisive.'

Putting those observations together with those quoted by Thorpe LJ from the judgments of Parker LJ in *Crawley Borough Council v Sawyer* (1988) 20 HLR 98, 102, and Neill LJ in *Brickfield Properties v Hughes* (1988) 20 HLR 108, 113, I agree with him that, in determining whether or not a departure from the premises has broken the continuity of residence, regard must be had, first, to the nature and extent of the continuing connection with the premises throughout the period of absence and, secondly, to the quality of the intention to return.

Judge Zucker found that the appellant was living with Mrs Goldenberg at the premises in November 1991, that he moved out at the end of February 1992 and that he moved back in again at the end of April or the beginning of May 1992. He was still living there on 15 November 1992. The judge also found, effectively, that the premises remained the appellant's postal address between February and May 1992. He evidently accepted the appellant's evidence, previously rehearsed, that all his belongings remained there during that period, with the exception of those few items he needed for his temporary absence. Those facts must be put together with the appellant's intention, as found by the judge, that he and his wife should continue to live together if, during the period of the house-sit, they found something suitable for the two of them; in other words, not to return to the premises in that event. There is no difference of substance between such an intention and an

intention to return to the premises unless they were able to find something suitable for the two of them. They are simply the two sides of the same coin.

On those facts, I would hold that there was no break in the continuity of the appellant's residence at the premises. I agree with Thorpe LJ that if this had been the simple case of the appellant's going to house-sit for a friend for a period of 10 weeks or so during the 12 months in question, there could have been no doubt in the matter. The case would have fallen well within the examples given by Denning LJ in *Middleton v Bull*. Was then the continuity broken by the quality of the appellant's intention? I do not think that it was. His intention not to return was contingent on finding something suitable for himself and his wife. That event did not occur. The intention was never realised. The appellant returned to the premises, which was still his postal address and where the bulk of his belongings still were. His intention caused no change in his circumstances. It was as if it had never been formed.

For these reasons, I would allow the appeal.

Appeal allowed with costs here and below. Costs below to be taxed on county court scale 2. Paragraphs 1, 2 and 4 of judge's order discharged. Legal aid taxation of appellant's costs of appeal.

Solicitors: *Fisher Meredith* for the grandson
Local authority solicitor

PATRICIA HARGROVE
Barrister