Michaelmas Term
[2014] UKSC 65
On appeal from: [2013] EWCA Civ 494

JUDGMENT

Loveridge (Appellant) *v* Mayor and Burgesses of the London Borough of Lambeth (Respondent)

before

Lord Neuberger, President
Lord Wilson
Lord Sumption
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

Wednesday 3 December 2014

Heard on 21 October 2014

Appellant	*Respondent*
Jan Luba QC Michael Paget (Instructed by Hopkin Murray Beskine)	Andrew Arden QC Desmond Kilcoyne (Instructed by Lambeth Legal Services)

LORD WILSON: (with whom Lord Neuberger, Lord Sumption, Lord Carnwath and Lord Toulson agree)

1. Section 28 of the Housing Act 1988 ("the 1988 Act") identifies a measure of damages payable by a landlord to a residential occupier of premises whom he has unlawfully evicted from them. Construction of the section is not straightforward. On 25 September 2012 His Honour Judge Blunsdon, sitting in the Lambeth County Court, determined a claim for damages brought by Mr Loveridge against the London Borough of Lambeth ("Lambeth"). Mr Loveridge had been a residential occupier of premises let to him by Lambeth. The judge found that it had unlawfully evicted him from them. By reference to the construction of it which he favoured, the judge awarded Mr Loveridge damages of £90,500 under section 28 as well as of £9,000 otherwise than under the section. Lambeth appealed to the Court of Appeal against the judge's award of damages under section 28. On 10 May 2013, by a judgment delivered by Briggs LJ with which Arden LJ and Sir Stanley Burnton agreed, [2013] EWCA Civ 494, [2013] 1 WLR 3390, the court favoured a different construction of the section, which led it to order that Lambeth's appeal be allowed, that the judge's award under section 28 be set aside in its entirety but that the award of damages otherwise than under the section be increased to £16,400. Against these orders Mr Loveridge now appeals.

2. In November 2002 Lambeth granted to Mr Loveridge a weekly tenancy of a flat at 19 Moresby Walk, London SW8. The tenancy was secure within the meaning of section 79 of the Housing Act 1985. The flat was on the ground floor and was self-contained with one bedroom. It was one of two flats in a purpose-built two-storey building and at all material times the flat upstairs, namely 20 Moresby Walk, was also subject to a secure tenancy. On 9 July 2009 Mr Loveridge went to Ghana, from where he did not return until 5 December 2009. He was in breach of a term of the tenancy agreement which required him to notify Lambeth of any absence from the flat for more than eight weeks. But he continued to pay the rent. On 22 September 2009, believing that he had died, Lambeth effected forcible entry to the flat; took possession of it by changing the locks; and left a notice to quit, expressed to expire on 26 October 2009. At around that expiry date it also cleared out his belongings and disposed of them. Two days after his return to England, but when he was unable to prevent it, Lambeth let the flat to somebody else. The judge rejected Lambeth's contention that prior to 22 September 2009 Mr Loveridge had ceased to occupy the flat as his principal home and that his tenancy had therefore ceased to be secure. It was on that basis that the judge held Lambeth's eviction of him to have been unlawful. It was agreed that his damages in respect of its trespass to his goods amounted to £9000; and so it

was in respect of their trespass that the judge added £9,000 to his award of £90,500.

3. The parties further agreed that, at common law, the damages for any unlawful eviction of Mr Loveridge from the flat during the subsistence of a secure tenancy amounted to £7,400. Mr Loveridge contended, however, that he was entitled to a higher sum by way of damages under sections 27 and 28 of the 1988 Act and he conceded that, if so, he was precluded by section 27(5) from also receiving damages at common law in respect of the eviction.

4. The main purpose behind the 1988 Act was set out in a White Paper, Cm 214, entitled "Housing: The Government's Proposals" and presented to Parliament in September 1987. That purpose, set out in Chapter 3, was to stimulate the availability of rented accommodation in the private sector by making lettings more attractive to private landlords. This was to be achieved by provisions which extended the ambit of two types of tenancy which had been introduced by sections 56 and 52 of the Housing Act 1980. The first was the "assured tenancy" in which, when letting certain types of property, the landlord had been entitled to extract a "market" rent rather than a lower, "fair", rent, albeit that his entitlement to recover possession at the end of the term had been restricted. The second was the "protected shorthold tenancy" in which, albeit at risk of a reduction of the contractual rent to a "fair" rent, the landlord had been entitled to recover possession at the end of the term. The 1988 Act duly extended the circumstances in which an assured tenancy could be granted; and it amended the description of a "protected shorthold tenancy" to an "assured shorthold tenancy" and changed its nature so as to enable the landlord to charge a "market", rather than a "fair", rent as well as to remain unshackled by any significant security of tenure on the part of the tenant at the end of the contractual term.

5. But the government, when introducing the bill which became the 1988 Act, and Parliament, when enacting it, both realised that it created a danger. It was that some unscrupulous landlords, tempted by the prospect of entering into new tenancies on terms much more favourable to themselves (or of selling their properties with vacant possession in what in 1988 was a spiralling real property market), would seek to drive out such of their existing tenants as, under the Rent Act 1977, enjoyed protection in respect both of rent and of security of tenure. So, in the White Paper, the government wrote:

> "3.17 It is important that existing tenants whose Rent Act rights will be preserved should be protected against the minority of landlords who may be prepared to harass them in order to obtain vacant possession and to relet at higher rents. The Government

> therefore proposes to increase the existing statutory protection by creating a new offence where the landlord harasses the tenant …. The Government also proposes to strengthen the civil law to enable tenants who have been evicted illegally or forced out by harassment to claim greater compensation. This would be an important additional deterrent to harassment."

6. The facility for the unlawfully evicted tenant to claim enlarged compensation was duly provided in sections 27 and 28 of the 1988 Act, which are in Chapter IV of Part 1 of it. The chapter is entitled "Protection from Eviction".

7. Section 27 is entitled "Damages for unlawful eviction". Subsection (1) provides:

> "This section applies if, at any time after 9th June 1988, a landlord (in this section referred to as 'the landlord in default') … unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises."

8. Section 27(2) provides that the section also applies if, in summary, the residential occupier yields occupation as a result of acts of harassment on the part of a landlord who knew that they were likely to have that result.

9. Section 27(3), (4) and (5) provides:

> "(3) Subject to the following provisions of this section, where this section applies, the landlord in default shall, by virtue of this section, be liable to pay to the former residential occupier, in respect of his loss of the right to occupy the premises in question as his residence, damages assessed on the basis set out in section 28 below.
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> (4) Any liability arising by virtue of subsection (3) above -
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> (a) shall be in the nature of a liability in tort; and
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> (b) subject to subsection (5) below, shall be in addition to any liability arising apart from this section (whether in tort, contract or otherwise).

> (5) Nothing in this section affects the right of a residential occupier to enforce any liability which arises apart from this section in respect of his loss of the right to occupy premises as his residence; but damages shall not be awarded both in respect of such a liability and in respect of a liability arising by virtue of this section on account of the same loss."

10. Section 27(6) provides that the landlord is not liable to pay damages under subsection (3) if in certain circumstances the occupier is reinstated in the premises.

11. Section 27(7) gives the court power to reduce damages under subsection (3) if, in summary, the occupier's conduct prior to the eviction makes it reasonable to do so or if the landlord had offered to reinstate him. The trial judge declined Lambeth's invitation to him to exercise this power. Although in a second ground of appeal Lambeth challenged his ruling in this respect, and although the Court of Appeal noted that in the light of its conclusion on the first ground the second ground did not need to be determined, Lambeth no longer pursues it even in the event that Mr Loveridge's appeal to this court were to succeed.

12. Section 27(8) provides the landlord with a defence to liability for damages under subsection (3) if, in summary, he proves that, when he deprived the occupier of occupation, he believed, and had reasonable cause to believe, that the occupier had ceased to reside in them. Lambeth raised this defence before the trial judge but he rejected it and Lambeth did not appeal against his ruling in this respect.

13. Section 27(9) provides definitions which apply both to that section and, by virtue of section 28(4), also to section 28. Two of the definitions are material.

    (a) The first, at (a), is the definition of "residential occupier", which is to have the meaning set out in section 1 of the Protection from Eviction Act 1977, namely a person occupying premises as a residence, whether (as in the case of Mr Loveridge) under a contract or by virtue of any enactment or rule of law giving him the right to remain there.

    (b) The second, at (b), is the definition of a residential occupier's "right to occupy", which is to include "any restriction on the right of another person to recover possession of the premises in question".

14. Section 28 is entitled "The measure of damages". Its relevant provisions are as follows and, since the issue surrounding its construction primarily relates to the terms of subsections (1)(a) and (3)(a), I will set them in bold:

> "(1) The basis for the assessment of damages referred to in section 27(3) above is the difference in value, determined as at the time immediately before the residential occupier ceased to occupy the premises in question as his residence, between -
>
> (a) **the value of the interest of the landlord in default determined on the assumption that the residential occupier continues to have the same right to occupy the premises as before that time;** and
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> (b) the value of that interest determined on the assumption that the residential occupier has ceased to have that right.
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> (2) In relation to any premises, any reference in this section to the interest of the landlord in default is a reference to his interest in the building in which the premises in question are comprised (whether or not that building contains any other premises) together with its curtilage.
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> (3) For the purposes of the valuations referred to in subsection (1) above, it shall be assumed -
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> (a) **that the landlord in default is selling his interest on the open market to a willing buyer;**
>
> (b) ..."

Although section 27(3) describes the damages payable to the tenant under section 28 as being in respect of his loss of the right to occupy, it is clear that they are designed to yield to him not the amount of his loss but, exceptionally, the amount of the gain which the landlord would otherwise have achieved by reason of the eviction.

15. It is clear that the principal target of sections 27 and 28 of the 1988 Act was the unscrupulous private landlord saddled with a tenancy protected, in terms both of rent and of security, by the Rent Act 1977 and therefore created prior to 15 January 1989, after which, as a result of section 34 of the 1988 Act, such a tenancy could not generally be created. Local authority landlords rarely perpetrate unlawful evictions of their tenants. When they do so, it is usually, as here, as a result of honest misjudgement and scarcely ever (although it was found to have occurred in *AA v London Borough of Southwark* [2014] EWHC 500 (QB)) as a result of any deliberate intention to act unlawfully. A local authority will not be motivated to seek to deploy its housing stock for gain. Nevertheless the words of section 27 are wide enough to cover an unlawful eviction on the part of a local authority; and when, as in the case of tenancies from the Crown, Parliament wished to exclude the operation of section 27 (and thus of section 28), it expressly so provided: section 44(2)(a). So it is agreed that the sections apply to an unlawful eviction of a tenant by a local authority.

16. Section 28(1) of the 1988 Act requires the court to make two valuations, namely (a) and (b), as at the time immediately prior to the unlawful eviction. Both valuations are of the landlord's interest, which, by virtue of subsection (2), means his interest in the building in which the demised premises are comprised even if it contains other premises. In the present case it was therefore agreed that the valuations were to relate to Lambeth's interest in the whole two-storey building at Moresby Walk, including the upstairs flat.

17. The two valuations are to be determined on different assumptions. Valuation (a) is to be based on the assumption that the tenant continues to have the same "right to occupy" the premises as he had prior to his eviction. Indeed, in the light of the definition in section 27(9)(b) of the Act, the assumption that he continues to have the same right to occupy includes an assumption that he continues to enjoy the benefit of the same restrictions on the landlord's right to recover possession as he enjoyed prior to the eviction. Valuation (b), by contrast, is to be based on the assumption that the tenant ceased to have that right, including that he ceased to enjoy that benefit.

18. The valuation exercises mandated by section 28(1)(a) and (b) of the 1988 Act would have been straightforward but for the further assumption which is mandated by section 28(3)(a). This provides that, for the purposes of both valuations, it shall be assumed that the landlord is selling his interest on the open market to a willing buyer. The interface between section 28(3)(a) and section 28(1)(a) is at the heart of the appeal.

19. Of course the notion that Lambeth would put the building at 19 and 20 Moresby Walk on the open market for sale is fanciful in the extreme. It could not dispose of the building without the consent of the Secretary of State: section 32(2) of the Housing Act 1985, as inserted by section 6(2) of and Schedule 1 to the Housing and Planning Act 1986. And, in the event of its proposed disposal to a private sector landlord, Lambeth would be required to consult the tenants and the Secretary of State could not give his consent if a majority of them had objected to it: paragraphs 2, 3 and 5 of Schedule 3A to the 1985 Act. It is agreed, however, that these formidable obstacles to sale are irrelevant. For the mandatory assumption is that Lambeth "is" indeed selling its interest on the open market. As Lord Donaldson of Lymington, Master of the Rolls, said in *Tagro v Cafane* [1991] 1 WLR 378, 387:

> "… the whole concept of the landlord … selling his interest on the open market to a willing buyer assumes that he *can* sell it on the open market to a willing buyer …"

20. It is further agreed that the least absurd hypothesis would indeed be of a sale to an ordinary private landlord rather than, say, to another local authority or to a private registered provider of social housing. The ordinary private landlord would be interested in purchasing the building for a simple reason: that, in his hands, the two sets of premises there could both generate market rents. Upon sale to him the secure tenancies held by the two tenants immediately prior thereto would cease to exist because the landlord condition of a secure tenancy would no longer be satisfied: sections 79 and 80 of the Housing Act 1985. Instead section 1(1) of the 1988 Act would convert the tenancies to being assured and would therefore confer on the landlord the power to bring the rents up to market level pursuant to sections 13 and 14 of that Act.

21. It now becomes possible to explain the dispute between the parties about the nature of the valuations mandated by section 28 of the 1988 Act.

22. Mr Jenner was the chartered surveyor and valuer whom both parties initially instructed to provide valuations.

    (a) In respect of valuation (a), his instructions, once refined, were to value the building as at 22 September 2009 on the assumption that both flats were subject to *secure* tenancies. By reference to a capitalisation of the rents payable under the tenancies, Mr Jenner's valuation (a) was in the sum of £123,000.

(b) In respect of valuation (b), his instructions were to value the building as at 22 September 2009 on the assumption that the owner had vacant possession of the downstairs flat but that the upstairs flat was subject to a *secure* tenancy. By reference to the market value of properties comparable to the downstairs flat and to a capitalisation of the rent payable for the upstairs flat, Mr Jenner's valuation (b) was in the sum of £213,500.

(c) So the difference between Mr Jenner's valuations (a) and (b) was £90,500, being the sum which the trial judge awarded to Mr Loveridge by way of damages under section 28.

23. Mr Robson was the chartered surveyor and valuer whom, with the court's permission, Lambeth instructed to provide valuations notwithstanding its prior joint instruction of Mr Jenner. It asked him to provide them on three different assumptions, of which it is only to the third that I need to refer, namely a sale on 22 September 2009 to an ordinary private landlord.

(a) In respect of valuation (a), his instructions were therefore to value the building as at 22 September 2009 on the assumption that both flats had then become subject to *assured* tenancies. By reference to market comparables, Mr Robson's valuation (a) was in the sum of £304,000.

(b) In respect of valuation (b), his instructions were to value the building as at 22 September 2009 on the assumption that the owner had vacant possession of the downstairs flat but that the upstairs flat had then become subject to an *assured* tenancy. By reference to market comparables, Mr Robson's valuation (b) was again in the sum of £304,000. For his opinion, not challenged by Mr Jenner, was that in 2009 there was no difference between the value of 19 Moresby Walk if bought with vacant possession and if bought subject to an assured tenancy.

(c) So the difference between Mr Robson's valuations (a) and (b) was nil, being the sum which the Court of Appeal considered to be Mr Loveridge's entitlement under section 28.

24. The issue is, therefore, whether the valuations of both flats (for valuation (a)) and of the upstairs flat (for valuation (b)) should be conducted on the assumption that they are subject to *secure* tenancies or to *assured* tenancies.

25. Lambeth's case is primarily constructed upon section 28(3)(a) of the 1988 Act, which requires the assumption of a sale by the landlord on the open market. It contends that a market valuation of property must take into account a change in the use which a purchaser might make of the property and for which he may therefore make allowance in his offer. In this respect it cites the judgment of the Judicial Committee of the Privy Council in *Raja Vyricherla Narayana Gajapathiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302, in which it was held that the market value of land subject to compulsory purchase should include such extra value as might be paid for the facility to collect fresh water which was generated by a spring on the land but which was presently going to waste. Lord Romer, at p 313, described it as self-evident that the land was to be valued by reference not merely to the use to which it was being put but to the uses to which it was reasonably capable of being put.

26. With respect, Lord Romer's proposition remains self-evident. But the exercise mandated by section 28 of the 1988 Act is more complicated than an identification of market value. The assumption of a sale on the open market is "for the purposes of" the valuations referred to in subsection (1), in which other assumptions are mandated, namely (a) that the tenant "continues to have the same right to occupy the premises" as he had immediately prior to the eviction and, alternatively, (b) that he "has ceased to have that right".

27. What was the right which Mr Loveridge had to occupy the downstairs flat immediately prior to the eviction? It was the right of a secure tenant. Lambeth correctly argues that the consequence of a notional sale to a private landlord would be to convert the status of Mr Loveridge's tenancy (and indeed that of the tenancy upstairs) from secured to assured. But in my view the notional exercise mandated by subsection 3(a) of section 28 does not extend to making the consequential adjustments to the nature of Mr Loveridge's right (or indeed that of the tenant upstairs) consequent upon sale. For that is barred by the words of subsection 1(a). Within this highly artificial exercise, regard to the effect of one assumption is halted by the terms of another.

28. The decision of the Court of Appeal in *Osei-Bonsu v Wandsworth LBC* [1999] 1 WLR 1011 relates to another rare example of an unlawful eviction of a secure tenant by a local authority. As here, it was as a result of the local authority's honest misjudgement. Under section 28 of the 1988 Act the trial judge awarded the tenant damages of £30,000. The court upheld Wandsworth's argument that the award should have been reduced by two-

thirds pursuant to section 27(7). But Wandsworth also sought to challenge the figure of £30,000, which, as it had earlier agreed, represented the difference between the value of the house subject to a secure tenancy and its value with vacant possession. The court held that it was too late for Wandsworth to resile from the agreement. But it noted both Wandsworth's proposed contention, which, but for the lateness, it regarded as strong, and the tenant's proposed rebuttal of it, which it regarded as weak. Wandsworth's proposed contention was that the tenant's secure tenancy was held only jointly with his estranged wife and that therefore Wandsworth, which was in the process of rehousing her, had only to persuade her to serve it with a valid notice to quit for the tenancy to come to an end. There was therefore a feature of his tenure prior to the eviction which was unrelated to the notional sale and yet which made it extremely fragile. The tenant's proposed rebuttal was that the hypothesis was of a sale by Wandsworth and that no purchaser would be likely to enjoy the same power of persuasion over the wife as Wandsworth enjoyed. In a judgment with which the other members of the court agreed, Simon Brown LJ said at p 1022:

> "The clear answer to this argument, I am satisfied, lies in [Wandsworth's] submission that what is being valued is the interest of the landlord … not the abstract interest of a notional willing buyer. Although the concept of a willing buyer helps to fix the respective valuations, one postulates the landlord's continuing ownership in fact."

Although it may take time to understand his last sentence, Simon Brown LJ there expressed the view, with which I respectfully agree, that the likely effect of a sale upon the subsistence or otherwise of the secure tenancy should not be brought into the valuation exercise mandated by section 28.

29. Nobody could have put Lambeth's argument more persuasively than did Briggs LJ in his judgment under appeal. He said in para 28:

> "Mr Loveridge's rights of occupation had, from the very grant of his secure tenancy, been vulnerable to being downgraded on a sale by his local authority landlord to a private landlord. It was a vulnerability inherent in the nature of his rights."

The Lord Justice rightly put aside the extreme unreality of any such proposed sale. But he endorsed a valuation under section 28(1)(a) which was based upon a notional downgrading of the right which Mr Loveridge had prior to the eviction, namely the right of a secure tenant, so as to become the right

only of an assured tenant. In my view his endorsement was wrong: for, as His Honour Judge Blunsdon had concluded in a judgment of enviable clarity, section 28(1)(a) requires the basis of the valuation to be that Mr Loveridge "continues" following the eviction to have "the same right" to occupy as he had prior to the eviction. I therefore propose that the appeal should be allowed and the judge's order restored.

30. Parliament might wish to revisit the application of section 27, and therefore of section 28, of the 1988 Act to unlawful evictions on the part of local authorities. No doubt all reasonable means of dissuading them from making unlawful evictions, whether by misjudgement or otherwise, should be in place. But the facts are that Lambeth did not realise a capital gain, and never aspired to realise a capital gain, as a result of its eviction of Mr Loveridge; and that its intention was always to re-let the flat and that, once it did so, even its notional gain was eliminated. In such circumstances it seems wrong that, by reference to a calculation of its notional gain, the law should require payment to Mr Loveridge out of public funds in an amount which is 12 times greater than that of his loss.