



PUMP COURT
Chambers

TEMPLE, LONDON EC4Y 7AB
Tel: (020) 7842 7070

Public Law Defences in Possession Proceedings

This is a version of my article **[2010] JR 85** which I have now updated to take account of the Supreme Court's decision in *Manchester CC v Pinnock* [2010] 3 WLR 1441; [2010] UKSC 45. It was, in turn, originally adapted from a talk on *Collateral challenges in public law* at the PLP Conference *Judicial Review Trends & Forecasts* 8th October 2009

Nik Nicol has been a barrister since 1986, specialising in Social Welfare Law, particularly Housing. He has appeared in all levels of court and tribunal in England, up to and including the House of Lords. He was formerly a law centre worker and Director of Policy and Research at the Public Law Project. He is currently a part-time Chairman of the Leasehold Valuation Tribunal and an accredited mediator. He has written or contributed to a number of books and articles on housing, human rights and fuel rights. His website is www.niknicol.co.uk.

Introduction

This article concerns the development of defences based on public law principles being used in county court possession proceedings, from the House of Lords's decision in *Kay v Lambeth LBC; Leeds CC v Price*¹ to the Supreme Court's consideration in *Manchester CC v Pinnock*².

The House of Lords famously established the limits of public law challenges in *O'Reilly v Mackman*:-

“[As] a general rule [it would be] contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.” – per Lord Diplock³

However, shortly after, the House of Lords also established that public law defences may be raised in the county court in *Wandsworth LBC v Winder*.⁴ D had a council tenancy. The Council resolved to increase council rents and served notice of increase on D. D thought the increases excessive and refused to pay the difference. The Council brought possession proceedings on the ground of rent arrears. In his Defence, D claimed he was not liable for the arrears because the resolutions and notices of increase were ultra vires and void. He also counterclaimed for a declaration to that effect. The Council applied to strike out the Defence and Counterclaim as an abuse of process in accordance with *O'Reilly v Mackman* and *Cocks v Thanet DC*.⁵

The House of Lords's response to the Council's application was straightforward and relatively simple. They held, firstly, that it was a paramount principle that the private citizen's recourse to the courts for the determination of his rights was not to be excluded except by clear words and that there was nothing in RSC Ord.53 [now CPR 54] or the Supreme Court Act 1981 s.31 which could be taken as abolishing a citizen's right to challenge the decision of a local authority in the course of defending an action such as the current possession proceedings. Secondly, it would be a very strange use of language to describe D's behaviour in relation to the proceedings brought against him as an abuse or misuse of the process of the court, for he did not select the procedure to be adopted and was merely seeking to defend the proceedings. He put forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour.

¹ [2006] 2 AC 465

² [2010] 3 WLR 1441

³ [1983] 2 AC 237, at 285E

⁴ [1985] AC 461

⁵ [1983] 2 AC 286

Limiting *Winder*

The simplicity of the House of Lords's reasoning appeared in logic to brook little dissent. However, the Court of Appeal in *Avon CC v Buscott*⁶ sought to distinguish and limit the effect of *Winder*. In that case, B and others were living on council land in improvised shelters. The Council brought summary possession proceedings. B sought to adjourn proceedings so that evidence could be adduced that he and the others were gypsies and that the Council were in breach of its then duty to provide sites for them. The judge refused the adjournment and B appealed.

The Court of Appeal held that a defendant could challenge the reasonableness of an authority's decision during ordinary proceedings, rather than in judicial review, where they did so in support of a private law right. *Winder* concerned a tenant who said rent arrears were not payable and so his right to occupy the property continued, i.e. "it was a defence on the merits",⁷ whereas B did not claim any right to occupy the land. B could only challenge the authority by way of judicial review. In the possession proceedings, B could only seek an adjournment to permit an application for judicial review and such an adjournment could only be granted if the judge was satisfied there was a "real chance of leave to apply being granted."

The Court of Appeal went further in *Manchester CC v Cochrane*⁸. C was an introductory tenant, a status of very limited security under Part V of the Housing Act 1996. The Council served the requisite notice and confirmed their decision on review. In the subsequent possession proceedings C had no defence under the statutory provisions but alleged breach of natural justice as a public law defence. The district judge, and then the circuit judge on appeal, refused to strike out the defence on the basis of *Winder*. The Council's appeal was allowed for 3 reasons⁹:-

- 1) Unlike in *Buscott*, C did have a right of occupation but Part V of the Housing Act 1996 provides that the court must (not may) make a possession order in certain circumstances. The court may not adjourn proceedings simply to put pressure on the landlord to reconsider, rather than pending the determination of an application for judicial review. "The general prohibition in section 38(3) of the County Courts Act 1984 [to grant any of the public law remedies, namely certiorari, mandamus or prohibition] operates as a ban on any county court reviewing the exercise or failure to exercise a public duty unless there is parliamentary authority for it to do so."

⁶ [1988] QB 656

⁷ per Lord Donaldson MR at 663D-E

⁸ [1999] 1 WLR 809

⁹ per Sir John Knox at 818G-821A

- 2) The fact that Parliament has conferred jurisdiction on the county court to consider public law points in homelessness appeals under s.204 of the Housing Act 1996 indicates that it has no jurisdiction where Parliament has not done so.
- 3) If an introductory tenant were to be allowed to introduce public law defences in the county court possession proceedings and they succeeded, then the proceedings would have to be dismissed and the tenant would become a secure tenant. However, in judicial review, the authority would be required to re-do the defective steps, such as a review. In the meantime, the adjourned possession proceedings would remain and there would be no danger of the tenant becoming a secure tenant by a procedural back door. An adjournment for judicial review is slow and cumbersome but its necessity is compelled by the statutory provisions and will remain so until Parliament changes them, including giving the necessary flexibility of avoiding a tenant becoming a secure tenant in the way suggested above.

Restoring *Winder*

This remained the position, with defendants seeking adjournments in the county court so that they had time to apply for judicial review in the Administrative Court, until the House of Lords in ***Kay v Lambeth LBC; Leeds CC v Price***¹⁰ appeared to reverse the effect of ***Buscott*** and ***Cochrane***, although neither case was mentioned in any judgment and only the former was even mentioned in argument.¹¹ There were two conjoined appeals. The first case concerned housing licensed by a local authority to a housing trust to use for homeless applicants. The House of Lords had previously held that the occupants were secure tenants.¹² LBL determined the head leases and sought possession on the basis that the occupants were now all trespassers. The second case concerned gypsies occupying local authority land without their consent, similar to the facts in ***Buscott***. Both cases were defended by reliance on ECHR Art.8 but in relation to public law defences, the House of Lords held:-

- Any procedure that requires consideration of ECHR/public law issues would be bound to delay proceedings. It is preferable, wherever possible, that the matter should be dealt with in the county court, rather than by adjourning the proceedings to enable the defendant to apply in the High Court for permission for judicial review of the decision to apply for the possession order. A defendant has the right to contend in his defence that the decision of a public authority to recover possession was one which no reasonable person could consider justifiable. This was said to be the consequence of the decision in ***Winder***, despite what was said in ***Buscott*** and ***Cochrane***.

¹⁰ [2006] 2 AC 465

¹¹ see Lord Hope at paras 86 and 110 (approved by Lord Scott at para 174, Baroness Hale at para 192 and Lord Brown at para 212) and Lord Brown at para 208

¹² *Bruton v London & Quadrant Housing Trust* [2000] AC 406

- If the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are:-
 - a. If a seriously arguable point is raised that the law itself is incompatible with ECHR Art.8; or
 - b. If the defendant wishes to challenge the decision of the authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided that the point is seriously arguable – **Winder**.

The majority held that the public law grounds of challenge under gateway b. do not include that the authority has acted in breach of the ECHR.

The House of Lords confirmed this statement of the law in **Doherty v Birmingham CC**.¹³ D and his family of gypsies had occupied a local authority site for 17 years. The Council terminated their licence not because anyone had done anything wrong but under plans to re-develop the site. D put forward human rights and public law defences. The House of Lords held that the law was incompatible with human rights but was shortly to be amended anyway. The case would be remitted to the court below to determine the reasonableness of the authority's decision to serve the notice to quit, taking into account the authority's reasons and the length of time the family had resided on the site.

The House of Lords in **Doherty** were faced, after they heard argument but before they gave judgment, with the European Court of Human Rights's judgment in **McCann v UK**¹⁴ which appeared to contradict the reasoning in **Kay** and **Price** on the effect and role of Art.8 of the ECHR. It is beyond the scope of this article to consider the impact on the debate on the role of the ECHR in English law but, partly in order to try to square the circle by retaining **Kay** and **Price** despite **McCann**, their Lordships sought to explain further the nature and role of public law challenges under gateway (b). Unfortunately, their comments seem to create more questions than answers:-

- a. Lord Hope stated¹⁵, "I think that in this situation it would be unduly formalistic to confine the review strictly to traditional Wednesbury grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the council's decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the first defendant and his family have resided on the site, would be appropriate. But the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. In my opinion the test of reasonableness should be, as I said in *Kay*, at para 110, whether the decision to recover possession was one which no reasonable person would consider justifiable." For this

¹³ [2009] 1 AC 367, per Lord Hope at para 52

¹⁴ (2008) 47 EHRR 40; [2008] HLR 40

author, it is impossible to fathom the difference between this formulation of *Wednesbury* grounds and the “traditional” sort so that the first sentence of this quote is meaningless.

- b. Both Lords Hope and Scott suggested that a judge hearing a public law challenge could resolve factual disputes but then both asserted that the role of the court was limited to whether the relevant decision was reasonable. This appears confusingly contradictory, suggesting both that the authority is the fact finder subject to the court’s review and that, instead, the court may be the fact finder.
- c. Lord Scott stated¹⁶ that the ECtHR “appear to believe that on an application for a summary judgment the court cannot consider ‘any issue concerning the proportionality of the possession order’”. Not so. An article 8 defence requires the judge to review the lawfulness of the local authority's decision to recover possession of the property in question and, in doing so, to review the factors that a responsible local authority ought to have taken into account in reaching its decision. The proportionality of the decision in all the circumstances of the case would be central to the review and if the local authority's decision could be shown to be outside the range of reasonable decisions that a responsible local authority could take, having regard both to the circumstances of the defendant as well as to all the other relevant circumstances, the decision would be held to be unlawful as a matter of public law.” This passage conflates the previously clear distinction between proportionality and reasonableness¹⁷, to the extent that he appears to regard proportionality as the same as reasonableness as currently applied in English courts. This author has not been able to locate any support for this proposition.
- F d. Lord Scott also stated¹⁸, “If all the circumstances of the case are taken into account, the conclusion that Mr McCann's article 8 defence was unarguable is, in my respectful opinion, inevitable and plainly right.” Lord Scott was clearly unaware that, to date, Mr McCann remains the only defendant to have succeeded in an English court at trial in his Art.8 defence to possession proceedings.

The Court of Appeal in *Doherty*¹⁹ had helpfully explained the principles that could be drawn from the seven separate speeches from the House of Lords in *Kay* and *Price*. In *Doran v Liverpool CC*²⁰ the Court of Appeal, equally helpfully, sought to explain the four full speeches of their Lordships in *Doherty*, reviewing and summarising the relevant law. The Council had terminated D’s licence to occupy a pitch at one of their sites, on the basis of alleged anti-social

¹⁵ at para 55

¹⁶ at para 85

¹⁷ See *R v SSHD ex p Brind* [1991] 1 AC 696

¹⁸ at para 87

¹⁹ [2007] HLR 32

²⁰ [2009] EWCA Civ 146

behaviour. D put in a public law defence. The judge gave summary judgment on the basis that the defence was unarguable. On appeal it was held:-

- 1) If a licensee wished to advance public law grounds for not making a possession order, they had to show a seriously arguable case that the authority's decision to recover possession was one which no reasonable person would consider justifiable.
- 2) There was no formulaic or formalistic restriction of the factors which might be relied upon by the licensee in support of an argument that the authority's decision to serve a notice to quit, and seek a possession order, was one which no reasonable person would have taken.
- 3) Such factors were not automatically irrelevant simply because they might include the licensee's personal circumstances, such as length of time of occupation.
- 4) Doherty also decided that the question whether the local authority's decision was one which no reasonable person would have made was to be decided by applying public law principles as they had been developed at common law, and not by reference to the ECHR.
- 5) When it came to judging whether an authority had acted in a way in which no reasonable person would have done, the existence of the court's statutory power to suspend possession was in itself an important factor.
- 6) On the factual history, the submission that no reasonable local authority would have served a notice to quit was hopelessly unarguable. It had cause to believe that there had been repeated breaches of the licence and antisocial behaviour by D or members of her family.
- 7) In such circumstances a reasonable council did not have to conduct the equivalent of a judicial investigation into where exactly the truth lay between the allegations and counter-allegations before deciding that it was appropriate to terminate the appellant's licence (*per* Waller LJ in **R (McLellan) v Bracknell Forest BC**²¹). If the decision to serve a notice to quit was reasonable on the material known to the local authority at the time, it could not be invalidated by a later reconsideration of that material. The court could not make a judgment of the reasonableness of the decision otherwise than on the facts as they reasonably appeared, or should have appeared, to the local authority at the time of making its decision.

Toulson LJ also noted²²:-

“All parties were agreed that *Doherty* had to some degree widened gateway (b) ... The parties disagreed sharply on the effect of the revision of the formula. ... Counsel were united in the view that the decision had created a new battleground area ... and predicted that there would inevitably be much argument about the scope of the

²¹ [2002] QB 1129 at para 97

²² at para 46

modification of gateway (b) in future cases in the county court and on appeal. That is a bleak prospect. The last thing that will help councils or caravan dwellers is further complexity or uncertainty.”

In **Central Bedfordshire Council v Taylor**²³ the facts were very similar to those in **Kay**, namely that the defendants were trespassers who remained in occupation after the head lessor terminated the defendants’ landlord’s interest. Waller LJ felt that this distinguished the case from **Doherty** and required him to go back to **Kay** to determine the relevant law. He derived the following propositions:-

- 1) The question of whether a decision of a public authority is “reasonable” goes beyond the question whether it is rational.²⁴
- 2) The authority should take account of the personal circumstances of the occupier known to it.²⁵
- 3) The court may consider the facts right up to its decision and is not limited to those known when the authority first decided to seek possession, taking into account the reality that an authority may make a fresh decision whether to continue with proceedings when faced with further relevant information.²⁶
- 4) It is unlikely that there will ever be circumstances in which it will be unreasonable to seek possession against trespassers, rather than not to allow a period of time for bringing a possession order into effect.²⁷

Limiting *Winder* again?

Two more Court of Appeal judgments developed the law yet further. The Court of Appeal did not have anything new to say in **Manchester CC v Pinnock**²⁸ about the line of cases since **Kay** and **Price**, save that they were considering the scheme for demoted tenancies under the Housing Act 1996 and held that the terms of s.143D specifically excluded jurisdiction to hear public law defences in the county court, leaving judicial review as the only potential remedy. This decision was appealed and the Supreme Court’s judgement is considered below.

In **Salford CC v Mullen**²⁹ the Court of Appeal heard five appeals together. Three concerned the introductory tenancy scheme which is also contained in the Housing Act 1996 and is in virtually identical terms as those of the demoted tenancy scheme. In the light of the judgment in **Pinnock** and the previous judgment in **Cochrane**, the Court of Appeal felt itself bound to

²³ [2009] EWCA Civ 613

²⁴ *Taylor* para 44

²⁵ *Taylor* para 44

²⁶ *Taylor* paras 39-41

²⁷ *Taylor* para 44

²⁸ [2010] 1 WLR 713

²⁹ [2010] EWCA Civ 336

hold that the county court's jurisdiction to hear public law defences in relation to introductory tenancies was similarly excluded. However, the Court of Appeal was aware of the upcoming appeal in **Pinnock** and sought to summarise the current state of the law in order to provide guidance for county court judges pending the Supreme Court's judgment.

The Court of Appeal pointed to its recent decision in **Barber v LB Croydon**.³⁰ In that case, the tenant successfully overturned a possession order on the basis that the local authority had acted unreasonably in proceeding without regard to their own policy on dealing with anti-social behaviour by disabled tenants. The Court of Appeal in **Salford** held that any argument regarding venue and the existence of a gateway (b) defence in the county court had been effectively foreclosed.³¹

Technically, the comments of the House of Lords in **Kay** and **Price** had been both *obiter* (i.e. not part of the *ratio* of the case) and *per incuriam* (decided without consideration of relevant authority). This problem had not been raised in, let alone cured by, later cases. Therefore, it had been possible to argue that the reasoning in **Buscott** and **Cochrane** remained valid. In effect, this was part of the argument put on behalf of the local authorities in **Salford**:-

- 1) The Court of Appeal in **Cochrane** relied on s.38(3) of the County Courts Act 1984 but that merely prevents the county court from issuing certain remedies. It does not stop the county court dismissing a claim for possession based on public law arguments. This argument was upheld in **Salford** in very short order without any express consideration of what the same court had said in **Cochrane**.³²
- 2) It was argued that a **Winder** public law defence was only open to a litigant to defend a private law remedy (which is what the Court of Appeal had decided in **Buscott**). However, the Court of Appeal in **Salford** pointed out that in **Doherty** the majority in the House of Lords had contemplated that a public law defence could be run in the county court even where the occupier did not have a private right and they were bound by **Doherty**.³³ It is also important to remember that the House of Lords made their comments in **Kay** and **Price** in the context of the ECHR. The House of Lords regarded the ability to raise a public law defence in the county court as an element in the ability of the courts to comply with the ECHR – Lord Hope stated “the two routes, or ‘gateways’, may be said to work together to address the incompatibility due to the lack of a procedural safeguard, which is the fundamental point that is at issue in this case.”³⁴

Having rejected two of the arguments on which **Buscott** and **Cochrane** were based, the Court of Appeal in **Salford** nevertheless decided, as already mentioned above, that they were bound by the conclusion in **Cochrane** as to introductory tenancies because any way around it was

³⁰ [2010] EWCA Civ 51

³¹ **Salford** para 50

³² **Salford** para 47

³³ **Salford** para 48

³⁴ **Kay** para 53

blocked by the decision in **Pinnock**. In particular, they relied on the procedural argument used in **Cochrane** (see paragraph (3) on page 4 above). The reasoning was specifically approved in **Pinnock**.³⁵ However, the reasoning is faulty. The notice to be served on an introductory tenant, the review and the outcome of the review must all come before possession proceedings are issued³⁶. If any of those were to be found to be defective in judicial review proceedings, it is more than arguable that they should be quashed and that, thereafter, any proceedings would have to be commenced afresh afterwards. This would mean that the problem seen by the Court of Appeal in **Cochrane** looms just as large if the defence is raised in judicial review proceedings rather than in the county court.

The Court of Appeal in **Salford** summarised that a gateway (b) defence would only be available for an introductory tenant in the sense that “the question will be whether there is some highly exceptional circumstance which should lead to the County Court adjourning the matter so that Judicial Review can be applied for in the Administrative Court.”³⁷

The other two appeals in **Salford** concerned non-secure tenants whose tenancies had been granted under the local authorities’ duties to homeless persons under Part VII of the Housing Act 1996. The Court of Appeal stated that, “if there is to be a judicial review that should take place in the County Court and ... the legislation does not itself contain ... a review procedure in relation to the facts which give rise to a decision to serve a notice to quit.” However, they said it would take highly exceptional circumstances for there to be a gateway (b) defence³⁸ and also pointed to a number of factors which would militate against a successful one³⁹:-

1. It will be relevant if the authority accept that they will continue to owe a duty under Part VII to secure accommodation for the occupier after eviction.
2. If the authority does not accept a continuing duty, then that decision will often be subject to review and county court appeal under ss.202-204 of the Housing Act 1996.
3. The purpose of the homelessness legislation is to provide temporary accommodation so that the authority may manage accommodation in the interests of the homeless as a group.

Pinnock in the Supreme Court

The county court in **Pinnock** had made a demotion order on the grounds of anti-social behaviour by the tenant’s children. The authority then took further possession proceedings due to allegations of further anti-social behaviour by the children. The county court judge held that he could only consider a challenge on conventional judicial review grounds and he could not resolve factual disputes or consider proportionality under Art.8 of the ECHR. On those

³⁵ per Stanley Burnton LJ in **Pinnock** at para 52

³⁶ see, in particular, s.129(6)

³⁷ **Salford** para 65

³⁸ **Salford** para 67

³⁹ **Salford** para 66

traditional judicial review grounds, he held that the authority's review panel had been entitled to uphold the decision to terminate the tenancy so that he was obliged to make the possession order. The Court of Appeal upheld this decision as referred to above.

The Supreme Court sat with a panel of nine judges so that they could reconsider the line of cases, both in the House of Lords and in the European Court of Justice, since **Kay** and **Price**. Lord Neuberger gave the single judgement of the whole court (in welcome contrast to the multiple judgements in the previous cases in the House of Lords). The Court held:-

1. When a local authority sought a possession order, the court had the power to assess the proportionality of making the order. This power was necessary if domestic law was to be compatible with Art.8 of the ECHR.
2. The court also had the power, in making the proportionality assessment, to resolve any relevant dispute of fact.
3. Both parties and the court could take into account matters, including grounds for possession, right up to the date of the relevant court hearing.
4. The court below had not applied the law correctly but the Supreme Court could assess proportionality itself. On the facts of this case, it was proportionate for a possession order to be made.

The Court defined the case as being principally about the application of Art.8 of the ECHR. However, their reasoning was intimately bound up with the issue of the availability of public law defences in the County Court.

Conclusion

It would appear that, in their eagerness to try to ensure compatibility between English law on possession proceedings and the ECHR, the House of Lords **Kay** and **Price** overlooked the development of the law since **Winder** and extended the principles derived from that case further than had been seen previously. However, the meaning and effect of that extension has still to be worked out and it is hoped that the Supreme Court will take the opportunity in **Pinnock** to provide further guidance.