Bhai v Black Roof Community Housing Association Ltd [2000] APP.L.R. 11/02

CA on appeal from Central London County Court before Kennedy LJ' Jonathan Parker LJ. 2nd November 2000

LORD JUSTICE JONATHAN PARKER:

INTRODUCTION

1. This is an appeal by the claimants in the proceedings, Rizwan Ali Bhai and Cathy Cabare, against an Order made by His Honour Judge Brian Knight QC on 28 October 1999, dismissing the appellants' appeal against a decision of an arbitrator appointed under the Independent Housing Ombudsman Scheme. The appeal to the Judge was on a point of law, pursuant to section 69 of the Arbitration Act 1996. The appeal to this court is brought with the permission of the Judge.

2. The defendant in the proceedings, and the opposing party in the arbitration, is a housing association now called Black Roof Community Housing Association Limited ("the Association"). The Association is the respondent to this appeal.

3. The issue before the arbitrator was whether the appellants, who are tenants of a residential property known as Flat 16, 97B Knatchbull Road, London SE5 ("the flat") under a contractual periodic tenancy granted by the Association in 1985, have a right to buy the flat under Part V of the Housing Act 1985.

4. It is common ground that the issue whether the appellants have a statutory right to buy the flat depends upon whether their tenancy is a secure tenancy for the purposes of the Housing Acts. If it is, then they have the right to buy.

5. The arbitrator decided that the tenancy was not a secure tenancy but an assured tenancy, and consequently that the appellants had no right to buy. However, neither party seeks to uphold the arbitrator's conclusion that the tenancy is an assured tenancy.

   Before the Judge, the parties effectively repeated the arguments of law which they had addressed to the arbitrator. The Judge, in a written judgment in which he reviewed the relevant statutory history (as set out below), held that the tenancy was not a secure tenancy and accordingly dismissed the appellants' appeal.

THE FACTUAL BACKGROUND

6. The factual background is non-controversial. On 9 December 1985 the Association (under its then name Black Roof Housing Co-operative Limited) granted the appellants a periodic tenancy of the flat. At that time the Association was, as its then name suggested, a fully mutual housing co-operative; that is to say, its membership was restricted to tenants or prospective tenants. As such, it was registered both with the Housing Corporation (under the Housing Acts) and with the Registrar of Friendly Societies (under the Industrial and Provident Societies Act 1965).

7. Since the grant of their tenancy the appellants have occupied the flat as their home.

8. In or about December 1991 (the precise date is not material) the Association, by altering its rules, ceased to be fully mutual.

THE STATUTORY BACKGROUND

9. In considering the effect of the relevant statutory provisions in the instant case, it is necessary to keep in mind the distinction between a housing association which is fully mutual, and one which is not. For convenience, I will refer hereafter to a fully mutual housing association (sometimes referred to as a housing co-operative) as a *"mutual association",* and to a housing association which is not fully mutual as a *"non-mutual association"*. As appears from the recital of the factual background, the Association was a mutual association at all material times prior to December 1991 or thereabouts, when it became a non-mutual association.

10. With that distinction in mind, I turn to the relevant statutory provisions.

11. When the appellants' tenancy was granted in 1985, it was neither a protected tenancy for the purposes of the Rent Act 1977 (see ibid. s.15), nor was it a secure tenancy for the purposes of Chapter II of the Housing Act 1980 (see ibid. s.49(2)). It was however subject to the fair rent regime contained in Part VI of the Rent Act 1977, since it fell within the definition of the expression "*housing association tenancy"* in Part VI (see ibid. s.86).

12. The Housing Act 1985 (which came into force on 1 April 1986) is a consolidating Act. It effectively replicates Chapter II of the 1980 Act, albeit not in precisely the same terms. Section 79(1) of the 1985 Act provides that a tenancy under which a dwellinghouse is let as a separate dwelling is a secure tenancy at any time when the conditions described in section 80 and 81 respectively as *"the landlord condition"* and *"the tenant condition"* are satisfied. (No issue arises in this case in relation to *"the tenant condition",* and it is accordingly unnecessary to make further reference to it.)

13. As originally enacted, section 80(1) of the 1985 Act provided that *"the landlord condition"* was that the interest of the landlord belonged to one of a list of specified authorities or bodies, including *"a housing association or housing co-operative to which this section applies",* and subsection (2)(a) provided that the section applied to a non-mutual association but not to a mutual one. Thus the appellants' tenancy continued to be a non-secure tenancy, since the Association was at that time a mutual association. In other words, so far as the appellants' tenancy is concerned, the 1985 Act had the same effect as the 1980 Act.

14. The Housing Act 1988 (which came into force on 15 January 1989) introduced the assured tenancy regime. Under the 1988 Act, most new housing association tenancies fall within that regime. But the regime did not apply to

existing tenancies (see ibid. Schedule 1 para 1). Hence the appellants' tenancy did not become an assured tenancy (and, as noted earlier, it is common ground that the conclusion of the arbitrator to the contrary was wrong). However, the tenancy continued to be a "*housing association tenancy*" (see ibid. Schedule 1 para 13).

15. The appellants' tenancy could only be or become a secure tenancy if and so long as the interest of the landlord belonged to an authority or body included in the list of prescribed landlords set out in section 80 of the Housing Act 1985 (see para 14 above). However, section 80 of the 1985 Act was amended by the 1988 Act ("filleted" was the expression used by Mr Luba QC, for the appellants), so as to exclude non-mutual associations from that list. Thenceforth, subject to an immaterial exception, under section 80 as amended neither mutual nor non-mutual associations were capable of fulfilling "the landlord condition" in relation to new tenancies.

16. Section 35 of the Housing Act 1988 also had the effect of removing housing association tenancies from the protection of the fair rent regime contained in Part V1 of the Rent Act 1977. In effect, there was to be no further rent protection for housing association tenancies, subject to a saving in relation to tenancies created before the commencement of the Act (see ibid. section 35(2)(a)). Hence the appellants' tenancy continued to be subject to the fair rent regime. Further, subsection 35(4) provides that a tenancy entered into after the commencement of the Act cannot be a secure tenancy unless certain specified conditions are fulfilled.

17. It is material to the arguments on this appeal to note section 35(5) of the 1988 Act provides that if, on or after the commencement of the Act, the interest of the landlord under a protected or statutory tenancy becomes held by a housing association, nothing in section 35 shall prevent it from being a housing association tenancy or a secure tenancy and, accordingly: *"…. in such a case section 80 of the Housing Act 1985 ….. shall have effect without regard to the repeal of the provisions of that section effected by this Act."*

18. Thus, section 35(5) creates the possibility that a tenancy which is currently a non-secure tenancy may in the future become a secure tenancy.

19. Schedule 18 to the 1988 Act contains a list of the repeals effected by that Act, including the partial repeal of section 80 of the 1985 Act (see above). Schedule 18 contains a saving provision in paragraph 4. In its unamended form, paragraph 4 is in the following terms (so far as material):

    "The repeals in section 80 of the Housing Act 1985-

    (a) have effect (subject to section 35(5) of this Act) in relation to any tenancy … entered into before the coming into force of Part 1 of this Act unless, immediately before that time, the landlord …. is a body which, in accordance with the repeals, would cease to be within the said section 80; and

    (b) do not have effect in relation to a tenancy …. entered into on or after the coming into force of Part 1 of this Act if the tenancy …. falls within any of paragraphs (c) to (f) of subsection (4) of section 35 of this Act."

20. The Local Government and Housing Act 1989 (which came into force on 16 January 1990) added an additional subparagraph to paragraph 4 of Schedule 18 to the Housing Act 1988, prefaced by the word "*and*". The additional subparagraph is in the following terms:

    "(c) do not have effect in relation to a tenancy while it is a housing association tenancy."

21. The issue on this appeal turns entirely on the meaning of these added words. Mr Luba QC contends that they create the possibility of the appellants' tenancy becoming a secure tenancy at some time in the future if the *"landlord condition"* in respect of that tenancy (i.e. the "*landlord condition*" applied by reference to the unamended list of prescribed landlords) is satisfied; and that in the instant case the *"landlord condition"* was satisfied when the Association converted itself into a non-mutual association. Mr Stephen Knafler (for the Association) contends that the added words do not carry that meaning.

THE JUDGMENT

22. Having referred to the relevant statutory provisions much more succinctly than I have been able to do, and having summarised the arguments addressed to him, the Judge expressed his conclusions as follows: *"If the tenancy in this case was not a secure tenancy when the repeals took effect, then unless the case falls within one or other of the exceptions permitting the creation of a secure tenancy after 15 January 1989, I do not see how it can be converted into a secure tenancy after the date the repeals took effect. The tenancy in this case does not fall within any of the exceptions in section 35 of the 1988 Act. It would seem illogical therefore if a pre-repeal non-secure tenancy had the potential to become a secure tenancy in the event of a change of status of the landlord. In my view it does not get Mr Luba very far to say that the repeal is ineffective in relation to a tenancy so long as it remains* ***"a housing association tenancy"*** *as defined in Part VI of the 1977 Act. The words in para. 4(c)* ***"… in relation to a tenancy while it is a housing association tenancy"****, I think must refer to a tenancy under which the landlord satisfied the landlord condition, otherwise it is difficult to see what relevance the provision has. If this is right, para 4(c) can have no application to this case because* ***at the date of the repeal the landlord did not satisfy the landlord's [sic] condition****. A contrary conclusion would be inconsistent with para 4(a). If, apart from the exceptions, a secure tenancy could not be created after 15 January 1989, I fail to see how a non-secure tenancy at that date could subsequently be converted into a secure tenancy. It may be that Mr Knafler's submission as to the purpose for the addition of para 4(c) is right, and that the addition of para 4(c) may have been simply to correct an omission from the original paragraph, as without it section 35(2) of the 1988 Act would appear to be purposeless. Whatever the true answer to this question is, it does not in my view have the result of creating a potential for the conversion of this tenancy into a secure tenancy. I therefore find in the landlord's favour, and dismiss the tenants' appeal."* (Emphasis supplied.)

THE ARGUMENTS ON THIS APPEAL

23. Mr Luba QC submits that in so far as he founded his decision on the (admitted) fact that "*at the date of the repeal the tenancy did not satisfy the landlord's condition*" the Judge fell into error in that he failed to recognise that a tenancy may change from time to time from a secure tenancy to a non-secure tenancy and *vice versa*, according to whether the "*landlord condition*" and the *"tenant condition"* are for the time being satisfied in relation to that tenancy. This potential for change of status is, Mr Luba submits, inherent in the statutory code relating to secure tenancies. In support of this submission, he cites the decision of this court **in *Basingstoke and Deane Borough Council v. Paice*** (1995) 27 HLR 433, where Waite LJ said this (at page 437): *"The use of the term "at any time" in section 79(1) [of the 1985 Act] shows that the section is to have ambulatory effect. Occupiers, that is to say, may be liable to pass in and out of secure tenant status - depending upon whether their landlord for the time being is or is not a local authority; or upon changes in the tenant's own circumstances taking him in and out of the tenant condition."*

24. Mr Luba relies on section 35(5) of the 1988 Act as providing an example of a provision which envisages that a tenancy may in certain circumstances change in character from a non-secure to a secure tenancy.

25. Mr Luba also relies on the fact that the appellants' tenancy falls within the definition of *"housing association tenancy"*, for the purposes of Part VI of the Rent Act 1977. He submits that on its true construction paragraph 4(c) gives the benefit of protection from the repeals to section 80 of the 1985 Act to tenants who held a "housing association tenancy" so defined. On that footing, he contends that when the Association converted itself from a mutual association to a non-mutual association the appellants' tenancy became a secure tenancy, and that accordingly the appellants have the right to buy the flat.

26. Mr Knafler accepts the *"ambulatory"* nature of the statutory code, but submits that the construction for which the appellants' contend would produce a result which would run contrary to the repeals themselves, in that the main change effected by the repeals was that non-mutual associations ceased thereafter to be capable of granting secure tenancies, attracting the right to buy, and that secure tenancies could thenceforth be granted only by a narrow band of landlords comprising local authorities and a few others. He stresses that these changes were of very considerable significance for housing associations, in allowing their housing stock to remain available to be rented out to persons in social need without being liable to be purchased at a substantial discount under the right to buy scheme.

27. Mr Knafler refers us to section 35(4) of the 1988 Act as an example of a statutory provision which reinforces that view of the nature of the changes effected by the 1988 Act, by making it clear that new tenancies cannot be secure tenancies unless they are granted by a limited category of landlords or unless they are granted to tenants with existing secure tenancy rights.

28. As another example of this, Mr Knafler refers to paragraph 4(a) in Schedule 18 to the 1988 Act. He submits that the thrust of paragraph 4(a) is essentially positive, emphasising that the repeals are to have effect in relation to tenancies entered into before the commencement date by landlords, such as the Association, who did not cease to be within section 80 of the 1985 Act by virtue of the repeals. This, he submits, can only mean that tenancies granted before the commencement date by landlords who were not then on the section 80 list were subject to the repeals, so that if the landlord later changed its status the tenancy would only become secure if the landlord fell within section 80 as partially repealed.

29. Mr Knafler also relies on the fact that section 194 of the Local Government and Housing Act 1989 refers to Schedule 11 to that Act (being the Schedule which adds subparagraph (c) to paragraph 4 in Schedule 18 to the 1988 Act) as containing *"minor amendments and amendments consequential on the provisions of this Act"*. He submits that in that context there is no warrant for construing paragraph 4(c) as having effected the substantial change for which the appellants contend.

CONCLUSIONS

30. I turn first to paragraph 4(a) in Schedule 18 to the Housing Act 1988. On even the most generous view, it is difficult to describe paragraph 4(a) as a paradigm of clarity in statutory drafting. On the other hand it is clear (as I read it) that it is directed to the impact of the particular repeals (that is to say, the *"filleting"* of the list of prescribed landlords in section 80 of the 1985 Act) on tenancies entered into prior to the commencement date: i.e. on e*xisting* tenancies. In relation to such tenancies, I construe paragraph 4(a) as meaning (a) that where immediately before the commencement date the interest of the landlord belonged to an authority or body which remains on the section 80 list notwithstanding the repeals (i.e. which has not been *"filleted out"*), the *"landlord condition"* in relation to that tenancy is thereafter to be applied by reference to the amended (*"filleted"*) list, and (b) that, conversely, where before the commencement date the interest of the landlord belonged to an authority or body which has been removed from the list by the repeals (i.e. which has been *"filleted out"*), the "landlord condition" in relation to that tenancy is thereafter to be applied by reference to the unamended (*"non-filleted"*) list.

31. Thus, on its true construction paragraph 4(a) in my judgment provides a saving for existing tenancies in respect of which, immediately prior to the commencement date, the *"landlord condition"* was satisfied (so that they were secure tenancies), but in respect of which the *"landlord condition"* would otherwise have ceased to be satisfied as from the commencement date, by virtue of the repeals: e.g. a tenancy where the landlord immediately before the commencement date was a non-mutual association. The saving is achieved not by providing that such tenancies shall continue as secure tenancies until such time as the non-mutual association disposes of its interest to an

authority or body which is not included in the amended list, for that would be inconsistent with the *"ambulatory"* nature of the statutory code. Rather, the saving is achieved by preserving the unamended *"landlord condition"* in relation to such a tenancy, so that it will be a secure tenancy at any time in the future when the interest of the landlord belongs to an authority or body within the unamended section 80 (e.g. a non-mutual association).

32. So construed, paragraph 4(a) does not impact upon the appellants' tenancy since immediately before the commencement date the landlord in respect of the appellants' tenancy was not an authority or body on the unamended section 80 list (the Association being at that stage a mutual association, not having as yet become a non-mutual association). Hence (as Mr Luba accepts) paragraph 4(a) does not create the possibility of the appellants' tenancy becoming a secure tenancy in the future if the landlord's interest should become vested in a non-mutual association.

33. On the other hand, paragraph 4(c), on its true construction, does in my judgment have that effect. The expression *"housing association tenancy"* in subparagraph (c) is not there defined, but it is in my judgment to be inferred that the relevant definition is to be found in Part VI of the Rent Act 1977. This conclusion is reinforced by the fact that the expression *"housing association tenancy"* is also to be found in section 35(5) of the 1988 Act - a subsection which is expressly referred to in paragraph 4(a). Section 35(1) of the 1988 Act provides that in section 35 the expression *"housing association tenancy"* has the same meaning as in Part VI of the Rent Act 1977. It follows, in my judgment, that the appellants' tenancy is a *"housing association tenancy"* within the meaning of subparagraph (c), and that the repeals do not have effect in relation to it so long as it continues to fall within that definition.

34. That in turn means, in my judgment, that while it is a housing association tenancy for the purpose of Part VI of the Rent Act 1977 the *"landlord condition"* in relation to the tenancy is the *"landlord condition"* as it was immediately before the repeals took effect: i.e. that the relevant list of prescribed landlords in section 80 of the 1985 Act is the *unamended* list, which includes a non-mutual association.

35. It follows, in my judgment, that when the Association converted itself into a non-mutual association the *"landlord condition"* was thereby satisfied in relation to it, and the appellants' tenancy thereupon became a secure tenancy.

36. For those reasons, I reach a contrary conclusion to that which the Judge reached as to the true construction of paragraph 4(c).

37. In a supplemental written skeleton argument Mr Knafler sought to pray in aid Article 1 of the 1st Protocol to the European Convention on Human Rights, which provides as follows: *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

38. However, Mr Knafler did not elaborate on this alternative argument in his oral submissions, and in my judgment he was right not to do so. In my judgment, Article 1 of the 1st Protocol has no application to the issue which arises on this appeal, which is as to the true meaning and effect of a provision of the housing legislation.

39. I should also record that Mr Luba invited us, on the basis of the principles laid down by the House of Lords in ***Pepper v. Hart*** [1995] AC 593, to refer to extracts from Hansard relating to the addition of paragraph 4(c) should we think fit to do so. In the event we did not think fit to accept that invitation, regarding it as unnecessary to do so in order to resolve the issue arising on this appeal.

40. For the reasons which I have given, I would allow this appeal.

Lord Justice Kennedy:

41. I agree.

Order:

1. Appeal allowed.
2. The orders made at paragraphs 4 and 5 of the Order by HHJ Brian Knight QC dated 28th October 1999 are hereby set aside.
3. The Award of the Arbitrator, Mr Michael Edward Browne, given on 25th March 1999 is hereby varied pursuant to the power contained in Arbitration Act 1996 section 69(7)(b) as follows:-
   (a) in paragraph 2.1 for "Assured" insert "Secure"
   (b) in paragraph 2.2 for "no" insert "the".
4. It is hereby declared pursuant to the power contained in section 110 Housing Act 1985 that the Appellants are secure tenants within the meaning of Part IV Housing Act 1985.
5. The Respondent shall pay the Appellants' costs in this court and in the court below (save provided at paragraph 2 of the Order of HHJ Brian Knight QC).
6. The Appellants' costs in the Court are to be subject of detailed assessment if not agreed.

(Order does not form part of approved judgment.)

Mr Jan Luba QC (instructed by Messrs Thomas & Co. for the Appellants)
Mr Stephen Knafler (instructed by Messrs Evans Butler Wade for the Respondent)