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peaceable

Peaceable entry to mortgaged premises: considering the doctrine's compatibility with the HRA 1998

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Cases: *Ropaigalach v Barclays Bank plc* [2000] 1 QB 263

Summary: This article discusses the common law doctrine of peaceable entry by a mortgagee into mortgaged premises. It is suggested that the doctrine is incompatible with Art 8 of the Human Rights Act 1998, and that the judgment of the Court of Appeal in *Barclays Bank v Ropaigalach* can no longer be regarded as good law. The article explores the issues through discussion of litigation begun in a county court in which the defendant mortgagee which had exercised the remedy decided to pay damages and costs to the mortgagor rather than defend a claim in trespass.

Introduction

Until quite recently, I had thought that by far the most preposterous aspect of the common law in the field of housing law from a human rights perspective was the rule in *LB Hammersmith and Fulham v Monk*.¹ That rule permits one joint tenant (A) of residential premises to terminate the other (B) joint tenant's legal rights in their home without giving him/her any warning or notice and without affording a court any role in deciding if inflicting such a cost on B is necessary. The Court of Appeal has latterly concluded in *Sims v Dacorum BC*² that the rule is perfectly consistent with the notion of 'respect' for one's home that is protected by Art 8 of Sch. 1 of the HRA 1998. The judgment has been forcefully criticised by Professor Nield in this journal,³ and Mr Sims is currently seeking permission to appeal the judgment to the Supreme Court.

¹ [1992] 1 A.C. 478.

² [2013] EWCA Civ 12.

³ Nield "Human rights and the rule in *Hammersmith v Monk*: *Sims v Dacorum BC*" (2013) *Conveyancer and Property Lawyer* 326. With what I would regard as admirable understatement, Professor Nield criticizes the judgment for: "its lack of meaningful engagement with the questions

Monk, I now realise, has a rival in terms of the lack of respect the common law pays to a person's home. It is not a rival one comes across very often either in theory or practice. But there it sits, tucked away shyly in the hedgerow of the common law: a mortgagee's presumptive remedial entitlement to exercise 'peaceable entry' into the mortgagor's home and then sell it.⁴

Mr Anderson's home

Mr Anderson,⁵ a middle aged man, grew up in a three bedroom terraced house in Manchester. He had lived there for the best part of forty years. He inherited the freehold from his mother when she died in the 1990s. There was no mortgage on the property when she died. But, facing some financial difficulties in the early 2000s, Mr Anderson took out a £60,000 mortgage from a relatively small mortgage and loan provider, which we might call Obelisk Financial Services plc. The house was perhaps worth £100,000 at that point. By 2012 its value had likely increased to £125,000, and the sum outstanding on the mortgage had fallen to around £50,000.

Mr Anderson, who lived alone in the house, had some financial difficulties in 2012 which led him to miss several payments on his mortgage, so that by the end of the year he was £800 or so in arrears. He spent some time away from his home visiting friends, and in May 2013 came back to find that his house had been broken into. A neighbour had called the police who had boarded up the premises to secure them. After contacting the police and having the boards removed, Mr Anderson found that his house was in a dreadful state and returned to stay with friends while he figured out what to do next.

On his next visit to his home, he found this notice stuck on the door and the locks to his house changed:

TAKE NOTICE

THE HOLDER OF A LEGAL CHARGE OVER THIS PROPERTY, KNOWN AS

1 ACACIA AVENUE, CLEGGSIDE, MANCHESTER

INTENDS TO TAKE POSSESSION OF THE PROPERTY AFTER A PERIOD OF FOURTEEN DAYS FROM THE DATE OF THIS NOTICE, PURSUANT TO THE POWERS VESTED IN THE MORTGAGEE AND IN ORDER TO EXERCISE ITS POWER OF SALE

before the court" and observes: "One cannot help but conclude that the Court of Appeal has dropped into a fairy tale slumber while the clash between the ECtHR and our highest court over the compatibility of mandatory rights to possession has been raging"; *ibid* at 334.

⁴ For the sake of clarity, I should emphasise that it is the remedy that exists at common law. The right which the remedy is vindicating presumably derives impliedly from s87(1) of the Law of Property Act 1925. My thanks to Martin Sixona and Sarah Nield for pointing this out to me.

⁵ The name is a pseudonym and all identificatory elements of the case have been altered. The factual matrix described is accurate.

PLEASE NIOTE THAT ANY BELONGINGS LEFT IN THE PROPERTY AFTER EXPIRATION OF THE FOURTEEN DAYS WILL BE REMOVED AND DISPOSED OF AS [sic] AGENT OF THE BORROWER BY VIRTUE OF THE PROVISIONS OF TH E LEGAL CHARGE.

ANY PERSONS CLAIMING TO HAVE AN INTERST IN THE PROPERTY SHOULD, WITHIN THE SPECIFIED PERIOD. CONTACT

NAME: PSL CORPORATE

TELEPHONE ; 123456789

DURING THE HOURS 9.00 AM TO 5.00 PM MONDAY –FIRDAY

DATED 17TH JUNE 2013

The fourteen days had by then passed. On phoning the number on the notice, Mr Anderson discovered that Obelisk had assumed – or claimed to have assumed – that he had abandoned the property, had exercised the power of peaceable entry to take possession of the house and had taken steps – including placing an advert on the *Rightmove* property sale website – to sell it. Notwithstanding Mr Anderson’s protestations that he had not abandoned the property, he was told the sale would go ahead. A somewhat shaken Mr Anderson promptly approached local a solicitors firm which in turned brief me to represent him.

Mr Anderson’s claim

One of the seminal British constitutional law cases - *Entick v Carrington*⁶ – is of course also classifiable as a tort law or land law case, the action being brought for trespass to property and trespass to goods. Camden CJ’s enunciation of the law of trespass was couched in grandiloquent language, but its substantive meaning is perfectly clear:

“The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him”.

This one might think is just what Obelisk had done to Mr Anderson. It had entered uninvited into his garden and then into his house, changed the locks and excluded him from the premises.⁷

⁶ 19 Howell’s State Trials 1029 (1765).

⁷ Since there was no-one in occupation of the premises when Obelisk did this, no offence was

But such acts would not amount to a trespass if Obelisk had a lawful entitlement to perform them. And one would assume Obelisk acted on the assumption that it was entitled to do so and so was secure from any suit in trespass because it relied on the common law doctrine of peaceable entry. And of course, if one turns to the judgment of the Court of Appeal in *Ropaigalach v Barclays Bank plc*⁸ one might think such an assumption would rest on good law.

Peaceable entry and the Ropaigalach judgment

While it might come as a surprise to many owner-occupiers, the proposition that a mortgagee is presumptively entitled to immediate possession of the mortgaged premises is a familiar element of our land law.⁹ Still more surprising perhaps to the layperson is the point that the entitlement is not contingent on any breach of the mortgage terms by the mortgagor.

In many mortgages relating to residential premises, the presumption is overridden or modified by express agreement. The mortgage agreement will likely specify that the mortgagor enjoys a continuing right to possession for so long as the terms of the mortgage are complied with. It may also constrain the mortgagee from seeking to gain possession of the premises other than by being granted a court order to that effect. In that event, or should the mortgagee follow that course even if not contractually obliged to do so, the mortgagor can invoke the protections of s.36 of the Administration of Justice Act 1970 (hereafter AJA 1970):¹⁰

36.— Additional powers of court in action by mortgagee for possession of dwelling-house.

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The court—

(a) may adjourn the proceedings, or

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—

(i) stay or suspend execution of the judgment or order, or

committed contrary to the Criminal Law Act 1977 s.6.

⁸ [2000] 1 Q.B. 263.

⁹ See for example Megarry and Wade, *The law of real property* (2000; 6th ed) para 19-067: “Since a mortgage gives the mortgagee a legal estate in possession, he is entitled, subject to any agreement to the contrary, to take possession of the mortgaged property as soon as the mortgage is made, even if the mortgagor is guilty of no default”.

¹⁰ The text of s.36 is reproduced in full here for reasons outlined at fn xx below and accompanying text.

(ii) postpone the date for delivery of possession,

for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.

(4) The court may from time to time vary or revoke any condition imposed by virtue of this section.

The origins of s.36 are concisely recounted in Chadwick LJ's judgment in *Ropaigeleach*.¹¹ From the mid-1930s,¹² courts developed a practice of adjourning mortgage possession summons brought on the basis of rent arrears to allow the mortgagor a chance to clear any arrears through instalments. That practice was subsequently held in *Birmingham Citizens Permanent Building Society v Caunt*¹³ to be inconsistent with the common law position. A subsequently established Committee on *The Enforcement of Judgment Debts* recommended that the previous practice be given a statutory status in respect of residential dwellings, which recommendation was enacted in s.36 of the AJA 1970.

Mr Ropaigeleach had been unable to invoke the protection of s.36 because Barclays, which held a mortgage over the premises, had sold the property without seeking a court order. The mortgage agreement had prevented Barclays from doing so without having first demanded payments of the sums secured under the mortgage. Barclays had made such a demand. Mr Ropaigeleach maintained that he was unaware of any such demand because he had been away from the property for a period of several months. By the time he returned, the property had been sold.

The crux of his argument (rejected at trial) before the Court of Appeal was that s.36 should be read to apply not just when the mortgagee began possession proceedings, but also – at the mortgagor's application – when the mortgagee sought to bypass the statutory protection by pursuing a common law entitlement. That argument obviously ran headlong into the obstacles presented by then prevailing approaches to statutory interpretation. S.36(1) is very blunt in its term as to the perquisite for the exercise of the court's jurisdiction: "...where...*the mortgagee begins an action*" (emphasis added). The obvious conclusion would therefore be that in the absence of an action begun by the mortgagee, the jurisdiction could not arise.

Mr Ropaigeleach's counsel (Anthony Scrivener QC) thus urged the court to adopt a purposive and contextualised approach to s.36. It is not possible here to engage with the intricacies of those submissions, but crudely put the argument was that the purpose of s.36 was to safeguard a mortgagor's possession of her home if the threat to possession arose because of mortgage arrears but it seemed to the court that the mortgagor was in a position to make adequate financial reparation to the mortgagee. The doctrine of peaceable entry manifestly contradicted that purpose, and if the doctrine was maintained it would provide an obvious means for lenders to bypass the statutory protection given to borrowers by s.36.

¹¹ [2000] 1 Q.B. 263 at 271-273. And see also Clarke, "Further implications of section 36 of the Administration of Justice Act 1970" (1983) *Conveyancer and Property Lawyer* 293.

¹² The era in which owner-occupation financed by mortgages was beginning to become widespread.

¹³ [1962] Ch. 883, esp at 912 per Russell J.

Mr Ropaigaleach relied heavily on an analysis of the problem he faced advanced by Alison Clarke in this journal in 1983.¹⁴ The article had it seemed persuaded Mantel LJ to grant permission for the appeal.¹⁵ Clarke noted that a literal construction of s.36 would indicate that it could not be applied (responsively by the mortgagor) to the mortgagee's exercise of peaceable entry:

"It is anomalous and undesirable to protect mortgagors against eviction by court process yet leave them open to eviction by self-help, particularly if--as apparently would be the case--the mortgagee's right to use self-help continued notwithstanding that he had applied to the Court for immediate possession and had been refused."¹⁶

The twin thrust of Clarke's article was that while there were very strong policy arguments for reading s.36 to have just such an effect, prevailing norms of statutory interpretation would seem to make it very difficult for a court to do so:

"The courts would therefore be faced with a difficult task in interpreting section 36 as removing the mortgagee's right to take possession peacefully. Arguably, it is a task they should refuse to undertake: reading words into a statute in order to restrict a common law property right is not usually regarded as justifiable, and one would expect the courts to be particularly reluctant to do so where, as here, it is not at all clear either what the words should be or where in the section they should be inserted".¹⁷

Chadwick LJ's leading judgment was neither receptive nor obviously sympathetic to these submissions. While describing Alison Clarke's critique as: "a careful and scholarly analysis",¹⁸ Chadwick LJ was not willing to push at the boundaries of constitutional possibility to arrive at a construction of s.36 which embraced peaceable entry. The law was correctly stated by the Law Commission in a recent report, and if the law was to be changed that was a matter for Parliament rather than the courts. Chadwick LJ drew on passages in two Law Commission publications:

"The language of the section, as well as the circumstances in which it was enacted, lend strong support to the view expressed in the Law Commission Working Paper No. 99 on Land Mortgages (1986), at p. 103, para. 3.69:

"(a) The court can exercise its discretion [under section 36 of the Act of 1970] only if the mortgagee applies to it for a possession order: technically, therefore, the mortgagee can deprive the mortgagor of protection by electing to seek some other means of enforcement."

There is a passage to the same effect in the report which followed that working paper: "Transfer of Land - Land Mortgages" (1991) (Law Com. No. 204), p. 38, para. 6.16:

"..... If the mortgagee prefers to obtain a court order for possession rather than obtain possession extra-judicially the court has power, if the property is a dwelling house, to withhold or delay the order on

¹⁴ Op. cit. n.10 above.

¹⁵ [2000] 1 Q.B. 263 at 268.

¹⁶ Clarke op. cit at 296.

¹⁷ Ibid at 295-296.

¹⁸ [2001] 1 Q.B. 263 at 274.

condition that the mortgagor remedies any default. Otherwise, the court has no power to regulate the exercise of the right: it is a matter in which equity has consistently refused to intervene.”¹⁹

Chadwick LJ neglected - perhaps surprisingly - to quote the final sentences of the relevant paragraph of the report:

“Consultation confirmed the view expressed in this working paper that this right is neither needed nor wanted by mortgagees, and that its continued existence is an unnecessary complication in the law: in practice, reputable mortgagees treat the right as a remedy, exercising it only when necessary for the protection or enforcement of the security. We recommend that the law should reflect this practice and that it should be an overriding provision of a formal and an informal mortgage that the mortgagor is entitled to the possession of the property, with the mortgagee being entitled to take possession only in specified circumstances....”

The recommendation buttresses the argument that Mr Ropaigealach should not be able to invoke s.36 in two senses. Firstly, in a narrow land law sense, it offers an ‘authority’ that s.36 had a limited purposive scope. Secondly, in a broader constitutional sense, the fact that the recommendation was laid before Parliament but not ‘acted’ upon could be taken as indicating that Parliament was content to leave the common law rule in place. Chadwick LJ concluded that what Mr Ropaigealach was asking the court to do was just not ‘possible’:

“I find it impossible to be satisfied that Parliament must have intended, when enacting section 36 of the Act of 1970, that the mortgagee's common law right to take possession by virtue of his estate should only be exercisable with the assistance of the court. In my view, the only conclusion as to parliamentary intention that this court can properly reach is that which can be derived from the circumstances in which the section was enacted, the statutory context in which it appears and the language which was used. All point in the same direction. Parliament was concerned with the problem which had arisen following *Birmingham Citizens Permanent Building Society v. Caunt* [1962] Ch. 883 ; it intended to restore the position to what it had been thought to be before that decision; and it did not address its mind to the question whether the mortgagor required protection against the mortgagee who took possession without the assistance of the court.”²⁰

Clarke LJ, with more noticeably evident reluctance, delivered a concurring judgment LJ at 283F:

“...I agree that it cannot readily be inferred that Parliament intended to give protection to mortgagors in such a case. It does however strike me as very curious that mortgagors should only have protection in the case where the mortgagee chooses to take legal proceedings and not in the case where he chooses simply to enter the property. As Alison Clarke put it in her illuminating article “Further implications of section 36 of the Administration of Justice Act 1970” in *The Conveyancer & Property *284 Lawyer* (1983), p. 293, to which Chadwick L.J. has referred, it is anomalous and undesirable to protect mortgagors against eviction by court process yet leave them open to eviction by self-help...

Like Chadwick LJ however, Clarke LJ eventually concluded that the curious anomaly could not be cured by currently accepted techniques of statutory interpretation:

“[I]n my judgment the problem should be approached by reference to the legal rights of the mortgagee and to the legitimate interests of the mortgagor in the light of the purpose of the Act. In these

¹⁹ Ibid at 273-274. Law Commission “Transfer of land – land mortgages” (1991) (Law Com. No 204) is available at:
<http://www.official-documents.gov.uk/document/hc9192/hc00/0005/0005.pdf>

²⁰ [2000] 1 Q.B. 263 at 282.

circumstances, if it were possible to construe section 36 by affording mortgagors protection whether or not the mortgagee chose to obtain possession by self-help or legal action, I for my part would do so. I have however been persuaded that it is not possible”

Writing in the *Cambridge Law Journal*,²¹ Martin Dixon suggested that the Court of Appeal had no real option but to decide the case as it had. He was however concerned by the potential implications of the judgment:

“The lacuna in section 36 revealed by *Ropaigalach*, operative when either the mortgagee or its successor seeks possession without a court order, may spark new interest in self-help, at least among those mortgagees with dubious lending practices”.²²

Expressing a view echoed by other commentators²³ – a view consistent with the Law Commission’s neglected 1986 recommendation – Dixon suggested Parliament should modify s.36 to remove the lacuna. No amendment was passed. Parliament, it seemed, had done nothing to address the issue.

Well, not directly. Although *Ropaigalach* is reported in the 2000 volume of the Queens Bench Reports, it was argued in October 1998 and judgment was handed down in December. The sale occurred in 1996. Unsurprisingly no thought was given in argument to the possible significance of Art 8 ECHR or Art 8 HRA. Even if such thought had been given, (as it was by Dixon in his critique of the judgment)²⁴ it is not likely that any relevant principles would have been identified. Notwithstanding this judgment, we issued (in the county court) a claim in trespass for damages and an interim injunction to get Mr Anderson back in his home and stop Obelisk trying to sell it. Fifteen years is after all a very long time in constitutional law terms.

Mr Anderson’s arguments

Having begun our skeleton argument with a recitation of the background facts, we put our case quite bluntly:

6. It is the Claimant’s case that *Ropaigalach* is no longer good law. The doctrine of peaceable entry when exercised in relation to a person’s home is incompatible with HRA 1998 Sch.1 Art 8.
7. To restore compatibility, the doctrine must be abolished or amended, or the Administration of Justice Act 1970 s.36 must be construed per HRA 1998 s.3 in a fashion which subjects the doctrine to the court’s statutory jurisdiction in s.36.
8. This defendant has trespassed into the Claimant’s home. It has unlawfully evicted him from his home. It has trespassed against his possessions. Until such time as the

²¹ “Sorry, we’ve sold your home: mortgagees and their possessory rights” (1999) *CLJ* 281.

²² *Ibid* at 283.

²³ See for example Dunn, “No tempering of the wind for the shorn lamb” (1999) *Conveyancer and Property Lawyer* 263 .

²⁴ And see also the perceptive analysis by Paton “Mortgagees can help themselves” (1999) *New Law Journal* 614.

claim is heard, the Defendant must be compelled to readmit the Claimant to his home and must be restrained from taking any steps to sell the property.

Working on the assumption that the place from which a court starts its analytical journey may have a significant bearing on the place where it ends up, we began our submissions by identifying what we argued were now firmly established HRA principles with which the content of normatively inferior common law had to comply.²⁵ The point was to present the issue as an HRA case which involved a land law issue rather than vice-versa.

The first step was therefore to make concise submissions as to the effect of *Manchester City Council v Pinnock*,²⁶ in which the Supreme Court eventually accepted that HRA Art 8 created a freestanding statutory defence to a possession claim in respect of a person's home. That defence, we suggested, has two distinct but related elements. The first, substantive dimension of the defence was that the interference with the Art right to respect for the home had – if the matter was raised by the defendant – to be demonstrated by the claimant to be necessary (or proportionate). Mr Anderson was facing eviction from and sale of his home, which might be thought rather extreme interferences with his Art 8 rights. The second, procedural dimension of the defence is that the issue of proportionality must be evaluated by an independent court or tribunal. We therefore framed our submissions in this way:

2. HRA 1998 Art 8

10. HRA 1998 Sch 1 Art 8 requires that a person cannot lawfully be evicted from her home against her will unless she is afforded the opportunity to have a court determine if that eviction is necessary or 'proportionate'.
11. This is now trite law. It is trite law not just because HRA 1998 s.2 has compelled our courts to take account of the meaning accorded by the ECtHR to Art 8 ECHR and to give Art 8 HRA the same meaning. The Supreme Court has accepted in *Manchester City Council v Pinnock* [2011] UKSC 6; [2011] 2 AC 104 that the meanings of Art 8 ECHR and Art 8 HRA 1998 Sch.1 in the context of possession proceedings are identical (para 48-49).
12. This court is no doubt familiar with the ECtHR's consistently stated assertion, latterly in *Kay v United Kingdom* [2011] H.L.R. 2, that (emphases added):

'68. As the Court emphasised in *McCann* (cited above, § 50), *the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end.*'

²⁵ The footnotes in the text of the skeleton argument have been added for the purposes of this article to explain or embellish the written submissions made. In essence they are the supplemental submissions one might expect to make orally in response to questions from the bench, but which would make a skeleton argument rather too long if included in written form.

²⁶ [2011] UKSC 6; [2011] 2 A.C. 104.

13. We underline the phrase 'any person'.

We then decided to buttress this point with an observation which - perhaps rather curiously – seems not to have been made much of in the plethora of Art 8 housing cases which have come before the courts in recent years:

14. But the point should also be regarded as trite law because – although this is often overlooked - the 'respect' that Parliament has demanded be shown to a person's home by enacting HRA 1998 Art 8 is an ordinary English word, bearing an accepted meaning (per the Concise Oxford Dictionary);

'1. regard with deference, esteem or honour. 2 a avoid interfering with, harming, degrading, insulting, injuring or interrupting. b treat with consideration.....'

15. Exercise of a proportionality jurisdiction by a court achieves this end.

We had underlined the phrase 'any person' in *Kay v United Kingdom* for two reasons. The first was to make it clear that while we understood that the substantive dimension of an Art 8 defence would rarely succeed, the substantive issue was consequential to an anterior procedural dimension that was an absolute entitlement. The point sounds almost facetious: if the entitlement is to have proportionality determined by a court, then one must first be able to put the matter before a court.

16. It is correct that an Art 8 entitlement will only secure a person's occupancy or possession of her home in a *substantive* success in rare (or 'exceptional') circumstances. But the *procedural* entitlement is that it is *always* for a court to form that judgment. Many, perhaps most litigants will fail to convince a court that Art 8 provides them with an effective substantive protection. But *all of them* ('any person') are (is) entitled to have the court ask and answer that question.

The second reason for dwelling on the 'any person' notion was to anticipate any submission from the Defendant that Art 8 only bit on actions taken by core public authorities or by hybrid public authorities performing public functions.²⁷ Obelisk fell into neither category: it was a private sector body exclusively concerned it seemed with making money.

17. The proportionality principle inherent in Art 8 ECHR and Art 8 HRA applies as readily when the body or person seeking to remove the person from her home is a private body as when it is a government body. The entitlement attaches to 'any person'. This is because, in either case, the true 'Defendant' is the law.
18. While the Supreme Court left this point as to the so-called 'horizontal effect' of Art 8 in the housing law context open in *Pinnock*, the ECtHR has applied the principle in a

²⁷ See the judgment of the Court of Appeal in *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] 1 W.L.R. 363.

series of cases. Obvious points of reference are: *Belchikova v Russia* (Application no. 2408/06; 25th March 2010); *Brezec v Croatia* (App no 7177/10) 18 July 2013; *Zehentner v Austria* (2011) 52 E.H.R.R. 22.²⁸

This was why we had planted the point in para 11 of the skeleton that Art 8 ECHR and Art 8 HRA had the same meaning:

19. Since the Supreme Court in *Pinnock* has indicated that Art 8 ECHR and Art 8 HRA bear the same meaning (see para 11 above), Art 8 HRA must be taken as being applicable in matters arising between private parties.

The difficulty which peaceable entry posed from an Art 8 perspective did not seem to require much elaboration:

3. Peaceable entry

21. The common law doctrine of peaceable entry obviously functions to protect the financial interests of the mortgagee. That is equally obviously a legitimate interest from an Art 8 perspective.
22. But the rule accords that interest an absolute weight. It makes no attempt to balance that interest against the mortgagee's Art 8 entitlements (because of course such rights did not exist when the rule came into being).
23. The rule shows no consideration, esteem deference or honour at all to Mr Lawrence's right to respect for his home of his home. The doctrine harms, degrades, insults and interrupts that right to respect.
24. And the doctrine does this because it affords no proportionality jurisdiction to the court. It affords no mechanism for a judicial assessment of the necessity of eviction. It is a rule which bears a constant capacity to be utterly arbitrary and capricious in its effect.

The next stage of the argument was to suggest ways in which the incompatibility should be removed. The obvious first route would be a simple suggestion that the common law rule should be amended or abolished. We decided however to use that as our fallback position. As our first line of attack we suggested that the best route to achieving incompatibility was to invoke HRA 1998 s.3 to re-interpret s.36.

There were to reasons for taking this point as our primary argument. The first was that it removed any scope for the defendant to argue that because as a private company it did not fall within HRA 1998 s.6, the HRA was inapplicable to this

²⁸ The ECtHR has not expressly stated in any of these cases that Art 8 (ECHR) is applicable in actions between private parties. But since the cases in issue were between private parties, it is – we suggested – a necessary inference that it does apply. The point, we were ready to say, is so obvious that it does not need stating. This led us into the point made at para 19. The relevant passage in *Pinnock* is at para 49[2011] UKSC 6; [2011] 2 A.C. 104.

litigation. The obvious source to rebut any such contention is the judgment of Keene LJ in *Ghaidan v Mendoza*:²⁹

[37]... First, the concession made on behalf of the respondent that the appellant's rights under the European Convention on Human Rights are relevant to the construction of para 2 of Sch 1 to the Rent Act 1977, even though this is litigation between two private individuals, was a proper one. Section 6(1) of the Human Rights Act 1998 ('the 1998 Act') makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, and by virtue of s 6(3)(a) this court is a public authority. It follows that this court cannot act incompatibly with a Convention right, unless (see s 6(2)) the court is acting to give effect to or enforce provisions of or made under primary legislation which cannot be read or given effect in a way which is compatible with such a right.

[38] That patently takes one to s 3 of the 1998 Act, with its obligation on the court to read and give effect to primary and secondary legislation in a way compatible with Convention rights 'so far as it possible to do so'.

We then framed our submission in this way, having taken the view that perhaps the best way to preface any submission as to the effect of HRA s.3, but especially any submission made in the context of housing law, is orally to take one's judge - who may be of a nervous or timid constitutional disposition - to the observation of Lord Phillips in *LB Hounslow v Powell*:³⁰

[98]....section 3 of the 1998 Act applies to all legislation, whether enacted before or after the 1998 Act came into force. In so far as this alters the construction given to legislation before the 1998 Act came into force, the 1998 Act has the effect of amending legislation: see *Ghaidan v Godin- Mendoza* [2004] 2 AC 557.

4. Removing the incompatibility

25. The incompatibility can be removed in one of two ways:

1. By lending a new meaning to the Administration of Justice Act 1970 s.36;

or

2. By amending or abolishing the common law rule.

4. 1. Lending a new meaning to the Administration of Justice Act 1970 s.36

26. Clearly, the common law rule would be inapplicable if it was inconsistent with a statutory provision. The rule can now properly be seen as inconsistent with the requirements of the Administration of Justice Act 1970 s.36:

27. The merits jurisdiction granted to the court under s.36 is manifestly sufficient to achieve compatibility with Art 8. The obvious difficulty facing the court in a case such as this is that the s.36 power is limited on its face to use in response to possession

²⁹ [2003] Ch. 380 at [37-38]. The analysis was not questioned when *Mendoza* went to the House of Lords.

³⁰ [2011] UKSC 8; [2011] 2 A.C. 186.

proceedings initiated by the mortgagee. In circumstances of peaceable entry by the mortgagee there are of course no possession proceedings.

28. The question of whether s.36 could be extended to cover peaceable entry was before the Court of Appeal in *Ropaigaleach v Barclays Bank plc* [2000] 1 Q.B. 263.
29. The Court declined to read s.36 in this fashion because to do so would have involved an improper departure from accepted canons of statutory interpretation; see especially Clarke LJ at 283F.....and 286 E.....³¹
30. *Ropaigaleach* was of course decided over ten years before *Pinnock*, at a time when subsequent developments in the protection afforded to a person's home by Art 8 ECHR and Art HRA could be (at best and by very few observers) only dimly foreseen.
31. In those ten years, the art of the 'possible' in the realm of statutory interpretation has also been much changed by the advent of the HRA s.3.
32. The Claimant relies upon *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 as to the proper use that may be made of HRA 1998 s.3.

Human Rights Act 1998

3.— Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights....

33. In *Mendoza*, the issue before the court was whether the succession provisions of the Rent Act 1977 (Rent Act 1977, Sch 1, para 2(2)) which allowed for a person living with a deceased tenant 'as the tenant's husband or wife' could be construed via HRA s.3 to include same sex partners.
34. The House of Lords concluded such interpretation was 'possible'. In his leading judgment, Lord Nicholls clarified the body of principle which had built up around the use of s 3.

'[27]....What is the standard, or the criterion, by which "possibility" [in s 3] is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of s 3 gradually accumulates.'
35. *Mendoza* is authority for the proposition that courts should not use HRA s.3 to lend Convention compliant meanings to statutory terms if to do so would produce a meaning 'inconsistent with a fundamental feature of [the] legislation'; (at para 45). What this notion of 'fundamental' appears to mean is that the court should satisfy itself that the meaning it might give to a statutory provision is not inconsistent with the policy objectives that Parliament was seeking to achieve when the term was enacted.

³¹ We referred to Clarke LJ's judgment rather than Chadwick LJ's opinion because Clarke LJ seemed more exercised and disturbed by being unable to bring peaceable entry within s.36 than Chadwick LJ.

36. If neither a fundamental nor systemic matter was in issue however, Lord Nicholls indicated that it was appropriate for s.3 to be used to achieve what would from a traditional understanding of the sovereignty of Parliament and the separation of powers be regarded as very unorthodox results:

'[32]. . . . Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. *It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant.* In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.'; (emphasis added).

38. To bring the doctrine of peaceable entry within the scope of s.36 treat successors cannot credibly be said to undermine a fundamental feature of the AJA 1970 nor to contradict the policy of the Act.

39. Lord Nicholls did not think any particular linguistic exactitude was needed in the way in which s.3 could be used:

'[35].... The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.'

40. Notwithstanding that observation, the Defendants suggest that the incompatibility is best removed by reading in the following words (in italics) to s.36:

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, *or where the mortgagee seeks to exercise the right of peaceable entry in respect of a dwelling-house occupied as her home by the mortgagor and an application to the court is made by the mortgagor*, the court may exercise any of the powers conferred on it by subsection (2) below.....

41. This reconstruction of s.36 would have no effect on the applicability of the peaceable entry doctrine to premises which were not occupied as a home within the meaning of HRA Art 8.

We were not of course in a position to ask the county court actually to give s.36 the meaning we proposed. As well as being a significant case in housing law terms, the House of Lords judgment in *LB Lambeth v Kay* made an important point of general principle as to the impact of the HRA 1998 on traditional understandings of precedent.³² Even if a domestic court is firmly of the view that a rule of domestic law articulated by a higher court is incompatible with a Convention Right, and even if that judgment of the higher court was arrived at without any consideration having been given to Art 8, the appropriate way for the lower court to proceed, should it consider the Claimant's submissions well-founded, would be to reject the incompatibility submission, apply the existing precedent but grant permission to appeal.

³² [2006] 2 A.C. 465 per Lord Bingham at para 43.

Our secondary line of attack was on the common law rule itself, independent of s.36.

4.2. Amending the common law rule.

44. A rule of common law is as susceptible to a challenge that it is incompatible with Art 8 as a provision of a statute. See Lord Nicholls in *LB Lambeth v Kay* [2006] UKHL 10; [2006] 2 AC 465:

[54]... [I]nvariably there may be the exceedingly rare case where the legislative code *or, indeed, the common law* is impeachable on human rights grounds". (Emphasis added).

45. The precise implications of the notion that the HRA requires the courts to re-examine common law principles in order to assess their compatibility with convention rights are perhaps most clearly stated by both Lord Nicholls and Lord Hope in *Campbell v. MGN Ltd* [2002] UKHL 22; [2004] 2 A.C. 457.

46. Lord Nicholls observes at [19]:

In applying this approach, and giving effect to the values protected by article 8, courts will often be aided by adopting the structure of article 8 in the same way as they now habitually apply the Strasbourg court's approach to article 10 when resolving questions concerning freedom of expression. Articles 8 and 10 *call for a more explicit analysis of competing considerations* than the three traditional requirements of the cause of action for breach of confidence identified in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41. (Emphasis added).

47. Lord Hope makes the same point at [86]:

The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. The jurisprudence of the European Court offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend, Lord Hoffmann, says, has shifted. It seems to me that *the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating....* (Emphasis added).

48. This concept of "more explicit analysis of competing considerations" (per Lord Nicholls) or "more carefully focused and more penetrating" balancing exercise (per Lord Hope) is a requirement of general application, and not one limited only to privacy cases; (although one might readily characterize changing the locks on someone's home and selling it as infringing upon the person's privacy rights).

50. The doctrine of peaceable entry has been formulated without any consideration having been given to the importance which Parliament has attached – in enacting Art 8 – to ensuring that our law affords proper 'respect' to a person's home. For that reason alone, it is appropriate that the rule be subject to re-examination.

52. That this duty in respect of the common law may sensibly be seen as a corollary of the court's obligations under HRA s.3 in respect of statutory provisions is made clear in the Court of Appeal judgment in *HRH Prince of Wales v Associated Newspapers Ltd* [2007] EWHC 522 (Ch); [2008] Ch 57: per Lord Phillips CJ:

"25 Section 3 of the Human Rights Act 1998 requires the court, so far as it is possible, to read and give effect to legislation in a manner which is compatible with the Convention rights. The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to Convention rights. In this way horizontal effect is given to

the Convention. This would seem to accord with the view of the European Court of Human Rights as to the duty of the court as a public authority: see *Von Hannover v Germany* (2004) 40 EHRR 1, paras 74 and 78.

53. And in all of these cases of course, as Lord Phillips reference to 'horizontal effect' makes clear, both of the litigants were private parties.
54. Compatibility with Art 8 could be achieved by amending the rule so that it is inapplicable in respect of premises which are the mortgagor's home within the meaning of Art 8 HRA.
55. Again, it is accepted that this court is bound by *Ropaigealach*, notwithstanding that that no consideration was given in that case to HRA s.3 or Art 8. The appropriate way for the court to proceed, should it consider the Claimant's submissions well-founded, would be to:
 1. Dismiss the claim
 2. Grant permission to appeal
 3. Grant an interim injunction requiring that:
 - (a) the Defendant restore the Claimant to his home; and
 - (b) the Defendant take no steps to sell the Claimant's home.

Conclusion

Given that Mr Anderson's house was up for sale on *Rightmove*, a certain urgency attended the lodging of his claim and the associated application for the interim injunction. We sent our skeleton argument and authorities bundle to the court along with the claim form, and the listing office at the county court was helpfully accommodating, finding us a two hour slot just a few days thence. Happily, and unsurprisingly, receipt of our skeleton prompted a wee rethink on the part of Obelisk. Obelisk's lawyers immediately agreed to return Mr Anderson into possession and to discontinue any attempts to sell the house. Negotiations then continued as to damages and costs, which were settled on the basis that Obelisk would pay Mr Anderson damages equivalent to one month's notional rental value and the costs he had incurred so far.

Mr Anderson's case is another example of what I have previously referred to as 'invisible law',³³ a situation – generally known only to the parties in the proceedings – in which one side chooses not to stand on what appears to be a clear legal doctrine either for fear that litigation may lead the doctrine to be changed or because the cost in terms of money and/or aggravation in pursuing the case make swallowing a 'defeat' in the instant case a practicable proposition. There is no way of knowing how many times mortgagees are currently exercising the right of peaceable entry and not meeting informed resistance from the mortgagor. It may well be that the number of instances is quantitatively insignificant. But if – as is surely the case – use of the

³³ "The holy grail as an empty chalice: proportionality review in possession proceedings after *Pinnock* and *Powell*" (2013) *Journal of Planning and Environment Law* 622 at 631.

remedy is in respect of a person's home is incompatible with Art 8 – even one such case is one too many. It would seem unlikely that the current government will find any legislative time to address and redress this difficulty. But since all that would be required is a modest adjustment to the terms of s.36 of the AJA 1970, a reform of this sort might be an attractive proposition for a private members bill. And that law, of course, would not be invisible.