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Proportionality review in possession proceedings

Corby Borough Council v Nicholle Scott; West Kent Housing Association Ltd v Jack Haycraft [2012] EWCA Civ 276; [2012] H.L.R. 23.

After a protracted and rather painful process of dithering and obfuscation,¹ the Supreme Court finally accepted in *Manchester City Council v Pinnock*² and *Hounslow LBC v Powell*³ that art.8 ECHR required proportionality evaluation by a court or tribunal to apply in all possession cases involving a person's home; and that art.8Sch.1 of the HRA 1998 should bear the same meaning in this context in domestic law as art.8 ECHR bears in international law.

As statements of principle, those conclusions are attractively straightforward. Difficulties arise when one takes the next step and asks what it is that *Pinnock* and *Powell* proportionality actually means. It may be that the principle is in essence very hard to separate from *Wednesbury* irrationality. That certainly is the view taken by many claimants of *Pinnock*'s effect, premised in part on the frequent suggestions made by the Supreme Court and ECtHR⁴ (and previously by the House of Lords in respect of so-called 'public law' defences in possession proceedings) that it would only be in a very rare or exceptional case that such a defence would even be seriously arguable, let alone ultimately successful.⁵

¹ See generally I. Loveland, "A tale of two trespassers part 1 and 2" (2009) *EHRLR* pp.148–169 and pp.495–511.

² *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104.

³ *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 A.C. 186.

⁴ cf. Lord Neuberger in *Pinnock* [2010] UKSC 45 at [45]:

"Although it cannot be described as a point of principle, it seems that the EurCtHR has also fringed the view that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain: *McCann v UK* (2008) 47 EHRR 40, para 54; *Kay v UK (App no 37341/06)* [2010] ECHR 1322, para 73"

⁵ See for example the views expressed by J. Holbrook, "Valuable Possession" (2011) 161 NLJ 425 (25 March 11). See especially Lord Bingham in *Kay v Lambeth* [2006] 2 A.C. 465, 491–492, para.29, to the effect that "only in very

The “seriously arguable” point does not have just a substantive dimension; i.e. that the defence will ultimately fail. It also has important procedural or case management implications. CPR Pt 55.8 allows the court to dispose of the case at first hearing on an essentially summary basis unless the defendant convinces the court that the claim can be: “genuinely disputed on a basis which appears to be substantial”.

The suggestion that art.8 makes no meaningful difference may overstate the case from a claimant’s perspective, given that the Supreme Court in *Pinnock* was at least explicit in declining to be explicit about exactly what proportionality might mean, either as a substantive defence or in terms of its implications for case management in the county courts. Lord Neuberger’s sole judgment indicated that the Supreme Court was happy to pass the buck on this question to the bottom rungs of the judicial hierarchy:

“[57] ...the court’s obligation under article 8(2), to consider the proportionality of making the order sought, does represent a potential new obstacle to the making of an order for possession. The wide implications of this obligation will have to be worked out. As in many situations, that is best left to the good sense and experience of judges sitting in the County Court”.

From a defendant’s perspective, the only obviously helpful prescriptive tool in *Pinnock* is the now oft-quoted passage at para.64:

“[64]. Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue “in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”, and that “the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases” seem to us well made”.

The proportionality point has surely now been pleaded on many occasions in the lower courts. But we have little idea of how often and with what level of “success”. Much of this “law” will be invisible. This is in part because it is very rare for a county court judgment which is not appealed ever to become widely available in

exceptional cases” could “an applicant ... succeed in raising an arguable case which would require a court to examine the issue”.

published form.⁶ Equally significantly, some claimants may conclude that it is ill-advised to press on in the face of what is ostensibly a credible defence and will settle the matter before trial.⁷ The ‘visible’ law will be restricted to reported appellate judgments of the higher courts. We now have two post-*Powell* Court of Appeal judgments to consider on the meaning of proportionality, which—unhappily—do not tell us a great deal.

The judgments of the Court of Appeal in *Scott* and *Haycraft*

If superficially construed, the Court of Appeal’s decision in the joined cases of *Corby BC v Scott*; *West Kent Housing Association Ltd v Jack Haycraft*⁸ can readily be seen as pouring a good deal of very cold water on art.8 defences. On closer examination however, both defendants might be thought to have been intrinsically weak candidates for *Pinnock* protection, who also did a rather poor job of making the most of what little they might have had to offer, and whose rather abject failures could be seen as invitation to other defendants’ lawyers to be more selective in choosing candidates for an art.8 defence and more rigorous in building a case on their client’s behalf.

Ms Scott had been granted an introductory tenancy by Corby Council in 2009. She rapidly went into rent arrears and failed to clear them. Although the arrears were only £300—a level at which

⁶ Some cases occasionally appear in *Current Law*. Traditionally the only source with even a little coverage at this level has been Jan Luba and Nic Madge’s “Housing Law Update” which appears every month in *Legal Action* and often contains brief notes of county court cases sent in by counsel or solicitors. Web-based sources, especially the housing law blog *Nearly Legal* have also begun to uncover some of this hidden law: <http://nearlylegal.co.uk/blog/> [Accessed October 26, 2012].

⁷ This may have a macro and/or a micro dimension. The micro dimension relates primarily to costs. The macro element relates to a fear that it is better to concede defended cases than run the risk of losing such a case on a point of law and thereby deprive oneself of what will always be an effective argument against the unrepresented or ineptly represented defendant. We have really no idea at all of the percentage of possession claims in which defendants who might have a plausible proportionality defence are not legally represented.

⁸ *Corby BC v Scott* [2012] EWCA Civ 276; [2012] H.L.R. 23.

it is unlikely any kind of order would be made against a secure tenant—Corby initiated the possession regime provided for under the Housing Act 1996 in a claim before the Northampton County Court. The regime essentially provides that a tenant can challenge the issue of a notice seeking possession through an internal review. If the authority decides to uphold the notice then—so long as it has complied with specified procedural requirements—its decision to begin possession proceedings could only be challenged on public law or HRA grounds.⁹ Ms Scott did not seek an internal review, and indeed seemed to underline her status as an unsatisfactory tenant by continuing to fail to address her arrears and engaging in some anti-social behaviour.

Her claim was not dealt with summarily under CPR Pt 55.8. The practice at Northampton County Court appears to be that a pleaded art.8 defence is invariably set down for trial. In this case, the matter was listed for a one day hearing before a circuit judge. Ms Scott did little to help her case by failing to comply with arrears payment schedules specified in the initial court order, although her mother paid off the arrears on her behalf the day before the trial.

Ms Scott's pleadings as to the "exceptional" nature seemed to be limited to the facts that the arrears had in fact been paid off and that she had been the victim of a violent physical attack (the perpetrator being convicted of attempted murder) a short while ago. However she produced no evidence *at all* at trial to suggest that the attack made her "vulnerable" in a *Pinnock* sense or had compromised her capacity to manage her tenancy and behaviour in a responsible fashion. Rather surprisingly, one might think, H.H. Judge Hampton was persuaded it would be disproportionate to grant an order, on the basis both of the attack and the (belated settlement) of the arrears.

Mr Haycraft had gone into occupation of his housing association home as a "starter tenant". This is in effect the housing association equivalent of an introductory tenancy, in which tenants are granted an assured shorthold tenancy which becomes assured on the expiry

⁹ The scheme is laid out in the Housing Act 1996 ss.124–130.

of (usually) 12 months' acceptable behaviour.¹⁰ Mr Haycraft's landlord decided to bring proceedings following various allegations against him of anti-social behaviour, including an allegation of indecent exposure (in respect of which no prosecution was brought). Mr Haycraft had challenged that conclusion before an internal review board, but his challenge was rejected.

Rather unfortunately, the Court of Appeal's judgment tells us nothing of value about the nature of that challenge. Nor are we told anything about the conduct of the initial hearing, before a Deputy District Judge, in which an outright possession order was granted, beyond the fact that no art.8 point was taken in the defence; (apparently because the case was heard before *Pinnock* was decided). Mr Haycraft's appeal to a circuit judge did seek to raise proportionality issues, although we are not told on what basis the appeal was brought. His submissions appeared to be that he had not committed the alleged indecent exposure, that his behaviour had been unproblematic for over a year, that he had some health difficulties, and that he now occupied his home with a new partner and their child. H.H. Judge Simpkiss dismissed the appeal without a full hearing, presumably on the basis that the pleaded case had no reasonable prospect of success per CPR Pt 52(11).

Lord Neuberger gave the sole judgment for the joined cases in the Court of Appeal. One assumes that he is best placed to know what the Supreme Court meant to do in *Pinnock* given that he gave the sole judgment in that case too. He re-stated the *Pinnock* view that there was little likelihood of a proportionality defence succeeding in respect of introductory or demoted tenancies, and that these slim prospects of success might be increased if the defendant was "vulnerable" and facing homelessness.

The Court saw no merit in either defendant's submissions. In Ms Scott's case, the problem was one essentially of "relevance". Being subjected to a vicious assault might well be "exceptional" in the overall scheme of things, but it per se had no relevance to the question of whether it was necessary to evict her from her home. In

¹⁰ Housing Act 1988 ss.19A–21.

that regard, the comment upon which most attention may fasten is at para.24:

“... There was no suggestion in the judgment, or even in the evidence, that the attack resulted in mental or physical injury which would render it particularly harmful to Ms Scott to be evicted”.

The notion of “particularly harmful to be evicted” appears to allude to the probable consequence of a defendant being vulnerable in a *Pinnock* sense. Assuming that for pretty well all defendants being evicted is going to be “harmful” to some degree, the “particularly harmful” test obviously invites defendants to lay a sound evidential base for showing the trial court that loss of their home would have an especially detrimental effect upon them. There is likely to be little point in arguing that “particularly harmful” is substantively a more indulgent test than that offered in *Pinnock*. The significance of the formula from a defendant’s perspective lies in its intimation that it will indeed be pointless to raise an art.8 defence based on personal circumstances if the parameters of that defence are not both clearly articulated in principle and evidentially well-grounded.

Scott also tells us that the paying off of arrears (at the last minute and by a third party) does not render a case “exceptional”.¹¹ This should not be taken to mean that the way in which a defendant deals with her arrears in the period between the service of an initial notice and the trial is necessarily irrelevant. What it suggests is that a defendant could only usefully present this argument if she has through her own devices managed to maintain a consistent downward trend in the arrears over a substantial period of time, has eliminated or substantially reduced the arrears, and can convincingly show that such behaviour will continue in the future.

In the same vein, the Court of Appeal suggested that Mr Haycraft’s reasonably lengthy period of “good behaviour” (there were no reported incidents of anti-social for the best part of a year before the hearing) cannot per se make the grant of an order disproportionate. Nor was the fact that he had some health

¹¹ *Scott* [2012] EWCA Civ 276 at [25].

problems (again not especially well supported evidentially) of any significance to a proportionality assessment. The judgment underlines the point that mere assertions as to ill-health will not assist a defendant in such cases. The least that will be required is an evidentially well-founded assertion as to really quite serious medical problems which would likely be exacerbated by eviction.

We might wonder if the Court of Appeal's conclusions as to the likely irrelevance of reducing arrears and behaving well will create a perverse incentive for defendants not to deal with arrears or stop causing a nuisance to neighbours if their only possible line of defence is proportionality review. It is certainly stock advice on the part of defence lawyers that a lengthy period of good behaviour will weigh positively in the balance at a final hearing, both because of their intrinsic value and because they can serve as a useful pointer to what will occur in future. The court seems not to have considered that point. But there is perhaps a more substantial criticism to be made of the judgment.

The practicalities of building a defence which “appears to be substantial”

CPR Pt 55.8 makes provision for the summary disposal of possession claims if the defendant does not dispute the claim “on grounds which appear to be substantial”. For claimants, this mechanism has the obvious attraction of being quick and cheap. *Pinnock* and *Powell* do tell us of course that there is no obligation on the claimant to predict and meet any possible art.8 defence in its pleadings. Nor is there any obligation on the court (except perhaps in a case where the defendant is not legally competent)¹² to render any assistance in that regard to the defendant, most obviously by adjourning the matter briefly and urging the defendant to go and seek legal advice.

As a matter of principle, *Scott* does seem to tell us that if a sound job can be and is done by the defendant's lawyers in identifying the relevant legal basis of a proportionality argument and

¹² See *Zehentner v Austria* (20082/02) (2011) 52 E.H.R.R. 22.

underpinning that legal argument with some cogent evidence then there is good reason to think that the case ought to go to trial and not be disposed of summarily. But the Court of Appeal does not seem to have considered how happily this substantive and evidential burden fits with the prosaic mechanics of building and presenting a proportionality case.

The first problem is a pretty simple one. Paragraph 64 of *Pinnock* identifies “vulnerable” people as the most likely beneficiaries of a proportionality defence. It is perfectly credible to assume that such “vulnerable” people will be among the least likely to seek legal representation in a timely fashion or indeed at all, and so will have their cases summarily disposed of under CPR Pt 55.8 without any thought being given to a possible art.8 defence. It may be that some such defendants will get representation of sorts at the last minute from a duty solicitor, but it would perhaps be rash to assume that a duty solicitor will have the time and capacity to do a good enough job at very short notice on the day of a hearing of convincing a district judge that there is a plausible art.8 case to be made.

Insofar as any such case would hinge on the personal circumstances of the defendant, a duty solicitor is likely to have no evidence at all save the say-so of the defendant as to those circumstances. Claimants will of course regale the court with the supposed (per *Pinnock*) “exceptional” nature of an arguable art.8 defence, and refer to *Scott* to suggest there is no evidence to indicate that evicting this defendant would be “particularly harmful” to her. The court will also be told that the defendant has had many weeks to seek legal advice, and if she has not done so then she is suffering a problem of her own making. As the law currently stands, there would nothing improper about the grant of a possession order on a summary basis in such circumstances.

The practical problem does not however end with the defendants who fail to seek timely advice. For publicly funded defendants, the initial tranche of funding is generally limited to considering merits and drafting a defence and initial witness statement. Funding for an expert witness - which may be crucial if any defence lies in the

“vulnerability” of the defendant—may not be forthcoming without a direction giving permission to rely on such evidence, and even if funding were to be available the press of time prior to an initial hearing may mean that such evidence cannot physically be produced before the hearing.¹³ One can readily expect claimants in such circumstances to fasten on the lack of expert evidence as *per se* a good reason for thinking that the personal circumstances dimension of a proportionality defence is not seriously arguable.

That the Court of Appeal did not engage with these issues is perhaps explained by what seems to be a quite careful statement by Lord Neuberger to the effect that it was offering a solution to the particular cases before it, not a generalised prescription:

“36 ...[W]e were told that there was no consistency of approach in different County Courts as to how to proceed when a tenant raises an Article 8 proportionality point in possession proceedings. In some courts, the case is automatically listed for a hearing on the merits of the point; in other courts, the case remains in the usual housing possession list, and is then (depending on the court) (i) adjourned for fuller consideration, (ii) automatically re-listed for a hearing, or (iii) briefly considered and then either rejected or adjourned as under (i) or re-listed as under (ii).

37 Although we were asked to do so, it does not appear to me to be appropriate for us to give firm guidance on the procedure to be adopted in possession cases where the tenant raises Article 8. We simply do not have the information available to give such guidance.....

39 The only specific point I would make is to emphasise the desirability of a judge considering at an early stage (normally on the basis of the tenant’s pleaded case on the issue) whether the tenant has an arguable case on Article 8 proportionality, before the issue is ordered to be heard. If it is a case which cannot succeed, then it should not be allowed to take up further court time and expense to the parties, and should not be allowed to delay the landlord’s right to possession. I accept, however, that it may well be that even that cannot be an absolute rule. Apart from that, questions of procedure in this area should perhaps be considered by the CPR Committee, and, meanwhile, Designated

¹³ One of the concealed cutbacks in the legal aid budget seems to be being effected by the simple expedient of the LSC not making a decision on funding until after a hearing date has passed; by which time it is too late unless the in person defendant has managed to persuade the court to adjourn the proceedings. I am regularly briefed by several solicitors who report this happening with increasing frequency.

Civil Judges may think it worth considering such procedures in the courts for which they have responsibility.”

If these paragraphs attract the attention they deserve then *Scott* has very little precedential value. It tells us that Ms Scott did not adduce credible evidence to support what may or may not have been a plausible case on the merits and that Mr Haycraft’s relatively brief period of good behaviour did not absolve him of responsibility for his earlier misdeeds. But that is perhaps not how the case will be (mis)-read.

What Corby BC v Scott did not do ... but what claimants will say it did

The major concern that *Scott* raises is that because the defendants did not succeed it will be invoked as an authority—and accepted as such by housing advisers and county court judges—for a much wider proposition than it really supports on a careful reading; namely that an art.8 defence is always likely to prove a worthless enterprise. There are several—interconnected—reasons for rejecting that understanding above and beyond the simple observation of fact made in the preceding paragraph.

The first is that we might easily forget that *Pinnock* and *Powell* proportionality is—thus far—limited to defendants who have/had introductory, demoted or non-secure homelessness tenancies. The Supreme Court’s presumption in *Pinnock* and *Powell* that proportionality in such cases should look much like irrationality rests on two supposed bases: the first that the low level of security attached to such tenancies is the result of considered legislative decision; the second that there are quite rigorous procedural safeguards attached to those substantive regimes.¹⁴

The second is that *Pinnock* and *Powell*—and *Corby BC v Scott*—only really broach what we might call the “personal circumstances” (or per *Scott* “particularly harmful”) dimension of proportionality as a doctrine. This is a perception of proportionality

¹⁴ The second point is very strong in relation to demoted tenancies; moderately so in relation to introductory tenancies; but rather hard to see at all in respect of non-secure homelessness tenancies.

which is concerned only with outcome at the end of the litigation process: Given the personal circumstances of this defendant, would it be proportionate for the court to grant a possession order? But the more interesting and perhaps quantitatively more important question is whether art.8 proportionality can in principle also reach to the claimant's conduct of its decision-making processes, and if it can do so in principle in what circumstances will it do so in practice and with what degree of rigour will courts scrutinise those processes?

In *Pinnock*, the Supreme Court rejected what we might call the “*Huang*” notion of proportionality as appropriate for possession cases. In *Huang*,¹⁵ an immigration case, the House of Lords accepted that in that context proportionality would bear a meaning similar to that deployed by the Canadian courts in its Charter of Fundamental Rights and Freedom jurisprudence under the so-called “*Oakes*” test.¹⁶ The Canadian Supreme Court offered this analysis in *Oakes*:

“69..[T]wo central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’.....It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test ... There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question.... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance’.”

¹⁵ *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167.

¹⁶ *R v Oakes* [1986] 1 SCR 103.

The court manifestly exercises an intrusive merits jurisdiction under the *Oakes* test, and one which moreover reaches to matters of purpose and conduct as well as outcome. The test imposes a substantial burden on the claimant. This is presumably why the Supreme Court in *Powell* thought it an inapposite test in the context of (some; i.e. demoted, introductory and non-secure tenancy) possession proceedings. As Lord Hope observed :

“41 A structured [Oakes] approach of the kind that Mr Luba was suggesting may be appropriate, and indeed desirable, in some contexts such as that of immigration control which was the issue under discussion in *Huang v Secretary of State for the Home Department*. But in the context of a statutory regime that has been deliberately designed by Parliament, for sound reasons of social policy, so as not to provide the occupier with a secure tenancy it would be wholly inappropriate. I agree with Mr Stilitz QC for the Secretary of State that to require the local authority to plead its case in this way would largely collapse the distinction between secured and non-secure tenancies...”.

Both *Pinnock* and *Powell* indicate that courts should accept as “a given” that a public authority landlord is pursuing a legitimate aim in an art.8 sense; the presumed legitimate aim being simply a desire to regain control of the premises in order to let them to someone else.¹⁶ This is not a matter the claimant needs to plead or prove as would be required under *Oakes*.

It may be that we should deduce from this (and from para.41 of *Powell*) that in relation to demoted, introductory and non-secure tenancies matters relating to the claimant’s decision-making processes (i.e. a failure to take account of relevant considerations for example) do not raise proportionality issues, but fall instead to be addressed on ordinary public law grounds. That question of principle will perhaps present itself to a higher court in the near future.

If so, one might hope that any consideration of the principle is undertaken in a more practically realistic fashion than occurred in *Scott’s* treatment of the outcome element of proportionality. Disproportionality in this sense might be inferable on the face of

¹⁶ *Pinnock* [2010] UKSC 45 at [53].

the claim. An obvious instance would be where a notice was issued by a council on the basis of rent arrears, but by the time proceedings are issued a delayed housing benefit payment has much reduced or removed the arrears. Equally, it may be possible to imply, at least to the extent needed for CPR Pt 55.8 purposes, a failure to take account of relevant considerations from what is *not* said in the claimant's particulars or accompanying (and often rather perfunctory) witness statement.

More often, such defences will emerge only after the defendant's advisers have had sight of her housing file. If a defendant seeks competent legal advice promptly it may be possible to examine the housing file sufficiently in advance of the first hearing. But that will often not happen, and the claimant's obvious response to requests to adjourn proceedings pending disclosure of the file is that the defendant is simply engaging in an unmeritorious fishing expedition to delay the inevitability of eviction and expose the claimant to unnecessary legal costs.

'Purpose' and 'conduct' issues were not raised in *Scott*, so the law on this point remains very unclear even in relation to demoted, introductory and non-secure tenancies. But if a defendant does not fall within the *Pinnock/Powell* categories —if for example she is a former joint tenant whose partner has unbeknown to her served a notice to quit on the landlord which is relying on the rule in *Hammersmith and Fulham LBC v Monk*¹⁷ to evict her, or if she is a potential "second successor" to secure a tenancy, or if a possession order is granted against her on the basis of ground 8 but her arrears were caused by a housing benefit error which has now been resolved —then the door would seem to be open to argue that she can rely upon a *Huang/Oakes* understanding of proportionality. It would be unfortunate if a misleading "headline" as to the effect of *Scott* (i.e. "Art 8 defences fail again") gains sufficient currency to "chill" either the readiness of defendants' lawyers to press such arguments and the willingness of county court judges to accept that they "appear to be substantial". The stern ticking off delivered by

¹⁷ *Hammersmith and Fulham LBC v Monk* [1992] 1 A.C. 478; [1991] 3 W.L.R. 1144.

Lord Neuberger to the trial judge in *Scott* might well have such an impact on low level judicial behaviour.

Conclusion

Article 8 and public law defences in the context of residential possession proceedings can raise complicated jurisprudential issues. *Pinnock* answered some questions and in turn raised several others. *Scott* takes us no further along the road to figuring out how significant an impact art.8 will have on the management and outcome of possession proceedings. It maybe however that we just delude ourselves if we try to characterise the law—whether it be the visible law in the reports or the invisible law in the lower courts—as a destination. It is perhaps better seen, at least in the medium term, as a journey; within which *Scott* proves to be no more than a five minute stop.

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