Neutral Citation Number: [2014] EWCA Civ 231

Case No: B5/2012/2849

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
MR JUSTICE CRANSTON
QB20120183

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th March 2014

Before:

LORD JUSTICE SULLIVAN
LORD JUSTICE McFARLANE
and
LORD JUSTICE LEWISON

- -

Between:

SOUTHEND-ON-SEA BOROUGH COUNCIL	**Appellant**
- and -	
ARMOUR	**Respondent**

- -
- -

MR NICHOLAS GRUNDY (instructed by Clarke Willmott, London) for the **Appellant**
MR JAN LUBA QC (instructed by Law, Hurst & Taylor, Westcliff-on-Sea) for the **Respondent**

Hearing date: 4 March 2014

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Approved Judgment

Lord Justice Lewison:

The issue

1. The main issue raised by this appeal is whether the trial judge applied an insufficiently rigorous test in deciding that the making of a possession order against a tenant under an introductory tenancy was not proportionate.

The facts

2. Mr Armour became the weekly tenant of 35 Bewley Court, Whittingham Avenue in Southend-on-Sea with effect from 31 January 2011, although the tenancy agreement was signed on 25 January and he moved in on that day. The tenancy agreement informed him that:

> "Your tenancy will begin as an introductory tenancy. It will become a secure tenancy after one year; unless you have broken the conditions of your introductory tenancy."

3. Almost immediately a neighbour complained about having been sworn at and threatened, in consequence the housing managers wrote to him on 4 February 2011. The letter said that it would be treated as a one off incident, but emphasised that antisocial behaviour was taken very seriously; and that any further complaint would be investigated very fully. A month later on 3 March 2011 Mr Armour had a telephone conversation with a member of the contact team, the ostensible purpose of which was to rearrange an appointment to deal with a defective boiler. He was rude and aggressive on the phone, and alleged that the boiler was illegal. The team member was left feeling upset and personally responsible. On that same day Mr Armour was sent another letter saying that his abusive behaviour towards a member of staff was "totally unacceptable". The third incident took place a few weeks later on 31 March 2011. Electricians had arrived at Mr Armour's flat following the stripping out of the kitchen ready for electrical works to take place. They said that Mr Armour had been abusive to them. They also alleged that Mr Armour had turned on the electricity after they had turned it off in order to carry out the works, in consequence of which one of the workmen received an electric shock. The electricians also alleged that Mr Armour had sworn at them and been abusive.

4. The immediate consequence of these three incidents was that Southend-on-Sea BC as landlord served Mr Armour notice of possession proceedings alleging, by reference to these three incidents, that Mr Armour had been guilty of conduct causing or likely to cause nuisance or annoyance. The notice said that court proceedings would not be begun until after 2 May 2011; and in the meantime advised Mr Armour of his right to request a review of the decision. Mr Armour requested a review. He said that he had not turned on the electricity and that no one had received a shock. He also asked for a chance to explain the other alleged incidents.

5. The review took place on 21 April 2011. The review panel considered the evidence and material and concluded:

> "The panel found that while there may have been an element of doubt as to how the circuit the electricians were working on became live it was clear that the [tenant] abused the contractors sent to carry out works to the property.
>
> Bearing in mind that [the tenant] had been warned only 3 [weeks] before the Panel found the abuse to be proven and therefore decided on Option 2: DISMISS the appeal."

6. The council began proceedings for possession on 7 June 2011. After various procedural delays the case came to trial before Ms Recorder Davies on 2 March 2012. That was nearly a year after the last of the three incidents, during which time there had been no further problem arising out of Mr Armour's behaviour. By an amendment to the pleadings, which the Recorder allowed at the beginning of the trial, Mr Armour raised a defence under article 8 of the European Convention on Human Rights and Fundamental Freedoms.

The Recorder's judgment

7. The Recorder held that the council's decision to initiate proceedings for possession was a reasonable decision and that at the date when the proceedings were issued Mr Armour would have had no defence. She also held that but for the interlocutory delays the case should have been heard in July or August 2011.

8. However, she held that the question of the proportionality of making a possession order fell to be decided as at the date of trial. In reaching her decision on that issue she said that she had to balance the duty and obligations of the council towards its tenants, prospective tenants and the community it served against Mr Armour's personal circumstances.

9. Having carried out that exercise she decided that in the circumstances pertaining at trial a possession order was no longer proportionate. She took into account the following personal circumstances:

    i) Since the council's initial decision it had come to light that Mr Armour lacked capacity to conduct litigation. He had been diagnosed with depression and Asperger's syndrome, although his conduct could not be attributed to that.

    ii) Although Ms Ward (who was Mr Armour's ex-partner) said that Mr Armour could not read or write, that was exaggerated, because he was able to send text messages, and responded very rapidly to the notice seeking possession.

    iii) Mr Armour's daughter Elise was living with him. Although she might find difficulty in sharing a bedroom if she were to move back to her mother's home, that was not so important as to make the possession order disproportionate.

    iv) What tipped the balance was that despite his mental health problems Mr Armour had kept to the terms of his tenancy for nearly a year. If a possession order were refused, his tenancy would become a secure tenancy. He would be at risk under that tenancy if there was any repetition of anti-social behaviour.

> His desire to keep his tenancy was supported by his probation officer, his community worker and members of his family. The anti-social behaviour had stopped as soon as Mr Armour had been served with the notice seeking possession.

10. The council appealed against that decision, but Cranston J dismissed their appeal. With the permission of Arden LJ they appeal for a second time. The principal ground of appeal is that the Recorder applied too generous a test to Mr Armour. There are additional grounds of appeal which raise new points that were not before the Recorder or the judge; and I will deal with those in due course.

11. Mr Nicholas Grundy appeared for the council; and Mr Jan Luba QC appeared for Mr Armour. At the conclusion of the hearing we announced our decision to dismiss the appeal, and said that we would put our reasons in writing. These are my reasons for joining in that decision.

Introductory tenancies

12. Introductory tenancies were created by the Housing Act 1996. Their purpose was to allow social landlords to grant tenancies under which the tenant would not have security of tenure until the expiry of a probationary period, usually one year. The purpose of the probationary period was to allow the tenant to demonstrate that he was a responsible tenant during that period. If he did that, then at the end of the probationary period the tenancy would be converted into a secure tenancy, under which the tenant had security of tenure. This policy is explained in Circular 2/97, paragraph 4 of which reads:

> "Introductory tenancies are designed to help in the fight against antisocial behaviour by making it easier for landlords to evict those tenants who persistently engage in neighbour nuisance before they achieve security of tenure."

13. Where a landlord has granted an introductory tenancy he may only bring it to an end by a court order for possession and the execution of that order: Housing Act 1996 s. 127 (1). The court must make a possession order unless section 128 applies: s. 127 (2). Section 128 (1) provides that the court must not entertain proceedings for possession unless the landlord has served a notice of proceedings complying with that section. Section 128 (3) requires the landlord to set out the reasons for seeking possession and section 128 (6) requires the notice to inform the tenant of his right to seek a review of the decision. If the tenant requires a review, then the landlord must review its decision: s. 129 (2). If the result of the review is to confirm the original decision, the tenant must be informed and given the reasons for the decision: s. 129 (5).

Proportionality

14. These provisions do not exclude the ability of the court to undertake a review of the landlord's decision in order to satisfy itself that the making of a possession order is not incompatible with the tenant's rights under article 8: *London Borough of Hounslow v Powell* [2011] UKSC 8; [2011] 2 AC 186. A number of cases in this court and in the House of Lords and Supreme Court have laid down the principles that

must be applied. A useful starting point is the judgment of Etherton LJ, reviewing much of the previous case-law, in *Thurrock Borough Council v West* [2012] EWCA HLR 5 Civ 1435. He formulated the following principles:

i) It is a defence to a claim by a local authority for possession of a defendant's home that the recovery of possession is not necessary in a democratic society within article 8(2), that is to say it would be disproportionate in all the circumstances. An order for possession in such a case would be an infringement of the defendant's right under article 8 to respect for his or her home and so unlawful within the Human Rights Act 1998 s. 6 (1).

ii) The test is whether the eviction is a proportionate means of achieving a legitimate aim.

iii) The threshold for establishing an arguable case that a local authority is acting disproportionately and so in breach of article 8 where re-possession would otherwise be lawful is a high one and will be met in only a small proportion of cases.

iv) The reasons why the threshold is so high lie in the public policy and public benefit inherent in the functions of the housing authority in dealing with its housing stock, a precious and limited public resource. Local authorities, like other social landlords, hold their housing stock for the benefit of the whole community and they are best equipped, certainly better equipped than the courts, to make management decisions about the way such stock should be administered.

v) That is why the fact that a local authority has a legal right to possession, aside from article 8, and is to be assumed to be acting in accordance with its duties (in the absence of cogent evidence to the contrary), will be a strong factor in support of the proportionality of making an order for possession without the need for explanation or justification by the local authority.

vi) An article 8 defence on the grounds of lack of proportionality must be pleaded and sufficiently particularised to show that it reaches the high threshold of being seriously arguably.

vii) Unless there is some good reason not to do so, the court must at the earliest opportunity summarily consider whether the article 8 defence, as pleaded, and on the assumption that the pleaded facts relied upon are correct, reaches that threshold.

viii) Even where an article 8 defence is established, in a case where the defendant would otherwise have no legal right to remain in the property, it is difficult to imagine circumstances in which the defence could operate to give the defendant an unlimited and unconditional right to remain.

15. In *Manchester CC v Pinnock* [2010] UKSC 45; [2011] 2 AC 104 Lord Neuberger said at [74]:

> "Where it is required in order to give effect to an occupier's article 8 Convention rights, the court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view."

16. That proposition was reaffirmed by the Supreme Court in *Powell* at [53]. In *Pinnock* Lord Neuberger also accepted 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: see [64].

The function of the appeal court

17. The first point raised by this appeal concerns the function of the appeal court. On behalf of the council Mr Grundy submits that whether a given set of facts crosses the high threshold of giving rise to an article 8 defence is a question of law. There is no question of discretion involved. I agree that there is no question of discretion. But the test which the courts must apply, whether described as proportionality or as deciding whether eviction is "necessary in a democratic society" is not, in my judgment, a bright line test. It is more in the nature of a value judgment. If a judge is required to apply a clear legal rule to a given set of facts, an appeal court can decide for itself whether that given set of facts measure up to the legal rule. But "the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision": *Re Grayan Building Services Ltd* [1995] Ch 241, 254 per Hoffmann LJ. In my judgment, this is the kind of decision in which an appeal court should be reluctant to reverse the value judgment of the trial judge.

18. The question of proportionality in relation to article 8 arises in many fields of law: immigration and the placement of children for adoption are two examples. In *Re B (A Child)* [2013] UKSC 33; [2013] 1 WLR 1911 Lord Neuberger (with whom Lords Wilson and Clarke agreed) said at [91]:

> "That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong."

19. Mr Grundy argues that if the appeal court shows too much deference to the value judgment of the trial judge, that will collapse the difference between those tenancies which require the court to be satisfied that it is reasonable to make an order for possession and those, like introductory tenancies, in which that kind of challenge is not permitted. I disagree. In the one case, the judge is asking himself or herself whether it is reasonable to make an order for possession. In the other the question is a different one: is the making of an outright order for possession proportionate? Both

are value judgments, albeit of different kinds. But I cannot see that the difference in the question posed to the *trial* judge that I have identified should radically alter the task of an *appeal* court reviewing the trial judge's decision. The one simply does not follow from the other.

20. Accordingly in my judgment the question for this court is not whether we would have made the same decision as the Recorder, but whether her decision was one that was open to her.

Was the Recorder's conclusion open to her?

21. At the first appeal before Cranston J the council argued that events that post-dated the council's decision to take possession proceedings were irrelevant to the proportionality review. That position is no longer maintained before this court. Nor could it be in the light of the extracts from *Pinnock* and *Powell* that I have quoted.

22. Rather, what the council now says is that compliance by the tenant with the terms of his tenancy cannot amount to the kind of exceptional circumstances that would justify a successful article 8 defence. Compliance with the terms of the tenancy ought to be regarded as the norm, not the exception. If Mr Armour's tenancy had been secure tenancy, then it is more than likely that the court would have made a suspended possession order against him. That would have had the effect that if there were to be a repeat of anti-social behaviour the council would have been able to enforce the possession order without having to start fresh proceedings. If, on the other hand, its current action is dismissed, then Mr Armour's tenancy will become a secure tenancy, with the consequence that if there were to be a repeat of anti-social behaviour the council would have to start fresh proceedings. In practical terms Mr Armour would be better off with the order that the Recorder made than he would have been if he had held a secure tenancy. That is the clearest possible demonstration that the Recorder's order has collapsed the distinction between an introductory tenancy and a secure tenancy.

23. Mr Grundy submits that the cases recognise that the tenant's good behaviour cannot support an article 8 defence, although his bad behaviour may undermine it. He relies in particular on the decision of this court in *Birmingham City Council v Lloyd* [2012] EWCA Civ 969; [2012] HLR 44. Before coming to the dictum on which he relies, it is necessary to give the context. Mr Lloyd had moved into a council house as a trespasser, following the death of his brother who had been the secure tenant. The council refused to grant him a tenancy, and began possession proceedings. Mr Lloyd raised a defence under article 8. The trial judge refused to make a possession order against him. His reasons were that (i) Mr Lloyd had had a history of depression which would worsen if he was evicted and made homeless; (ii) his financial circumstances and history of rent arrears at his previous accommodation would render it difficult for him to find other accommodation if he was evicted from the flat; (iii) much effort and some expenditure had been incurred by Mr Lloyd in setting up his own web design business, all of which would be wasted if he lost the place from which to work; (iv) there was confusion in the circumstances in which Mr Lloyd gave up his tenancy of his previous accommodation; and (v) this was not a case where the occupier of the property concerned, namely Mr Lloyd, had been guilty of nuisance, anti-social behaviour or criminal activity and he appeared to get on with his neighbours.

24. This court reversed that decision. The striking feature of that case was that Mr Lloyd was a pure trespasser, who had never had any right to be in the property, and the effect of the judge's order was that he would be able to remain there indefinitely. It is in those circumstances that Lord Neuberger MR said at [24]:

> "Finally, there is the point that he has not caused a nuisance, or done anything criminal, and has got on with his neighbours. To my mind that is not a reason which begins to help him establish an Article 8 argument; all it does is to say that a factor undermining his Article 8 argument, such as existed in *Pinnock*, does not exist in his case."

25. Since Mr Lloyd never had any right to occupy the dwelling that statement is unexceptionable. A well-behaved trespasser is still a trespasser. Mr Grundy also relied on Lord Neuberger's earlier statement at [19] that:

> "With all respect to the Recorder, it seems to me that even if Mr Lloyd had been a tenant whose tenancy had come to an end, and who, as an ex tenant, had no right to remain in occupation under domestic law, it does not seem to me that he would have had a strong enough case to justify the refusal of an order for possession."

26. No doubt that is true in the vast majority of cases. But in the case of an introductory tenancy, the whole point is to test the tenant's behaviour over a one year period in order to see whether he can be a responsible tenant. Moreover, strictly speaking, Mr Armour is not an "ex-tenant" because his introductory tenancy is prolonged until the conclusion of the proceedings and any appeal. If a possession order is refused, then unlike the case of Mr Lloyd the tenant will not have an indefinite and uncontrolled right of occupation. On the contrary, as the Recorder appreciated, he will become a secure tenant on the same terms as the introductory tenancy. That will have the consequence that any further breach of the terms of the tenancy may result in an order for possession (either suspended or outright) being made against him.

27. Behavioural issues in cases about introductory tenancies have arisen before. One of the appeals heard with *Powell* was *Leeds CC v Hall*. Mr Hall became an introductory tenant under a tenancy granted by Leeds CC on 21 April 2008. He lived alone. Allegations were made of noise nuisance and anti-social behaviour by Mr Hall and by visitors to the property. The behaviour which was complained of was mainly of noise nuisance from loud music and television and the banging and slamming of doors. Mention was also made of shouting, screaming and arguing, banging on the communal door and ringing a neighbour's doorbell at night and in the early hours of the morning. It was also said that Mr Hall had engaged in threatening and intimidating behaviour and had been verbally abusive towards his neighbours. On 1 July 2008 a noise abatement notice was served on him. He did not appeal against that notice, and he appears to have disregarded it as complaints continued to be received. On 28 November 2008 Leeds CC served a notice of proceedings for possession on him under section 128 of the 1996 Act. A review was sought, and the notice was withdrawn following the review. Leeds CC continued nevertheless to receive allegations of noise nuisance and anti-social behaviour, so on 6 March 2009 it served a further notice of proceedings for possession on Mr Hall. He again requested a

review, but this time the review hearing upheld the service of the notice. The Court of Appeal ([2010] EWCA Civ 336; [2011] 1 All ER 119) held that Mr Hall's case that the order was disproportionate was unarguable. The court said at [79] that:

> "… there is no basis for arguing that it is unlawful for a Local Authority to refuse to change its mind by reference to facts which simply seek to demonstrate that the behaviour of the occupier has now improved."

28. The Supreme Court agreed at [86]. That, however, was a case in which the tenant's anti-social behaviour had persisted for the best part of a year; where less draconian action had been tried and failed, and where there had already been one review which led to the withdrawal of the notice seeking possession. Moreover, in the out-turn Leeds CC did decide to offer Mr Hall a secure tenancy, precisely because his behaviour had improved: see *Powell* at [67].

29. Mr Grundy argues that if a defence such as Mr Armour's is allowed to succeed, that is an incentive to delay proceedings. The cases stress that where an article 8 defence is raised it should be dealt with summarily in the first instance. I see the force of that point, but the time for summarily dealing with the defence is when it is raised on the pleadings. Once, as in our case, the judge has allowed the pleadings to be amended without objection in order to raise the defence, the judge is bound to consider the defence on its merits.

30. The question is not whether the circumstances are exceptional because as the Supreme Court pointed out in *Pinnock* exceptionality is an outcome rather than a test. Where, as here, the tenant under an introductory tenancy gets off to a shaky start, but mends his ways for almost all of the one year period, I consider that that improvement in behaviour is capable of being a factor in deciding whether it is disproportionate for the landlord to continue to insist on recovering possession. What weight to give it is a question for the trial judge. In my judgment, on the material that was before the Recorder she was entitled to come to the conclusion that by the trial date, it had become disproportionate to make a possession order. Other judges might have come to a different conclusion, but that does not mean that the Recorder's conclusion in our case was wrong.

Fresh evidence: the principles

31. The council wishes to rely on fresh evidence which, they say, undermines the evidence that was given on Mr Armour's behalf at trial. In the case of a first appeal the appeal court will usually decide the question of admitting fresh evidence by reference to the well-known criteria in *Ladd v Marshall* [1954] 1 WLR 1489. Those criteria are:

    i) The evidence could not have been obtained with reasonable diligence for use at the trial.

    ii) The evidence would probably have had an important (though not necessarily decisive) influence on the result of the case.

    iii) The evidence must be credible (though it need not be incontrovertible).

32. The question of judgments alleged to have been procured by fraud has been considered in depth by this court in *Noble v Owens* [2010] EWCA Civ 224; [2010] 1 WLR 1489. That was a case of a first appeal, in which it was alleged that the claimant had fraudulently exaggerated his injuries at trial. The court noted that there were two lines of authority:

    i) That derived from *Ladd v Marshall* which said that where fresh evidence is properly admitted and it appears to the court that it might, if admitted, have had an important effect on the trial, the right course is to send the case back for retrial.

    ii) That derived from *Jonesco v Beard* [1930] AC 298 which said that where it is alleged that there was deceit in the court below, the proper course is to leave the aggrieved party to commence a new action, save where the Court of Appeal either determines the issue of fraud itself —in effect where it is admitted — or the evidence is incontrovertible.

33. The difficulty for the court was how to reconcile these two lines of authority, if indeed they could be reconciled. Smith LJ said at [27]:

> "In my judgment, the true principle of law is derived from *Jonesco v Beard* and is that, where fresh evidence is adduced in the Court of Appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where the fraud is either admitted or the evidence of it is incontrovertible. In any other case, the issue of fraud must be determined before the judgment of the court below can be set aside."

34. At [39] Elias LJ set out the argument that at [41] he said he found compelling:

> "… *Ladd v Marshall* is inapplicable where the allegation is one of fraud allegedly perpetrated by the successful party. The appropriate remedy in such circumstances is for the defendant to take separate proceedings to have the judgment set aside for fraud. Save where the fresh evidence sought to be admitted is so probative of fraud that it would be futile to require the defendant to take separate proceedings, the court should never order a retrial without fraud being proved."

35. He concluded at [50]:

> "Even if the appellate court can order a retrial in the context of a fraud action, it should only do so where it can be satisfied to the appropriate standard of proof that the fraud has been established, with the burden on he who alleges the fraud. Plainly it would be futile to require a party to incur the cost and the delay of fresh proceedings where the evidence is overwhelming and therefore incontestable, or where the alleged fraud is not contested. But where the issue is in doubt, separate proceedings in fraud should be pursued."

36. Sedley LJ agreed. What the court decided to do in that case was to remit the issue of fraud for trial by the original trial judge. In fact when the issue of fraud was tried, the trial judge decided that no fraud had been committed at the original trial: [2011] EWHC 534 (QB).

The evidence at trial

37. Before coming to the fresh evidence it is necessary to outline the relevant evidence that was before the Recorder. Mr Armour himself did not attend the trial or give oral evidence, but he made a witness statement that was before the court. In that statement he said that he lived at the property with his daughter. He dealt with the three incidents but denied that they had happened. He also said (twice) that he could not read or write.

38. Mr Armour's ex-partner Louise Ward attended the trial and gave evidence. Her witness statement was also before the court. She said that she and Mr Armour had had a volatile and at times violent relationship. She said that he had had a troubled life and had mental health problems. He had recently been diagnosed with Asperger's syndrome, although he did not like to think that he had any mental health problems. His condition made him withdrawn and short tempered. She also said that Mr Armour could not read or write. She said that there had been a great improvement in Mr Armour since he moved into the property. He had carried out works to his daughter's bedroom which turned it into her "dream bedroom" and he devoted his whole world to her. She discussed Mr Armour's many criminal convictions. She pointed out that there had been no complaints since the first three months of the tenancy, and that Mr Armour had lived peacefully in the property for almost a year.

39. The Recorder was also shown material emanating from Dr Mario Marasco, a GP in Southend, who had been Mr Armour's GP since September 2011. He said that Mr Armour suffered from severe depression and Asperger's syndrome; and that an eviction would be very detrimental to his mental health. He also completed an assessment of Mr Armour's capacity to conduct the proceedings and concluded that he lacked capacity in that respect. In that assessment he said in terms that he had assessed Mr Armour on 24 October 2011.

40. As noted, the Recorder decided that contrary to the evidence of Mr Armour and Ms Ward, Mr Armour had been guilty of the anti-social conduct complained of (although there was doubt about whether he had turned on the electrical supply); and she did not consider that the position of his daughter was of significant weight. What was important in her view was that Mr Armour had complied with the terms of his tenancy for nearly a year, despite his mental health problems.

The fresh evidence

41. There are two strands to the fresh evidence on which the council seeks to rely. The first consists of evidence from Ms Ward in which she says that she did not tell the truth in her previous evidence. In her statement of 16 January 2013 she says:

    i) Mr Armour can read and write. She has seen him read correspondence, newspapers and letters. She has seen him complete crossword puzzles and he has left her notes of jobs to do.

ii) She says (although not in quite these bald terms) that Mr Armour was allocated the flat by the council because she falsely asserted that she had thrown him (and her daughter) out of the property which they had been sharing; and that she did this in order to enhance his chance of obtaining a council flat.

iii) Her daughter did not live with Mr Armour at the flat (contrary to what the Recorder had been told).

iv) She gave the instructions to Dr Marasco about Mr Armour's condition and thus enabled him to sign the various documents that he did; although he never in fact saw Mr Armour. Mr Armour's mental health problems had been grossly overstated, and it was unnecessary for him to have had a litigation friend to represent him in the proceedings.

v) Mr Armour did in fact see a psychiatrist, called Dr Lars Davidsson.

vi) She is now aware that she lied in court but she did so in order to prevent Mr Armour from being evicted.

42. Ms Ward made a second (updating) statement on 23 May 2013; but that statement does not deal with historic facts. In essence that statement deals with allegations of threats made by Mr Armour, which have been reported to the police.

43. Dr Davidsson's report has been put into the case papers. It was prepared between the trial and the first appeal. Among other things Dr Davidsson saw Mr Armour, who was accompanied by Ms Ward.

44. The second strand of evidence is a psychiatric report prepared by Dr Michael Isaac. He was jointly instructed as a single joint expert. He interviewed Mr Armour on 15 November 2013 and prepared a report dated 18 November 2013. Dr Isaac said that it was difficult to make a robust substantive diagnosis of personality disorder based on one interview and a relatively patchy history. But he thought that a diagnosis of antisocial personality disorder was reasonable, probably carrying a psychiatric comorbidity with social anxiety, with obsessive compulsive disorder. He found no evidence that Mr Armour had a serious mental illness, or mood disorder. Although Mr Armour had episodes of low mood, they did not amount to clinical depression. As far as Asperger's syndrome was concerned, although he did not wish to be too quick to dismiss the diagnosis, Mr Armour did not give him the impression of someone with a neuro-developmental disorder.

45. He concluded that Mr Armour had mental capacity to conduct the litigation, although he was a vulnerable person and special measures should be taken to ensure that he understood the proceedings.

Fresh evidence: discussion

46. Whether Mr Armour obtained his tenancy through deception was not a ground raised in the council's notice of possession proceedings. Nor was it any part of the council's pleaded case. If the Recorder's order is upheld, with the consequence that Mr Armour becomes a secure tenant, an allegation that the tenancy was obtained by deception (if

proved) is a ground for possession under ground 5 of Schedule 2 to the Housing Act 1985. The alleged fraud is not admitted; and the evidence of it is certainly not incontrovertible. I do not regard this evidence as material on this appeal.

47. It is true that the Recorder took into account the difficulties that Elise might experience if she had to move, but she said that those difficulties did not make the grant of a possession order disproportionate. This part of the fresh evidence (if true) is unlikely to have changed the result.

48. The extent of Mr Armour's literacy is still uncertain. But the Recorder herself found that Ms Ward's evidence was exaggerated, and did not rely on any finding of illiteracy in reaching her conclusion. Ms Ward's current evidence is also contradicted by what she told Dr Davidsson following the trial before the Recorder. This part of the fresh evidence (if true) is also unlikely to have changed the result.

49. The allegation that Dr Marasco certified that Mr Armour did not have capacity and diagnosed mental illness without even having seen him is a very serious allegation of professional misconduct. It has apparently not been put to Dr Marasco for his comments. It is also contradicted by the GP records which Dr Isaacs examined. I do not consider that in these circumstances any significant weight can be attributed to this part of the fresh evidence.

50. There is also this problem. Ms Ward said that she lied first time round, but is now telling the truth. If she should not have been believed first time round, why should she be believed now? Denning LJ made this very point in *Ladd v Marshall* itself. He said:

> "We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to tell the truth." It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition."

51. That leaves the report of Dr Isaac. In his skeleton argument in support of his application to amend the grounds of appeal to rely on that report Mr Grundy says:

> "The Council has been sceptical throughout that Armour lacks capacity."

52. If the council was sceptical about that why did it not take steps to adduce psychiatric evidence of its own? In fact by an order dated 7 February 2012 DJ Dudley ordered that no further medical evidence should be adduced at trial. That order was not appealed. The report of Dr Isaac, on which the council now wishes to rely, was prepared more than 18 months after the trial. It was also prepared after the first appeal. Mr Grundy says that if that evidence had been before the Recorder then Mr Armour's failure to attend to give evidence would have been held against him. But that submission assumes that if his mental capacity had been in issue Mr Armour would still have chosen not to attend. That is pure speculation. Second he says that the Recorder could not have found that his good behaviour was "despite his mental capacity issues". It is true that a finding in precisely those terms would not have been made (assuming that the Recorder accepted Dr Isaac's opinion). However, Dr Isaacs did not give Mr Armour a clean bill of mental health. As his report says he thought that Mr Armour suffered from antisocial personality disorder, which would have

entitled the Recorder to give him credit for having kept that disorder in check for the best part of a year.

53. In my judgment not only should Dr Isaac's evidence not be admitted on the ground of delay, it is unlikely that it would have had an important influence on the outcome of the case.

Second appeals

54. Thus far, I have considered the application to admit fresh evidence by reference to the usual *Ladd v Marshall* criteria. But this is not a first appeal: it is a second appeal. Although we did not hear oral argument on this question, in his written material Mr Luba submitted that stricter criteria should apply to the admission of fresh evidence on a second appeal. The criterion for the grant of permission for a first appeal is that (a) the court considers that the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard: CPR Part 52 r. 3 (6). In the case of a second appeal to the Court of Appeal the criteria are stricter. They are (a) the appeal would raise an important point of principle or practice or (b) there is some other compelling reason for the Court of Appeal to hear it: CPR Part 52.13 (2). How does that impact on the *Ladd v Marshall* guidelines?

55. The question of the admission of fresh evidence on a second appeal was considered by this court in *Re Uddin (A Child)* [2005] EWCA Civ 52; [2005] 1 WLR 2398. That case concerned a fact finding hearing about child abuse. The judge had made findings and permission to appeal to the Court of Appeal was refused by the Court of Appeal itself. The mother (against whom the findings had been made) then applied to re-open the appeal on the ground that fresh evidence was available. Dame Elizabeth Butler-Sloss P gave the judgment of the court. The relevant points are these:

    i) The *Ladd v Marshall* criteria are "the stuff of first-time-round appeals based on new evidence": see [19].

    ii) The principle of finality yields so as to allow a first appeal on *Ladd v Marshall* grounds. But it will prevail so as to disallow a second appeal - a *Taylor v Lawrence* application - on such grounds: see [19].

    iii) If the discovery of fresh evidence is ever to justify reopening a concluded appeal, the case must at least have this in common with the instances of corrupted process: the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claims of finality in litigation - especially pressing where what is contemplated is a second appeal. Finality is itself a function of justice, and one of great importance: see [21].

    iv) It must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result *has in fact* been perpetrated: see [22].

    v) That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be

> met where it is shown only that a wrong result may have been arrived at: see [22].

56. Although this case is not a true re-opening of an appeal, it is a second appeal. The observations of the court in *Re Uddin* are not, in my judgment, confined to cases of reopening concluded appeals. I discussed this question in *Wiemer v Redstone Mortages Ltd* [2014] EWCA Civ 81. My judgment (with which Floyd LJ agreed) contains the following:

> "29. That case was a case in which an appeal had already been decided by the Court of Appeal on appeal from the Family Division, so it is not quite on all fours with our case. But in the case of a first appeal, the applicant has only had one previous chance to adduce the evidence, namely at the original hearing. In the case of a second appeal, he has already had two chances, once at the original hearing and once again on the first appeal.
>
> 30. These features mean that in my judgment it is appropriate to adopt a more stringent approach to the admission of fresh evidence on a second appeal than would be adopted on a first appeal. That, I believe, is consistent with the second appeals test in CPR part 52.13, namely that there must be a compelling reason for this court to hear a second appeal if it does not raise an important point of principle or practice."

57. Thus although we did not hear oral argument on the point, as at present advised, I consider that Mr Luba is right.

Result

58. These are my reasons for joining in the decision to dismiss the appeal.

Lord Justice McFarlane:

59. I agree.

Lord Justice Sullivan:

60. I also agree.