

## Public law defences and mandatory grounds for possession

Sarah Salmon, barrister at Field Court Chambers, looks at the decision in *Harris v Hounslow LBC* [2017] EWCA Civ 1476. The Court of Appeal dismissed the tenant's appeal against a possession order made on mandatory grounds under the Housing Act 1985. The tenant had failed at first instance in his public law defence challenging the review procedure adopted by the local authority on the basis that any procedural defect had been cured during the pendency of the proceedings.

The Court of Appeal held, *inter alia*, that the general application of public law principles to decisions of a local authority landlord must not be allowed to undermine the legislative scheme of this mandatory ground for possession.

### *Mandatory grounds for possession*

Section 94, Anti-Social Behaviour, Crime and Policing Act 2014 introduced, *inter alia*, a mandatory ground for possession against secure tenants. In outline, so long as one of five conditions is met, notice requirements satisfied and, if relevant, review procedures followed, then the court will be required to grant a possession order, subject to any defence based on the rights of the occupier under the European Convention of Human Rights: s.84A, Housing Act 1985.

The five conditions in section 84A, Housing Act 1985 relate to anti-social behaviour by the tenant, a member of the tenant's household or a visitor. Condition 4 is that the dwelling-house has been the subject of a closure order and access to the dwelling-house has been prohibited (under the closure order or under a closure notice) for a continuous period of more than 48 hours: s.84A(6).

### *Notice requirements*

A tenant must be given notice of the intention to rely on the mandatory ground for possession: s.83ZA, Housing Act 1985. The notice requirements differ dependent upon which condition is relied upon. In addition to general notice requirements (that the court will be asked to make an order under s.84A, the reasons for the decision to apply for the order, informing the tenant of any right that he may have to request a review of the decision and the time within which a request must be made, the ground and particulars), so far as the conditions are concerned, if the landlord proposes to rely upon condition 4 the notice must also state the closure order concerned, and must be served on the tenant within the period of 3 months beginning with the day on which the closure order was made, or if there is an appeal against the making of the order, the period of 3 months beginning with the day on which the appeal is finally determined, abandoned or withdrawn.

### *Review procedure*

The Secretary of State and Welsh Ministers may make regulations governing the conduct of such reviews but generally: (a) a tenant may request a review of a landlord's decision to seek an order for possession; (b) such a request must be made in writing before the end of the period

of 7 days beginning with the day on which the notice is served; (c) on a request being duly made, the landlord must review its decision and notify the tenant in writing of the decision on the review; (d) if the decision is to confirm the original decision, the landlord must also notify the tenant of the reasons for the decision; and, (e) the review must be carried out, and the tenant notified, before the day specified in the notice as the day after which proceedings for the possession of the dwelling-house may be begun: s.85ZA, Housing Act 1985.

### ***Public law defences to possession claims***

The ability to raise a public law defence to private law proceedings has been common practice since the decision in *Wandsworth LBC v Winder (No 1)* [1985] AC 461.

In *Doran v Liverpool City Council* [2009] EWCA Civ 146; [2009] 1 WLR 2365 Toulson LJ stated at [67]:

*“... where notice to quit has been served, but the occupier asserts that the decision to serve it and seek possession was unlawful, it is for the licensee to make good such a defence. To do so, it must be shown that the council’s decision to serve the notice and seek possession was one which no reasonable council would have taken in the circumstances known, or which ought to have been known, to it at the time of the decision. This is a high test and rarely likely to be satisfied where the decision was made in good faith.”*

This is a well-established principle of public law. It is not for the court to take the decision and step into the shoes of the decision-maker but to review the decision and decide whether or not it was so unreasonable that no reasonable authority could have come to the same conclusion.

### ***Court’s powers if breach found***

Another question that has come before the courts in relation to possession proceedings is: what happens when a person establishes a breach in public law terms?

In *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834; PTSR 56, the Court of Appeal said the following, *inter alia*, in refusing to set aside a possession order despite the judge having found the council to have given no regard to s.49A Disability Discrimination Act:

*“...given that a breach of a public law duty is relied on by way of defence in the present case, it seems to me that it is open to the court in this situation to take the view that, if the decision would not have been set aside on an application for judicial review, it should not provide a basis for a defence to the proceedings for possession...”*: per Lloyd LJ at [37].

Simply, Carnworth LJ stated at [46]:

*“Applying a practical approach the judge was entitled to find that consideration of [the] disability would not have made any difference to the authority’s decision to seek possession.”*

In *Holley v Hillingdon LBC* [2016] EWCA Civ 1052; [2017] P.T.S.R. 127, the Court of Appeal considered a public law defence based on the argument that the authority had erred in not considering the discretionary grant to the defendant of a tenancy when he did not qualify to succeed. Arden LJ held:

*“Let it be assumed that...the respondent did not in any event consciously consider whether to apply a residual exceptional discretion to the appellant’s case. The question remains whether that nonetheless renders its decision to evict him unlawful. It is open to a public authority, when the lawfulness of its decision-making process is challenged in this way, to seek to show that, even if its policies and process had complied with the relevant dictates of public law, it would inevitably have led to the same outcome for the complainant.”*

### **Mr Aaron Harris**

Following various complaints of anti-social behaviour and the authority attempting, without success, to prevent the nuisance by alternative method, the police applied for a closure order. The closure order was granted. Subsequently, the authority served a notice upon Mr Harris under s.83ZA. The notice complied with all the statutory requirements.

Mr Harris did not request a review within the statutory timeframe but, some five days after the deadline, requested an extension of time. The authority refused the request and thereafter issued possession proceedings. Prior to the possession trial, the authority offered to review its decision and the review was completed. The authority decided to proceed. There was no challenge to that decision. Mr Harris did, however, raise a public law defence which included a complaint that the authority should have extended time for the review.

The district judge held (see paragraph 15 of the Court of Appeal judgment):

- (a) there was no valid public law challenge to the decision to serve the notice;
- (b) once the request for a review had been made, the authority should have granted an extension of time or, if there was no power to extend time, ought to have withdrawn the notice and serve a fresh one so as to start time running again; but,
- (c) the fact a review was carried out during the proceedings meant that the procedural defect had been cured and a possession order could be made.

### ***The appeal***

Mr Harris contended that the district judge was correct regarding the extension of time or withdrawal of the notice but that the failure to carry out a review could not be retrospectively cured. The authority disagreed with the judge’s conclusions regarding the extension of time and/or requirement for a fresh notice.

The Court of Appeal held, *inter alia*, at [17]-[28]:

- (a) the authority cannot “extend time” in the sense of altering a statutory time limit. The correct question was whether the authority had the power to agree to accept an out of time request for a review.
- (b) the purpose of the mandatory ground for possession is to provide relief for others *i.e.* witnesses, victims and the community. It engages the public interest. The seven-day time limit is not for the sole benefit of the landlord;
- (c) the importance of the time limit is obvious due to it being expressed within the statute and those effected by the anti-social behaviour would have a right to be concerned if a landlord was not doing all it could to bring a swift end to such behaviour;
- (d) it would place unnecessary strain on resources if authorities had to deal with applications for an extension of time on a case by case basis; and,
- (e) a tenant who requests a review out of time is not entitled to a statutory review and the landlord has no obligation or power to conduct one.

As to the review that was conducted, the Court of Appeal agreed with the authority that it was not a statutory review but rather part of a series of decisions that the authority took in the course of the proceedings, any of which might be challenged on public law grounds. The Court added to this at [27] that:

*“...the general application of public law principles to decisions of a local authority must not be allowed to undermine the legislative scheme of this mandatory ground for possession”.*

### **Comment**

It is unlikely that this decision will stop points being taken where a tenant misses the deadline for the statutory review either before or after proceedings are issued. Landlords subject to public law defences should still consider, as part of their decision-making process throughout possession proceedings, whether there are particular circumstances that mean a non-statutory review should be carried out. The case does, however, add to the existing bank of case law that suggests a tenant would need a very cogent case indeed to be successful on a public law challenge to possession proceedings especially, as in this case, where the statutory procedure was followed.