Dispensing with a Landlord's Notice - Meaning of "Just and Equitable"

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This article examines the meaning of "just and equitable" in the context of the court's power to dispense with landlord's notices under the Housing Act 1988.

If a dwelling is required as a principal home (ground 1 in Schedule 2 to the Housing Act 1988), the landlord is required to give notice in writing to the tenant, not later than the beginning of the tenancy, that possession might be recovered on this ground. The court, however, has discretion to dispense with the notice requirement if it would be "just and equitable" to do so. There is also a similar dispensing requirement in relation to the service of a landlord's notice of intended proceedings in relation to an assured tenancy under s.8 of the Housing Act 1988: see, s.8(1)(b).

General principles

It is apparent that, in determining what is just and equitable, the court is obliged to look at all the circumstances. In *Bradshaw v Baldwin-Wiseman* (1985) 17 HLR 260, a decision on Case 11 of Schedule 15 to the Rent Act 1977, (premises required by former owner-occupier, etc.), the Court of Appeal unanimously held that the words "just and equitable" were of very wide import, preferring the minority view of Stephenson LJ in the earlier case of *Fernandes v Parvardin* (1982) 5 HLR 33, who considered that there was no need to give the words any restricted meaning. In *Bradshaw*, the Court of Appeal reiterated the minority approach that all circumstances were relevant in determining whether to dispense with the written notice, including those affecting the landlord, or his successors in title, those of the tenant and those in which failure to give written notice had arisen. This approach has been consistently applied in subsequent case law.

In *Mustafa v Ruddock* (1998) 30 HLR 495, for example, the relevant matters to the exercise of the discretion as to whether to dispense with the statutory notice under ground 1 in Schedule 2 to the Housing Act 1988 were held to be: (1) that the original letting on its face purported to grant an assured shorthold tenancy; (2) that there was no evidence of hardship or merit on the tenant's side to balance against the landlord's side; (3) there was genuine hardship to the landlord; (4) the error was of the letting agents against whom the landlord had no effective remedy as they were bankrupt; (5) ground 1 was mandatory if the notice had been given or the court exercised discretion in the landlord's favour; and (6) whilst the court

would not ordinarily interfere with the exercise of such a discretion, the trial judge had erred in exercising his discretion by failing to take into account that the tenant had been informed by the agreement that the security of tenure was limited, and that the landlord had fulfilled the residence requirements of ground 1, and that there was no countervailing evidence of hardship from the tenant.

On the other hand, in *Ibie v Trubshaw* (1990) 22 HLR 191, where the landlord sought possession under Case 11 of Schedule 15 to the Rent Act 1977, the Court of Appeal held that it would not have been just and equitable to dispense with notice in this case merely because the occupiers had signed licence agreements and knew, therefore, that their occupation was temporary.

Oral notice

In several cases, the landlord had given only verbal notice and the question before the court was whether this was sufficient to invoke the court's discretion to dispense with the written requirements.

In Boyle v Verrall (1997) 29 HLR 436, the facts were briefly as follows. In 1987, Mrs Boyle purchased the freehold of a flat. Both she and her husband had a tenancy of a small country cottage and Mrs Boyle decided to let the flat furnished until it was needed by her and her husband. In 1993, she let it to a Mr Verrall at a rent of £650 per month (which was later increased to £700 per month). Mrs Boyle intended to create an assured shorthold tenancy but, because of an error, she failed to serve on Mr Verrall a completed s.20 notice with the result that she created an assured tenancy terminable only on one or more of the grounds specified in Schedule 2 to the Housing Act 1988. Mr Verrall knew at the time of her mistake and deliberately took advantage of it by failing to draw it to her attention. Mrs Boyle subsequently claimed that she was entitled to terminate the tenancy on ground 1 in Schedule 2, namely, that she required the flat as a principal home for her husband. She maintained that she made it plain to Mr Verrall (at the commencement of the letting) that she and her husband were expecting to need the flat at some time in the future.

The Court of Appeal, disagreeing with the trial judge, held that, in all the circumstances, it was just and equitable to dispense with the requirement of written notice under ground 1. In so doing, the Court reiterated that the ground in question, being mandatory, entitled the landlord to possession as of right. The court had no discretion and the landlord did not even have to show that his requirement of the property for use as his or his spouse's principal home was reasonable. All that the landlord had to establish was that he bona fide wants, and genuinely has an immediate intention of using, the property for that purpose: *Kennealy v Dunne* [1977] QB 837. On this basis, the discretionary element comes into play only where the landlord has not served the requisite written notice at the time of entering into the tenancy.

Auld LJ, who gave the leading judgment, clearly recognised that oral notice, given when the tenancy was granted, may (with or without other surrounding circumstances) be an important determining factor in granting dispensation. In his view, however, the absence of oral notice was not a reason for restricting dispensation to circumstances where an "exceptional case" for it could be shown - the approach taken by the trial judge who had regarded Mr Verrall as in greater need and treated that factor as decisive when weighed against Mr Verrall's conduct in taking advantage of Mrs Boyle's error. In so doing, the judge had not correctly analysed the position by comparing the availability to the Boyles of another home with the proposition that Mr Verrall was without money and the flat was his only home. In addition, Auld LJ considered that Mr Verrall's persistent late payment of rent was a relevant circumstance to be taken into account in deciding whether to dispense with written notice. Applying the correct test, "unglossed by any consideration of exceptionality because of the lack of formal notice", the only conclusion was that it was just and equitable to grant dispensation.

In the course of his judgment, Auld LJ referred to the earlier decision in *Fernandes*, mentioned above, on Case 11 of Schedule 15 to the Rent Act 1977, where the Court of Appeal held that the trial judge was right to dispense with the requirement of written notice since it was evident that the tenants had been made fully aware, when they were granted the tenancy, that the flat in question had been part of the landlord's home and that, therefore, if the landlord required it for herself (or for a member of the family), they might be evicted. In this case, oral notice was just as effective, as a practical matter, as written notice. Despite the fact that greater hardship would fall on the tenants if evicted, there was no question of them being taken by surprise. In view of the oral warning, they could not look on their tenancy as anything other than a temporary letting: see also, *Davies v Peterson* (1988) 21 HLR 63.

By contrast, in *White v Jones (Notice to Quit)* (1994) 26 HLR 477, at the time of the grant of the tenancy, neither side believed that there was security of tenure in respect of the property in question. In fact, both parties then believed that the tenancy was unprotected. Consequently, oral notice given by the landlords that they might require the premises for their own use was of much less significance. In this case, therefore, although the oral notice given was a relevant factor, it did not outweigh other counter-balancing factors. The length of time in which the tenants had lived in the property as their home (just over 20 years) and the severe hardship that would result from eviction, compared with the lesser hardship to the landlords of being unable to use their property as a pied-a-terre for a maximum of three months of the year, were all relevant in deciding what was just and equitable. On balance, these factors outweighed the significance of the oral notice in the circumstances of the case.

Notice not received

The dispensing requirement may be utilised even in circumstances where the notice, albeit sent by the landlord, is not actually received by the tenant.

In *Minay v Sentongo* (1982) 45 P & CR 190, a notice under Case 11 of Schedule 15 to the 1977 Act was given on the landlord's behalf to the tenant, when the tenancy was created, stating that possession of the premises (again, a flat) might be recovered under the case in question. It later transpired, when the landlord brought proceedings for possession of the flat, that the notice sent by the landlord's letting agents had not actually been received by the tenant. The Court of Appeal, agreeing with the trial judge, held that it was right to dispense with the requirement of notice since the landlord had honestly believed that she had complied with the requisite formalities under Case 11. In fact, the landlord had done all that could be required of her, short of personal service, to give the tenant the required notice.

No intention to recover possession under the relevant ground

In *Bradshaw*, referred to earlier, the landlord's mother had granted a tenancy without any intention of recovering possession under Case 11. After the mother's death, her daughter sought possession, under Case 11, in order to move into the property herself. The Court of Appeal held that, where it appeared that there had never been any intention to create a Case 11 tenancy, it could not be just and equitable to dispense with the requirement for written notice. In this case, no written notice was ever given to the tenant and, moreover, there was never any suggestion that the mother might do so. The Court concluded that it had not been the intention of Parliament that Case 11 should be applied to a tenancy that had not in the first place been intended to be a temporary letting, but had been intended to carry with it Rent Act security. To hold otherwise would mean that a landlord, by asking for dispensation, could turn what was originally intended to be a protected Rent Act tenancy into one that could be terminated at will. Similar reasoning would, no doubt, apply, to an assured tenancy protected under the Housing Act 1988: see, *R v Bradford City Council, Ex Parte Parveen* (1996) 28 HLR 681, (Ground 1 of Schedule 2, Housing Act 1988).

Section 8 notices under the Housing Act 1988

Section 8(1) of the Housing Act 1988 provides that the court shall not entertain proceedings for possession of a dwelling let on an assured tenancy unless the landlord has served a requisite notice of intention of seeking possession, or the court considers it just and equitable to dispense with the requirement of such a notice: s.8(1)(b).

It is apparent that the mere fact that the appropriate particulars have not been given in the notice does not mean that the landlord's proceedings will necessarily be struck out. Even if the failure to give the statutory notice does create prejudice to the tenant, that will not be conclusive. The court is obliged to weigh all the circumstances before it when deciding whether to dispense with the notice requirement. In *Kelsey Housing Association v King* (1996) 28 HLR 270, the tenants, although served with a notice to quit, had not been given a statutory notice under s.8 of the 1988 Act. In their summons for possession, however, the landlords set out various allegations of nuisance and annoyance alleged to have been caused

by the tenants. The Court of Appeal held that the purpose of the requirement of the s.8 notice was to enable the tenant to take steps to remedy the complaints so that he can be in as good a position as possible to avoid eviction. Every case depended on its own facts and the court was required to take all the circumstances into account, from both the view of the landlord and of the tenant, in deciding whether to grant dispensation. In this case, the trial judge was correct to look at the facts occurring both before and after the proceedings had started. It was apparent that the tenants had suffered no prejudice and, by the time of the hearing, they had had ample time to put right the nuisance and annoyance. The position, of course, may be very different in relation to a case based on arrears of rent where, through not being given proper particulars (or any at all), a tenant might suffer prejudice in spending money he would otherwise have saved or used to make up arrears which were properly established: see, at 277.

Substituted proceedings

Finally, it may be worth mentioning that the discretionary power under s.8(1)(b) of the 1988 Act is wide enough to allow for the requirement for a fresh s.8 notice to be dispensed with in cases where the reality is that the same breach of the same terms of the same tenancy is being relied upon in later proceedings and where the relief being sought is no different. However, it would not be legitimate to order the dispensing of notice without some consideration of the facts of the case, or of any objection to that course which may be taken by the tenant: see, *Knowsley Housing Trust v Revell* [2003] HLR 63, where a local authority landlord began possession proceedings against tenants as secure tenants after serving notices under s.83 of the Housing Act 1985, but where the housing stock was later transferred to a registered social landlord which continued proceedings against the tenants as assured tenants under s. 8 of the Housing Act 1988.

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The law is stated as at 16 August 2021.