

## A new neighbour

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### *Is proportionality moving in? Robert Strang reports on orders for sale after Pinnock*

On an application for an order for sale of property to enforce a charging order, the law as it is presently applied by the High Court does not require explicit consideration of the occupants' human rights (in particular those protected by Art 8 of the European Convention on Human Rights) or the proportionality of the proposed interference with them: *NatWest Bank v Rushmer* [2010] EWHC 554 (Ch), [2010] All ER (D) 205 (Mar) paras 50 and 51.

In *Manchester CC v Pinnock* [2010] UKSC 45, [2010] All ER (D) 42 (Nov) in respect of possession orders sought by public authority landlords, the Supreme Court bowed to the repeated insistence by the European Court of Human Rights (ECtHR) that people facing eviction from their home are entitled to have the proportionality of the decision to evict them assessed by a court.

Although the Supreme Court said that its judgment in *Pinnock* only bears on local authority landlords in possession claims, it is likely to have a wider effect, at least as an indicator of the supremacy of the ECtHR's approach, in cases involving possible eviction, to the question of the proportionality of the interference with Art 8 rights and the court's role in determining that question. This article looks at how these developments might affect applications for an order for sale.

In *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch), followed in *NatWest v Rushmer*, the court held that on an application for an order for sale the court's discretion must be exercised compatibly with the Art 8 rights of those affected by the order, and went on to say that meant "in a way which gives due respect to the right of all those living in the property, not just the debtors, to have respect for their family life and their home."

However, the available case law does not show the courts carrying out an explicit consideration of the proportionality of the proposed interference with Art 8 rights. Rather, in *NatWest v Rushmer* the court only went so far as to say that it would not rule out the possibility that there may be circumstances in which it would be necessary explicitly to consider the question of proportionality. In that particular case, the court held, it had not been necessary even to give explicit consideration to the Art 8 rights of the occupiers.

The judgment in *Pinnock* might lead to a change from that position. The judgment is not of direct application to applications for orders for sale, but the Supreme Court in *Pinnock* has signaled a change in the approach of the English courts, in response to the consistent and unambiguous approach of the ECtHR to cases involving proposed evictions.

In *Pinnock* the Supreme Court was responding to a string of recent ECtHR cases in which the following principle was repeatedly expressed: that a person at risk of eviction should be able to have the proportionality of the measure assessed by an independent tribunal. Among the ECtHR cases referred to and followed by Supreme Court was the case of *Zehentner v Austria* (App no 20082/02) in which the ECtHR considered the effect of Art 8 in the context of an order for sale to enforce the Austrian equivalent of a charging order and in which that principle was reiterated.

Having considered the recent ECtHR cases, the Supreme Court departed from previous judgments of the House of Lords and adopted the approach on which the ECtHR had insisted. This change of approach is likely to have an impact on applications for orders for sale, for the following reasons.

### **Proportionate interference**

The ECtHR jurisprudence has long made it plain that an interference with rights must be proportionate to the legitimate aim. The direct effect of the string of cases

which led to the Supreme Court's change of mind is that where the decision to evict has been taken by a public authority by seeking to enforce a right to possession, the person evicted must be able to have the proportionality of that decision determined by the court.

However, it could be argued that the case for an express consideration by the court of the proportionality of the measure is, if anything, stronger in the case of an application for an order for sale. In such cases, the eviction of the occupant will not be the result of establishing a landlord's legal right to possession, but rather will be the result of the exercise of the court's discretion to order a sale to enforce a simple debt. Further, in such cases the court will be the only public authority addressing its mind to the question, so that the court's exercise of its discretion will be the only possible opportunity to consider the proportionality of the measure.

In the light of those considerations, it seems that the decision in *NatWest v Rushmer* is not entirely in tune with the ECtHR jurisprudence. The approach of the ECtHR would more likely be to hold that due consideration of the Art 8 rights of those affected involves a consideration of the proportionality of the measure affecting them; it is unlikely that the ECtHR's approach would be satisfied by an exercise which did not explicitly consider Art 8 at all.

## The Proportionality Test

To carry out a proportionality test would not be to introduce a heavy new burden. In *Pinnock* (at para 55) the Supreme Court held that the requirement that the court carry out a proportionality test should pose no difficulties in practice or principle where a court is being required to consider where it is reasonable to make an order for possession. The same considerations would apply to the court's exercise of its discretion under CPR 73.10(1).

The proportionality test is a structured test involving four questions. They are (*Huang v Home Secretary* [2007] 2 AC 167, para 19):

1. Whether the objective justifying the interference is sufficiently important to justify limiting the right;
2. Whether the measures designed to meet the objective are rationally connected to it;
3. Whether the means used interfering with the right are no more than is necessary to accomplish that

objective; and

4. Whether the interference strikes a fair balance between the rights of the individual and the interests of the community.

The test can be adapted to ask the questions at the level of the particular case rather than the general. In other words, under the fourth question, for example, the court can assess the balance struck between the interests of the parties involved (as, for example, the ECtHR did in *Zehentner*).

It will be apparent from looking at the four questions that the first and second questions are of a more general nature and that they will pose no real problem on a consideration of the individual case. The first has already been answered positively by the law makers and the courts. The answer to the second is plainly, yes.

It will also be apparent that the determination of the third and fourth questions will probably involve asking similar questions to those asked under the existing case law, because according to the case law the courts have been asking themselves: is there another option instead of selling the property; is it fair, on balance, to sell the property.

## Adapting arguments

To change to an explicit proportionality test on applications for orders for sale would not amount to a great change in practical terms. But the proposition that it is not necessary explicitly to consider proportionality might not survive long in the light of the supremacy of the ECtHR's approach to the question, now recognised by the Supreme Court in *Pinnock*.

Given the above, applicants for an order for sale might do well to be prepared to deal explicitly with Art 8 and to be in a position to put forward their arguments on the court's exercise of its discretion in proportionality terms. Whether they do so instead of or in addition to other arguments, they should be able to adapt their arguments to the structure of the proportionality test without much difficulty.

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