15 June 2016

PRESS SUMMARY

McDonald (by her litigation friend Duncan J McDonald) (Appellant) v McDonald and others (Respondents) [2016] UKSC 28
On appeal from: [2014] EWCA Civ 1112

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEAL

The appellant, Fiona McDonald, is aged 45 and suffers from a personality disorder. In May 2005 her parents purchased 25 Broadway Close, Witney ("the property"), as a home for her, with the assistance of a loan from Capital Home Loans Ltd ("CHL"), which was secured by way of a registered legal charge over the property. From about June 2005, the respondents granted the appellant a series of assured shorthold tenancies ("ASTs") of the property, the last of which was granted in July 2008 for a term of one year. The appellant continues to live in the property.

Owing to financial difficulties with their business, the respondents failed to meet payments on the loan as they fell due. CHL accordingly appointed Andrew Hughes and Julian Smith ("the Receivers") to act as receivers of the property. The rent due was regularly paid, but the arrears persisted. The Receivers subsequently served a notice, in the name of the appellant's parents, on the appellant on 13 January 2012, indicating that they would be seeking possession of the property and, on the expiry of that notice, they issued proceedings in the name of the parents for possession of the property in the Oxford County Court.

His Honour Judge Corrie heard the proceedings on 4 December 2012 and 7 March 2013. He gave judgment on 22 April 2013 and held that the court was not required to consider the proportionality of making an order for possession against a residential occupier where the person seeking possession was not a public authority, and as section 21(4) of the Housing Act 1988 ("the 1988 Act") required him to make an order for possession against a person holding under an AST who had been served with an appropriate order, he had to make such an order. The judge added that, had he been entitled to consider proportionality, he would, on balance, have concluded that the claim for possession was disproportionate and dismissed the action. The Court of Appeal dismissed the appellant's appeal. The appellant now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses Fiona McDonald's appeal. Lord Neuberger and Lady Hale give the only judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

This appeal raises three questions **[1]**:

(i) whether a court, when entertaining a claim for possession by a private sector owner against a residential occupier, should, in light of section 6 of the Human Rights Act

1998 ("the HRA") and article 8 of the European Convention on Human Rights ("the ECHR") be required to consider the proportionality of evicting the occupier;

(ii) whether, if the answer to question (i) is yes, the relevant legislation, in particular section 21(4) of the 1988 Act, can be read so as to comply with that conclusion;

(iii) whether, if the answer to questions (i) and (ii) is yes, the trial judge would have been entitled to dismiss the claim for possession in this case, as he said he would have done.

The appellant's argument is that the judge should have taken into account the proportionality of making an order for possession for article 8 purposes and, on that basis, could have refused to make an order for possession despite the apparently mandatory terms of section 21(4) of the 1988 Act and section 89(1) of the Housing Action 1980 ("the 1980 Act"), which limits the period for which a court can postpone an order for possession taking effect **[29-30]**.

It is well established that it is open to the occupier to raise the question of the proportionality of making an order for possession where the party seeking possession is a public authority within the meaning of section 6 of the HRA **[34]**. In deciding this issue in the case of *Manchester City Council v Pinnock* [2011] 2 AC 186, the Supreme Court made it clear that nothing in its judgment was intended to bear on cases where the person seeking possession was a private landowner **[37]**. The appellant contends that the same reasoning applies to a private sector landlord because the court which would grant the order for possession is a public authority for the purposes of the HRA **[38-39]**.

The court's preliminary view is that it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship between the parties, at least where there are legislative provisions through which the democratically elected legislature has balanced the competing interests of private sector landlords and residential tenants **[40]**. Were it otherwise, the ECHR could be said to be directly enforceable as between private citizens so as to alter their contractual rights and obligations **[41]**. As to the Strasbourg authorities, the admissibility decisions of *Di Palma v United Kingdom* (1988) 10 EHRR CD 149 and *Wood v United Kingdom* are inconsistent with the appellant's case **[48]**. While subsequent authorities provide some support for the notion that article 8 is engaged on the making of the order for possession against a residential occupier such as the appellant, there is no support for the proposition that the judge could be required to consider the proportionality of the order which he would have made under legislation such as the 1980 and 1989 Acts **[49-59]**. The appeal is accordingly dismissed on the first issue **[59-60]**.

As to the second issue, it would not be possible to read section 21(4) of the 1988 Act in the way contended for by the appellant **[61-70]**. Had the court been persuaded that the appellant was right on the first issue, a declaration of incompatibility under section 4 of the HRA would have been the only remedy **[70]**.

As to the third issue, the judge did not consider whether, if he had found that the claim for possession were disproportionate, there might have been other solutions to the problem than dismissing the claim **[71]**. In those rare cases where a court is required to assess the proportionality of making a possession order, its powers to suspend or postpone the effect of that order are severely limited by section 89(1) of the 1980 Act **[72]**. The cases in which it would be justifiable to refuse, as opposed to postpone, a possession order must be very few and far between and could only be cases in which the landlord's interest in regaining possession was heavily outweighed by the gravity of the interference in the occupier's right to respect for her home **[73]**. On the facts of this case, it seems likely that the most the appellant could hope for on a proportionality assessment would be an order for possession in six weeks' time, the maximum permitted by section 89(1) of the 1980 Act **[75]**.

References in square brackets are to paragraphs in the judgment