B2/2004/2060

Neutral Citation Number: [2005] EWCA Civ 639

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM CENTRAL LONDON COUNTY COURT

(MR RECORDER LUBA QC)

Royal Courts of Justice

Strand

London, WC2

Wednesday, 11th May 2005

B E F O R E:

**LORD JUSTICE PILL**

**LORD JUSTICE CHADWICK**

**LORD JUSTICE MAY**

- - - - - - -

**LONDON BOROUGH OF MERTON**

**Claimant/Appellant**

-v-

**SONIA JANE RICHARDS**

**Defendant/Respondent**

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(Computer-Aided Transcript of the Palantype Notes of

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**MR WAYNE BEGLAN** (instructed by London Borough of Merton, Legal Services, Merton Civic Centre, London Road, Morden, Surrey SM4 5DX) appeared on behalf of the Appellant

**MISS TRACEY BLOOM** (instructed by Messrs Pierce Glynn Solicitors, London SE1 1DB) appeared on behalf of the Respondent

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**J U D G M E N T**

1. LORD JUSTICE PILL: This is an appeal by the London Borough of Merton ("the appellants") against a decision of Mr Recorder Luba QC given at the Central London Civil Justice Centre on 10th September 2004, following a hearing over several days in June 2004. The judge dismissed an application by the appellants for possession of residential premises at 29 Oxford Avenue, Wimbledon SW20, occupied by Mrs Sonia Richards ("the respondent").

2. Permission to appeal was granted by Carnwath LJ on three points following an oral hearing.

3. On 13th May 2002 the appellant served a notice on the respondent seeking possession of 29 Oxford Avenue. The appellants, as local housing authority, are the freehold owners of the premises and had granted a secure tenancy to the respondent, who occupied it as a family home with her partner and their children. The tenancy began on 7th March 1994. Possession was sought under ground 5 of the statutory grounds for possession, set out in Schedule 2 to the Housing Act 1985. A claim form was issued on 8th July 2002.

4. Schedule 2 has the heading "Grounds for possession of dwelling-houses let under secure tenancies". Ground 5 reads:

"The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by:

(a) the tenant, or

(b) a person acting at the tenant's instigation."

5. At the material time in early 1994 the respondent was an employee of the appellants working in their council tax department. Her mother, Mrs Lesley Cowper, was a housing officer in the appellant's housing and social services department.

6. When the circumstances in which the tenancy had been granted emerged in August 2000, the appellants reported the facts to the police and later dismissed both women from their employment. They were both subject to criminal proceedings. Mrs Cowper pleaded guilty at Southwark Crown Court in December 2001 to having obtained the tenancy for her daughter by deception. She received a community sentence. Proceedings against the respondent were not pursued, and she was discharged.

7. The application for possession was heard over five full court days in June 2004, both parties being represented by counsel. There were also post-hearing written submissions. A post-hearing application to recall the respondent for further cross-examination was refused.

8. The Recorder's judgment is extremely long and detailed. It is not necessary for present purposes to go into such detail.

9. The previous tenant of the premises was Mrs Mahon, who had lived there for over 30 years. By 1994 she was in her mid-80s and in poor health. The respondent was in her late 20s and had two young children. Since May 1992 she had been the appellants' tenant at premises at 57A Aboyne Drive, a two-bedroomed maisonette. She wanted to obtain a tenancy of larger premises, but knew that the scarcity of properties was such that she was unlikely to be able to upgrade under the appellants' transfer scheme for current tenants. She appreciated, as the judge put it, that the only realistic method of securing an alternative council house would be by finding another tenant of a larger home willing to exchange homes with her. The appellants operated a mutual exchange scheme, the details of which were fully explained to the judge and by the judge in his judgment. The new tenancy was granted to the respondent on the basis that she was exchanging homes with Mrs Mahon. It would not have been granted had the appellants been aware that Mrs Mahon did not intend to move into the premises then tenanted by the respondent.

10. In the event, Mrs Mahon went to live with a daughter, Mrs Robertson, in Lowestoft. Mrs Mahon, by then over 90 years old, did not give evidence at the hearing, but her daughter did.

11. Tenancy termination notices were issued with respect to the former tenancies, and the respondent's new tenancy commenced on 7th March 1994. In the course of her work in the appellants' council tax department she had made entries on 3rd March 1994 closing down her account for Aboyne Drive and Mrs Mahon's at Oxford Avenue from 7th March, noting in the record that Mrs Mahon had said that her son would be decorating the property (that is the Aboyne Drive property) while she stayed with a daughter in the North. The respondent created new accounts for herself and for Mrs Mahon at the premises formerly occupied by the other.

12. There is no doubt that Mrs Cowper played a substantial part in making the arrangement, in part using her position as a district housing officer to do so. She accompanied Mrs Hingston, the district housing officer for the district including Oxford Avenue, on the necessary inspection visit to the Oxford Avenue premises, and she completed the inspection form for Aboyne Drive. The respondent and Mrs Mahon each signed the necessary tenancy exchange application forms. The respondent gave her form to her mother. Mrs Cowper short-circuited normal procedures and took the tenancy agreements to Mrs Mahon and to the respondent to sign. Mrs Mahon signed the agreement, but made it clear to Mrs Cowper that she had no intention of moving to Aboyne Drive and was going to live in Lowestoft, whither she moved on or shortly after 17th February 1994. Mrs Cowper obtained the respondent's signature to the tenancy agreement for Oxford Avenue.

13. The judge rejected the submission on behalf of the appellants that, from the outset, Mrs Mahon was an unwilling and unwitting participant in the scheme. Some degree of participation by her had been necessary. The judge found that Mrs Mahon was acting as she did to help the respondent to obtain her home, but she had told Mrs Cowper that she was not intending to move to Aboyne Drive.

14. The judge found that when Mrs Cowper knew that Mrs Mahon had no intention of moving to Aboyne Drive, the submission by her of the tenancy agreements to the appellant's letting section was a false representation, known by Mrs Cowper to be false.

15. The judge heard detailed evidence from the respondent and from Mrs Cowper, both of whom were fully cross-examined. Their evidence was that the respondent did not know that Mrs Mahon was not moving to Aboyne Drive, and that the respondent was working on the assumption that a mutual exchange under the scheme was being operated. There was no direct evidence that she knew of the false representation. The judge was invited to infer from the evidence and all the circumstances that the respondent was a party to making the false statement, or that her mother was at least acting at her instigation in acting on her behalf at all and in making the false statement.

16. At paragraph 105 of the judgment the judge considered in detail what he described as the unusual features of the respondent's account of events, including her amendment of council tax records and, much later, in 1999, making a deliberately misleading entry when seeking to exercise a right to buy the premises. In the following paragraph the judge stated at paragraph 106 (in the judgment the respondent is referred to throughout as "the defendant", and I do not propose to change in each case that description):

"In the light, not least, of that last admission of deliberate deception, I approached the assessment of the Defendant's evidence with very considerable caution. In the course of her evidence the Defendant displayed an extraordinary approach to what was proper and improper conduct in her role as a member of the Council's staff. She displayed no compunction whatever about her dealing, as a Council Officer, with her own personal details on the Council's computer system despite the obvious scope for abuse. She did not think her own mother was acting anything other than 'objectively' when approving payment of a decorating allowance to her for Aboyne Drive, despite (again) the evident scope for abuse. She did not take the opportunity she had had at interview in the police station to give her own account. The circumstances of her own visit (with mother, children and partner) to Lowestoft in Autumn 2000 to track down and see Mrs Mahon do her no credit. In short, if the Defendant's evidence had been the only evidence supporting her account of what occurred in the early stages of the mutual exchange transaction in early 1994, I would not have found it a wholly satisfactory basis on which to make findings as to where the truth lay."

17. As to Mrs Cowper, the judge held that her evidence was "wholly unsatisfactory". She had "little or no grasp of what would objectively be viewed as proper or improper conduct for a Council officer." Her conduct in relation to her daughter's tenancy was described by the judge as "disgraceful" conduct for a tenancy management officer. The judge stated that he had little or no confidence in the truth of Mrs Cowper's evidence. Having referred to her conduct, he stated (paragraph 149):

"Her past conduct and her demeanour before me certainly bore that out. My impression of her was of a woman doggedly and determinedly content to meddle in her daughter's affairs as she (Mrs Cowper) thought best and without reference to her daughter where she considered that appropriate. That such conduct might involve deception of her daughter, deception of her employers, forgery or fraud or any other impropriety did not seem to matter, in my assessment of her evidence, if she was doing what she thought was best for her own daughter's interests."

18. On the critical question of whether the respondent knew that the exchange transaction between her and Mrs Mahon was not going to proceed, the judge stated at paragraphs 151 and 152:

"151. The first critical finding I must make is as to whether the Defendant actually knew from her mother that the transaction was effectively 'off' (after the second meeting between Mrs Cowper and Mrs Mahon and before the commencement of her own tenancy on 7 March 1994) but that she nevertheless participated in the remaining steps necessary to bring that transaction to fruition. Notwithstanding all the other reservations I have (and have earlier expressed) as to her evidence generally, I cannot confidently find that she did know. Indeed, having carefully assessed and re-assessed her evidence, it seems to me tolerably plain that had she known that Mrs Mahon had 'pulled out' she would not have participated in what would thereafter have been a manifestly fraudulent scheme to achieve the new home she desired for her family. There was simply too much at stake. She was giving up her 'lovely' (albeit overcrowded) home at Aboyne Drive in order to take up a new home at Oxford Avenue in need of very considerable work. Achievement of her new family home under a deception or fraud would render that achievement forever vulnerable to being overturned by discovery of her wrongdoing and would provide an uncertain basis on which to establish what was to be the new and long-term home for her still very young children. I cannot find that she was lying to me in her evidence that she did not know. That part of her evidence I do accept as truthful.

152. It follows that, on the evidence before me, I am not satisfied, even on the balance of probabilities, that the Council has established that by the completion of her tenancy agreement document for Oxford Drive and its subsequent submission to the Council, the Defendant herself knowingly made any 'false statement'. It is my assessment of her evidence that she throughout intended to move to Oxford Avenue if she properly could, and as her completion of that document represented. I am not satisfied that by the date it was completed and/or submitted, she knew that the premise on which her grant of a new tenancy was based - that Mrs Mahon would move to Aboyne Drive - was no longer true."

19. The judge added at paragraph 161, when dealing with the construction of the word "instigation":

"161. I am fully alive to the need for caution in accepting the truthfulness of the evidence of either the Defendant or her mother but I am satisfied that, having regard in particular to the Defendant's evidence (in the context of the evidence in the case as a whole), Mrs Cowper's intervention in the mutual exchange process was but another instance of her uninvited intermeddling in her daughter's affairs. Mrs Cowper's meddling was a hallmark of her dealings with her daughter's tenancy matters."

20. Reference is made to the evidence, and the judge completed the paragraph by stating:

"I do not accept, on the facts, the submission of Mr Beglan that the Defendant 'allowed' her mother to assume a pivotal role. There was no question of any 'allowing' or 'instigation' by the Defendant at all."

The judge accepted that part of Mrs Cowper's evidence in which she said that she had not told her daughter what had happened.

21. Dealing with the meaning of the word "instigation" in ground 5, the judge stated at paragraph 159:

"159. In my judgment, however, this case is decided by its facts not upon nice questions of statutory construction. Even on a broad construction of the enlarged Ground 5, the Council must, in my judgment, show that Mrs Cowper's intervention in the mutual exchange transaction was at the 'instigation' of the Defendant as at the stage of the making of the false statements. I am not satisfied that the Council has been able to demonstrate that."

22. The submissions of Mr Beglan, for the appellants, are made in the context of a general submission that on the evidence the judge's findings of fact and conclusions were very surprising. Most intelligent women in their late 20s would be in the confidence of their mothers and at least aware of action taken on their behalf in matters such as tenancies, especially when both women are employed by the same local authority on different aspects of housing questions. Mr Beglan realistically accepts the difficulties he faces, however, in disturbing findings of fact by a judge who has had a prolonged opportunity to assess the witnesses and their evidence and has set out in considerable detail the evidence, and his findings and conclusions.

23. Mr Beglan's first submission is in relation to the council tax entries made by the respondent on 3rd March. It is submitted that the judge had insufficient regard for their importance, and at one stage in his judgment appeared to have had regard only to events up to 25th February, thus excluding the council tax entries. In his specific findings of fact the judge made no reference to the entries.

24. I see no force in that submission. At paragraph 96 of his judgment the judge set out the entries in full, stating that, as compared with the 1999 events which he described in detail, these were "of more direct relevance to the events of early 1994".

25. The judge referred to the council tax entries episode immediately before expressing the findings about the defendant's credibility at paragraph 106, which I have read. Moreover, in the judgment at paragraph 146 the judge clearly recognised that the material date for present purposes was 7th March.

26. The judge clearly had the council tax entries in mind. In failing to refer to them again at a later stage of his judgment, an error in my view is not demonstrated. On the judge's general findings, the content of the entries was another illustration, on which the respondent relied, of what she had been told by her mother. As evidence that the respondent was a party to her mother's fraud, the judge clearly took it into account when reaching his conclusion. Nor can it be said that in the absence of the false entry, the lease would not have been granted. There is no evidence from which it could have been inferred by the judge that the falsity of the council tax entries could have been discovered by the council tax department, and their falsity communicated to the letting department between 3rd and 7th March, thereby to prevent the issue of the lease.

27. The second point is in relation to paragraph 151 of the judgment, which I have also read. First, it is submitted the judge's use of the word "confidently" demonstrates that the wrong standard of proof was applied. It was a suggestion that a good deal of weight was to be required before he could be satisfied, and something more than proof on a balance of probabilities.

28. I do not agree. The way in which the standard of proof should be approached in circumstances such as these was stated by Lord Nicholls of Birkenhead in In re H (Minors) [1996] AC 563, at 586E-F:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."

29. It was to demonstrate that those principles should be applied that the judge used the word "confidently". It was used in the sense that the judge could not conscientiously find for the appellants on the evidence he had heard. Further, in the opening words of the following paragraph the judge expressly stated that he was "not satisfied, even on the balance of probabilities".

30. Secondly, in relation to paragraph 151, it is submitted that the conclusion is insufficiently reasoned. The respondent's admitted fraud on another occasion should have been mentioned expressly in that paragraph. Her particular position as a woman capable of taking risks should have been considered. I see no merit in that submission. The judge did have regard to the particular circumstances of the respondent. He described the unusual features of her evidence. He was entitled to conclude, in all the circumstances, that her evidence on the vital issues could be believed, and in doing so to have regard to the risk involved in participating in a fraudulent scheme. He was not obliged to restate in the paragraph the particulars of her other misconduct.

31. The third submission is that the judge misconstrued the word "instigated" in ground 5. Even if the judge had given the word too limited a meaning, his finding at paragraph 159 makes it very difficult for the appellants to succeed on this point. Counsel submits that the word should be construed broadly, because the purpose of ground 5 is to ensure that tenancies are not granted on the basis of false information. If a tenant asks someone else to act on her own behalf, the risk of that person being dishonest is intended to be on the tenant. Moreover, it is submitted, if a daughter makes no attempt to dissuade her mother from acting on her behalf, that amounts to instigation within the meaning of ground 5.

32. In my view the submissions fail. On any view "instigate" means more than tolerate. It means to bring about or initiate. The Latin source of the word, as mentioned in the Concise Oxford Dictionary, is *instigare*: to urge or incite. The ground refers to instigation and not merely to someone "acting on behalf of the tenant". On the judge's findings of fact, there was no instigation by the respondent in this case.

33. Moreover, I would hold that the instigation must be of the false statement and not merely instigation of action in general on behalf of the tenant. It is true that sub-paragraph (b) could have, but does not, state "making a false statement at the tenant's instigation". However, the expression as a whole clearly links the instigation with the false statement, in my view. Moreover, the word "instigate" fits more comfortably in this context with action to promote a specific act, than with a general instruction to act. In my judgment, the judge adopted the right approach to the word instigate.

34. I understand the sense of grievance which the appellants may feel about the judge's findings of fact on the evidence in this case, but those findings of fact cannot, in my judgment, be disturbed in this court. I would dismiss this appeal.

35. LORD JUSTICE CHADWICK: I agree.

36. The respondent's tenancy of 29 Oxford Avenue, Wimbledon, was granted with effect from 7th March 1994 under the appellant council's mutual exchange scheme and on the basis that the former tenant of 29 Oxford Avenue, Mrs Lillian Mahon, was to move to 57A Aboyne Drive, the flat which until then had been let by the council to the respondent.

37. The judge found that statement made to the council as to Mrs Mahon's intention to move were false. By March 1994 Mrs Mahon did not intend to exchange her house at 29 Oxford Avenue for the respondent's flat at 57A Aboyne Drive. Mrs Mahon's intention was to move away from the area to live near to her daughter in Suffolk. The falsity of the statement that Mrs Mahon was intending to move to 57A Aboyne Drive was known to the respondent's mother, Mrs Lesley Cowper, a council housing officer. It was through her that, in effect, that statement was made to the council.

38. The question for the judge, so far as now material on this appeal, is whether ground 5 in Schedule 2 to the Housing Act 1985 had been established, so as to found a claim by the council for possession of 29 Oxford Avenue - let, as it was, under a secure tenancy from March 1994. The statutory ground is in this terms:

"The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by:

(a) the tenant, or

(b) a person acting at the tenant's instigation."

39. The judge found that the respondent did not, herself, know that the statement as to Mrs Mahon's intentions was false at the time when the tenancy was granted. Nor was she reckless in that regard. Other tribunals might have reached a different conclusion on that issue. If a different conclusion had been reached, it would have been difficult, if not impossible, to attack that conclusion in this court. But that question in this court is whether there was material on which the judge could reach the conclusion which he did reach. For the reasons which Lord Justice Pill has set out -- and with which I agree -- there was sufficient material for the judge to reach the conclusion on that issue which he did.

40. That made it necessary for the judge to go on to consider whether the false statement was made knowingly or recklessly by a person acting at the tenant's instigation. He found that the statement was made by Mrs Lesley Cowper with knowledge as to its falsity. But he did not find that she made the statement at the tenant's instigation; and he did not find that the tenant knew that the statement which Mrs Cowper made was false.

41. I respectfully agree with Lord Justice Pill that the requirement under ground 5 is that the tenant knows that the statement made at his or her instigation is false. The words of the statute are "by a false statement made knowingly ... by ... a person acting at the tenant's instigation"; they are not "by a statement made by a person at the tenant's instigation, knowing that it is false". There is, as it seems to me, no reason in policy why the tenant should be at risk of losing his or her home by reason of false statements made by another which the tenant had no reason to think were untrue.

42. The requirement under ground 5 was not made out on the evidence before the judge; and there is no basis upon which this court could interfere with the judge's conclusion. I, too, would dismiss this appeal.

43. LORD JUSTICE MAY: I agree that this appeal should be dismissed for the reasons which Lord Justice Pill and Lord Justice Chadwick have given. I gratefully adopt the account of the facts and circumstances of the appeal that Lord Justice Pill gave.

44. Mr Beglan argues three grounds of appeal referred to for convenience as grounds 1, 2 and 6. I take them briefly in the order in which Mr Beglan made his submissions.

45. I take ground 6 first. This says that the Recorder did not sufficiently take account of the council tax entries which Miss Richards wrongly made and which should have had a determining effect on his assessment of her credibility and honesty. The terms of these council tax entries may convenient be found at page 293 of the bundle and are, so far as material, in the following terms. There was a council tax entry which said "has done ME" (meaning mutual exchange) "Mrs M says her son will be decorating and getting the prop ready for her to mve into while she stays with daughter in the North." Of the same date was a letter drafted by Miss Richards in these terms:

"Mrs Mahon the tenant at my new address will be moving to my address the same day ..."

46. Mr Beglan says that these statements are, in all the circumstances, so startling or laughable that they demanded to be dealt with by the judge. If the judge had addressed them properly they were so startling that the complicity with her mother's dishonesty was difficult to avoid. I do see that the general impropriety of Miss Richards making council tax entries in which she was personally involved was an element from which the judge might have inferred her complicity with her mother. But the judge did not in fact do so. The point was there to be made. But I do not see how these council tax statements can be said to have induced the grant of the tenancy by the housing department, when there was no evidence or probability that the council tax department would communicate the entries to the housing department which was in a different building. Nor do I see that these statements are so startling or laughable as to indicate probable complicity by Miss Richards with her mother. The property into which Mrs Mahon was supposedly to move may have been lovely, but people who move into a property for the first time often have some redecoration done, even if the general state of the property is good. I do not see that it should be regarded as odd even if an elderly lady moving house should go to stay with her relations in Lowestoft whilst some decoration is done to her new home. Further, the Recorder did take these matters into account in assessing Miss Richards' credibility (see paragraphs 94, 106 and 105).

47. As to ground 1, I am not persuaded that the Recorder dealt with the evidence inadequately or gave inadequate reasons. I grant that his main conclusion may perhaps be seen as somewhat surprising, but the Recorder dealt with proper balance and at length with the evidence of each of the witnesses. He addressed the case which the council made. He faced up to the decision that he had to make as to whether Miss Richards was complicit in her mother's dishonesty. He weighed her evidence properly, noting the points of weakness in it. His critical judgment was an assessment of credibility after hearing and properly considering all the material oral evidence. The Recorder, in my judgment, properly assessed his central task when he said in paragraph 150 of his judgment that his assessment of Miss Richards and her evidence:

"... must be made against the background of the substantial and sustained attack on her credibility that Mr Beglan quite properly puts forward as arising from the many detailed respects in which her previous conduct has been unsatisfactory and her evidence wanting. I need not recount his list. I have the matters he urged upon me orally and in writing most fully in mind. The assessment has been a difficult process - requiring careful reflection on the Defendant's demeanour and disposition in giving her live evidence before me taken together with the contents of her statement and the adverse inferences I have already drawn in respect of some of her evidence."

48. In my judgment, the Recorder's critical finding is not amenable to appeal on the general grounds advanced.

49. The second ground of appeal relies on submissions as to the proper construction of ground 5 of Schedule 2 of the Housing Act 1985 (as amended), which provides as a ground for possession under section 84(1) of the 1985 Act that:

"The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by:

(a) the tenant, or

(b) a person acting at the tenant's instigation."

50. Mr Beglan submits that this should be construed so that it would be sufficient if the person acting at the tenant's instigation knows that the statement is false or is reckless about it, even though the tenant does not.

51. I disagree. It is a short point. Mr Beglan might have been correct if the words were "a person acting on the tenant's behalf", instead of "at the tenant's instigation". But I think that the natural meaning of the words which Parliament has in fact used -- specifically using the word "instigation" -- is that the tenant has to instigate the making of the false statement when the tenant himself knows that the instigated statement is false or is reckless about it. In any event, the judge found that there was no instigation in this case as a matter of fact. Mrs Cowper did what she did off her own bat. I do not consider that this finding is amenable to appeal.

52. As I say, I too would dismiss this appeal.

**ORDER: Appeal dismissed with costs, to be the subject of a detailed assessment; and a public funding assessment.**

(Order not part of approved judgment)