

E-FLASH No. 161
FROM ARDEN CHAMBERS
O'Connor v. Kensington & Chelsea RLBC
Court of Appeal, March 30, 2004

The Court of Appeal has reiterated the need for local authorities to consider the full wording of Housing Act 1996, s.191, when reaching decisions on applications and reviews under Part 7. The duty to consider s.191(2) - "an act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate" for the purposes of the s.191(1) definition of intentional homelessness ("A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy" available accommodation which it would have been reasonable to continue to occupy) - exists whether or not submissions by or on behalf of the applicant have expressly drawn attention to it.

A man and wife - tenants of a Housing Trust - went to Ireland with their daughter to visit the man's dying father. After the death, the man, who suffered from depression, was badly affected and, as a result, the family was not able to return to London. Arrangements were made for various people to look after and live in their Housing Trust property and pay rent on their behalf while they were away, the last of whom, unknown to the tenants, allowed arrears to build up to the point that a suspended order was made, about which he likewise did not inform the tenants. The suspended order was not complied with. When the family sought to return, the man locked them out of the property and - because they were not occupying the property - they were unable to obtain housing benefit with which to help them clear the arrears; nor could they obtain public funding in time to evict the man before the Trust sought to execute the order for possession. A further suspension was refused by the county court, although the family had managed to reduce the arrears from almost £2,000 to £83. The decisions of both the Trust and the court were described in the Court of Appeal as "remarkably harsh".

The family applied to the local authority as homeless. The authority held that they had become homeless intentionally in substance because their failure to make arrangements (including notifying the Trust) to safeguard their tenancy over a period of some 16 months was what had led to the loss of their tenancy and their consequential homelessness, a decision upheld on review despite their contention that they had been unaware that the man had not been paying the rent and that a suspended order for possession had been made. An appeal to the county court which raised s.191(2) was dismissed. The key finding on the good faith argument was that the Appellants could not "as they seek to do, rely on ignorance of acts which they should, on the respondents' proper findings, have been aware of and of which they would have been aware had they acted with appropriate diligence and complied with the terms of their tenancy".

At the county court hearing, it emerged that the family was currently occupying premises under an assured shorthold tenancy. The county court judge accordingly held that, even if the appeal had been allowed, he would have refused relief in the exercise of his discretion, because they were no longer homeless. On appeal to the Court of Appeal, it was argued that there was no such discretion. While the court was agreed that in any event the case would not have been one for the exercise of any such discretion because the family's accommodation was already under threat for want of funds, Sedley LJ thought that the only discretion enjoyed by the county court was confined to its inherent discretion to restrain abuses of its

processes, while Waller LJ - with whose judgment Carnwath LJ agreed - expressed some reservations, and felt instinctively that the court ought to be able to make no order if proceedings were pointless, although he declined to explore further the existence or width of any such power.

On the good faith issue, s.191(2) imposed no requirement that ignorance of a relevant fact be reasonable, although wilful ignorance would fail the good faith test. The statutory dividing line is not at the point where an applicant's ignorance of a relevant fact is due to his own unreasonable conduct but at the point where by shutting his eyes to the obvious he cannot be said to have acted in good faith. On the authority's approach, while a finding of intentionality may have been open to them, they had not addressed "the serial questions" posed by s.191(1) and (2), in particular whether the omission to safeguard the tenancy had been in good faith and in ignorance of such relevant facts as non-payment of the rent and the possession proceedings, but had elided the two subsections and obscured that critical question. The duty to consider this arose irrespective of the submissions made by the Appellants' solicitors.

Andrew Arden QC and Dominic Preston of Arden Chambers appeared for the Appellants.

Warning! Arden Chambers' E-Flashes are no more than an immediate response to a recent decision (or other legal development), on a selective basis, intended to help recipients keep up-to-date with information which may interest them without needing to await publication of more considered material. Recipients should therefore seek advice or await fuller information if proposing to take action in consequence of an E-Flash.