Neutral Citation Number: [2024] EWHC 845 (Ch) Case No: CH-2023-000205

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 16 April 2024

Before:

MR JUSTICE ZACAROLI

- -

Between :

YISROEL WEINTRAUB	**Claimant/ Appellant**
- and –	
LONDON BOROUGH OF HACKNEY	**Defendant/ Respondent**

- -

Mr Duncan Heath (instructed by **Clarke Mairs Law Limited**) for the **Appellant**
Mr Michael Paget (instructed by **in-house Legal Department**) for the **Respondent**

Hearing date: 26 March 2024

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JUDGMENT

Mr Justice Zacaroli:

Introduction

1. Rabbi Weintraub and his late wife were granted a secure tenancy of a council flat in the borough of Hackney, London (the "Property") on 4 November 2002, pursuant to ss.79-81 of the Housing Act 1985 (the "1985 Act"). After his wife died, in June 2008, Rabbi Weintraub continued to live there on his own. Nervous of being in the Property on his own overnight, however, he arranged for a succession of people to stay with him. Those arrangements came to an end in 2017.

2. At the time that it became more problematical to get people to stay overnight with him, Rabbi Weintraub, in discussion with his family, formulated a plan to buy the Property with the intention of converting the basement into a separate flat where someone else, such as a grandchild, could live. As there was no-one who could stay in the Property with him overnight, he began to spend the nights elsewhere – usually (approximately six nights out of every eight) at his daughter's house nearby, but on other nights (when his daughter had other guests staying) with friends. Apart from his twice daily attendance at the synagogue, Rabbi Weintraub's days were mostly spent at the Property, where he spent his time in study and eating meals made for him by his daughter. He kept very few possessions at the Property, which was practically empty.

3. On 18 October 2017 he applied to the council for the right to buy the Property under Part V of the 1985 Act.

4. On 8 January 2018, Rabbi Weintraub was offered a 125 year lease, at a premium of £305,100, which he accepted on 29 March 2018. On 24 April 2018, however, the council denied his right to buy, on the grounds that he did not reside at the Property as his only or principal home. A second application for the right to buy the Property was also refused and, on 18 February 2019, the council served Rabbi Weintraub with a notice to quit.

5. Rabbi Weintraub, who is now in his late eighties, brought a claim against the council for a declaration that he had the right to buy the premises. After a twoday trial, HHJ Saunders dismissed the claim on the basis that Rabbi Weintraub did not occupy the Property as his only or principal home. This is an appeal against that decision.

The law

6. By s.79(1) of the 1985 Act, a tenancy under a dwelling-house is let as a separate dwelling as a secure tenancy at any time when the conditions described in ss.80 and 81 as the "landlord condition" and the "tenant condition" are satisfied. The landlord condition includes, by s.80(1), that the landlord is a local authority (and is therefore satisfied in this case). The tenant condition is, in the case of an individual, that "the tenant … occupies the dwelling-house as his only or **pri**ncipal home": s.81.

7. By s.118 of the 1985 Act, subject to certain conditions which are not relevant to this appeal, a secure tenant of a dwelling-house has the right to buy it.

8. The tenant condition involves two questions: (1) does the person in question occupy the dwelling as a home and (2) if so, does he or she occupy it as his or her only or principal home? – see *Dove v Havering LBC* [2017] EWCA Civ 156, per Lewison LJ at §17.

9. A person may be in occupation of a dwelling as a home, even though they are not currently living there. The principles to be applied in determining whether a tenant continues to occupy a dwelling as his or her home despite living elsewhere were summarised by Etherton LJ in *Islington LBC v Boyle* [2011] EWCA Civ 1450, at §55:

> "First, absence by the tenant from the dwelling may be sufficiently continuous or lengthy or combined with other circumstances as to compel the inference that, on the face of it, the tenant has ceased to occupy the dwelling as his or her home. In every case, the question is one of fact and degree. Secondly, assuming the circumstances of absence are such as to give rise to that inference:
>
> (1) the onus is on the tenant to rebut the presumption that his or her occupation of the dwelling as a home has ceased;
>
> (2) in order to rebut the presumption the tenant must have an intention to return;
>
> (3) while there is no set limit to the length of absence and no requirement that the intention must be to return by a specific date or within a finite period, the tenant must be able to demonstrate a "practical possibility" or "a real possibility" of the fulfilment of the intention to return within a reasonable time;
>
> (4) the tenant must also show that his or her inward intention is accompanied by some formal, outward and visible sign of the intention to return, which sign must be sufficiently substantial and permanent and otherwise such that in all the circumstances it is adequate to rebut the presumption that the tenant, by being physically absent from the premises, has ceased to be in occupation of it. Thirdly, two homes cases, that is to say where the tenant has another property in which he or she voluntarily takes up full-time residence, must be viewed with particular care in order to assess whether the tenant has ceased to occupy as a home the place where he or she formerly lived. Fourthly, whether or not a tenant has ceased to occupy premises as his or her home is a question of fact. In the absence of an error of law, the trial judge's findings of primary fact cannot be overturned on appeal unless they were perverse, in the sense that they exceeded the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible; but the appeal court may in an appropriate case substitute its own inferences drawn from those primary facts."

10. The same principles are "also engaged where the tenant ceases to occupy the property as his or her only or main home even if he or she continues to occupy it as a home; as for example where what has once been the tenant's only home becomes no more than a weekend holiday home. Moreover, the question of an intention to return … is in reality an intention to revert to a previous pattern of existence": *Dove v Havering LBC* (above), per Lewison LJ at §22.

The judge's judgment

11. The facts were not materially in dispute before the judge. His findings, at §51 to §55 of his judgment, may be summarised as follows:

(1) Since 2017, Rabbi Weintraub visits the Property – if not daily – at least for a considerable portion of the week, for several hours at a time between his morning and evening visits to the synagogue (where he also bathes).

(2) He spends his time in the Property in study and prayer, and eating the packed lunch which his daughter prepares for him.

(3) He spends the nights either at his daughter's house, except at weekends when he stays with friends.

(4) He has an intention to return to the Property once the right to buy process is completed.

12. I set out the judge's findings at §56-58 in full:

> "56. However, this is not a case of abandonment but one to determine whether the premises are used as the Claimant's only or principal home. In my view, the premises are used (or were used at least from 2017 onwards) mainly for study purposes – however laudable that is.
>
> 57. The Claimant does not sleep there. He does not entertain there, apart from the odd visit such as family or friends. Not unnaturally in view of his age, he is heavily reliant on his daughter and son-in-law, and Mr Schiomoni (and indeed the local synagogue) for the remainder of his daily and, crucially, overnight living needs – but, in my view, that activity is largely centred around his daughter's home not the premises.
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> 58. I do find it surprising that, irrespective of his frugal nature, that very little of his personal belongings are left in the premises. The basement contains only a few, as can be seen from the photographs taken by Mr Seridag. More importantly, the premises are practically empty, even if one recognises that the photographs, I have seen may not be completely exhaustive."

13. On the basis of these findings, the judge concluded that the Property was not Rabbi Weintraub's only or principal home. At §76 to §78 he concluded as follows:

> "76. Accepting that certain bills and bank account statements in the Claimant's name are delivered to the premises, and that he at

> least has a presence there during the daytime, such that he treats the premises as his home, that is, in my view, insufficient for him to demonstrate (on an objective basis) that this is his only or principal home – in accordance with the principles set out in *Dove*.
>
> 77. The contrary evidence is compelling. He sleeps elsewhere every night – mainly at his daughter and son in law's. They care for him substantially. Whilst accepting that he is a man who requires little in the way of material possessions, the evidence demonstrates that the premises are used solely for study purposes akin to a library environment. The premises look practically empty and unused. He attends the synagogue each day on two occasions – and they along with his family and friends provide for him.
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> 78. Mr Heath has suggested that his situation could be categorised as one akin to a sofa surfer and that it must follow that, as he has only one flat, that must be his only or principal home. I cannot agree with that submission – the true test is an objective assessment of whether this is the case. From these findings and those that I have expressed at some length earlier in this judgment (and I refer to paragraphs 21-60), I cannot find this to be the case."

14. Notwithstanding his finding of fact that Rabbi Weintraub intended to return to the Property, once the right to buy process was completed, the judge found, at §74, that "the question of an intention to return to the premises simply does not arise". That was because: "[his] intention is to retain the secured tenancy enabling him to secure the right to buy. There is no evidence before me that [he] intends to return to his council tenancy."

Grounds of appeal

15. There are two grounds of appeal. First, that the judge erred in law and/or in fact when finding that the Property was not Rabbi Weintraub's principal or only home. Second, that the judge erred in law when holding that Rabbi Weintraub's intention to return to living exclusively at the Property was not relevant because he only intended to return as an owner.

16. In support of the first ground, Mr Heath, who appeared for Rabbi Weintraub, first submitted that it was not open to the judge to find that the Property was not occupied by Rabbi Weintraub as *a* home, because the council had not pleaded otherwise, and had conceded that Rabbi Weintraub did occupy it as a home.

17. He then submitted that in order to make a finding that the Property was not Rabbi Weintraub's only or main home, it was necessary for the judge to identify some other property which *was* his main home, and that the judge had failed to do so.

18. In support of the second ground, Mr Heath submitted that the judge had wrongly imported an additional requirement when considering the possibility that Rabbi

Weintraub had an intention to return to the Property, namely that he must intended to do so *qua* tenant.

First ground of appeal

19. The first question under the first ground of appeal is whether the judge found that the Property was not being used by Rabbi Weintraub as a home at all, or whether he found only that it was not being used as his only or principal home.

20. Mr Paget, who appeared for the council, submitted that the judge had indeed found that Rabbi Weintraub was not using the Property as a home. I disagree. The judge's comment, at §56, that "this is not a case of abandonment but one to determine whether premises are used as the Claimant's only or principal home", and his conclusion at §76 that the fact that Rabbi Weintraub "treated" the Property as his home was insufficient to demonstrate that it was "his only or principal home", demonstrate that he was considering, and only considering, the second of the two questions posed by Lewison LJ in *Dove*. Moreover, that question is only relevant where it is either found, or assumed, that Rabbi Weintraub was occupying the Property at least as *a* home.

21. The second question is whether it is necessary, in order to reach a conclusion that a dwelling-house is not a principal or only home, to conclude that some other property *is* the principal home. I think that it is. In order to conclude that a dwelling-house is not a person's only home, it is logically necessary to establish that the person has another home elsewhere. Where a person has more than one home, then in order to conclude that one of them is not the principal home, it logically requires that one of the other homes *is* the principal home.

22. The third question is whether, as Mr Heath submitted, the judge failed to conclude that some other property was Rabbi Weintraub's principal home. Although the judge did not say so in terms, I consider that he did reach such a conclusion. Specifically he found that Rabbi Weintraub's daughter's house was his principal home. The judge's conclusion (at §78) that the Property was not Rabbi Weintraub's principal home was based on the findings reached earlier in the judgment. At §57 (set out in full above), he compared the limited use of the Property with the remainder of Rabbi Weintraub's daily – and crucially overnight – living needs, which he found "centred around his daughter's home".

23. It is true that, at §66, the judge distinguished the *Boyle* case on the grounds that "it was a case of identifying which of two houses was the principal home – which is not the case here." Reading his judgment as a whole, however, that sentence must be an error. First, in the immediately following paragraphs he referred to the *Dove* case as being more relevant, because it met the issues in this case, noting that it was a case where the question was whether the relevant premises were being occupied as the tenant's principal home. Second, in the section of his judgment under the heading "conclusion", he expressly addressed and determined (as I have already noted), the question whether the Property was Rabbi Weintraub's only or principal home.

Second ground of appeal

24. The judge's reasoning for ignoring Rabbi Weintraub's intention to return to the Property is simply that there was no evidence that he intended to "return to his council tenancy".

25. Neither party was able to point to any authority which addressed the question of whether an intention to return to a property held pursuant to a secure tenancy as a principal or only home was sufficient only if the intention was to return to the Property as tenant under the existing council tenancy.

26. Mr Paget's main submission was that Rabbi Weintraub's intention to return was a conditional or contingent one, and that the condition or contingency was too uncertain.

27. He relied on *Robert Thackary's Estates Ltd v Kaye* (1989) 21 H.L.R. 160. In that case, the tenant of the relevant premises, having moved out from them while certain repairs were carried out, intended to return only if certain additional works were carried out by the landlord. Slade LJ, with whom Hollings J agreed, applied the test propounded by Ormerod LJ in *Tickner v Hearn* [1960] 1 WLR 1406:

> "I think there must be evidence of something more than a vague wish to return. It must be a real hope coupled with the practical possibility of its fulfilment within a reasonable time."

28. In *Tickner* and two other cases referred to by Slade LJ (*Leslie and Co. Ltd. v Cumming* [1926] 2 KB 417; *Wigley v Leigh* [1950] 2 KB 305) this test was held to be satisfied where the tenant intended to return to the premises if and when their health improved, and where there was a realistic possibility of that occurring.

29. Applying that test to the facts in *Thackary's* case, Slade LJ said: "I can see here no sufficient evidence of a real hope that Mrs. Kaye's demands concerning the work to be done at No.6 would ever be met or that the conditions attached to her intention would ever be fulfilled by the landlord within a reasonable time."

30. In the present case, the judge was not referred to any of the above cases, and did not consider the application of the test in *Tickner*. Had he done so, leaving aside only the question whether an intention to return as owner, rather than as tenant, is sufficient, he could only have held that Rabbi Weintraub had a real hope to return, coupled with the practical possibility of its fulfilment within a reasonable time. That conclusion is inevitable in light of (a) the judge's finding of fact that Rabbi Weintraub intended to return to the Property once the right to buy process had completed, and (b) the fact that – subject only to the satisfaction of the

    tenant condition – Rabbi Weintraub was entitled to, and was in a position to, exercise the right to buy.

31. Accordingly, I do not think the fact that Rabbi Weintraub's intention to return was conditional or contingent is in itself a reason to conclude that he did not remain in occupation for the purposes of the 1985 Act.

32. Mr Paget also relied on the language used by Lewison LJ in *Dove*, cited above: the question of an intention to return is "in reality an intention to revert to a previous pattern of existence". That was said, however, in the context of his conclusion that the principles set out by Etherton LJ in *Boyle* applied also to cases where the tenant continues to occupy premises as their home, but not as their principal or only home

33. By the "previous pattern of existence", therefore, Lewison LJ was intending to refer to the resumption of occupation as the principal or main home. He did not have in mind the question which arises in this case, and cannot be taken to have been imposing a further requirement, that the intended return to the premises must be as tenant, rather than as owner.

34. Nor did Lewison LJ intend (by the reference to a previous pattern of existence) to exclude an intention to return once refurbishment work was carried out. *Thackary's* case demonstrates that an intention to return, once works are carried out, can satisfy the test of occupation provided there is a practical possibility of the works being carried out.

35. The question remains whether an intention to return, but only once the right to buy process is completed, is a sufficient intention to satisfy the test of occupation. Addressing the question from first principles, in the absence of authority, it might be said that since s.118 of the 1985 Act is all about the right of a secured tenant to buy, it is necessary to establish that the tenant condition can be established *before* the right to buy process is activated, and that an intention to return only after the right to buy process is completed would be too late. The fact that it is labelled the "tenant" condition lends some support to that view.

36. I do not think this is right, however. As the cases I have referred to earlier make clear, it is not essential that a secured tenant is *currently* living in the premises as his or her only or principal home. An intention to return to such a pattern of existence is sufficient. If, for example, the secured tenant is spending a year working abroad, with the intention of returning to the premises thereafter, there is no reason why he or she could not exercise the right to buy at some point during that year of absence. The fact that the timing of the intended return is not tied to a particular date, but to the completion of the right to buy process, so that necessary works can be undertaken to enable Rabbi Weintraub to resume spending his nights at the Property, does not in my judgment justify a difference in outcome. As for the label, it is the substance of the condition that matters, and that refers only to occupying the "dwelling-house" – i.e. the physical property – as the only or principal home.

37. Accordingly, I conclude that Rabbi Weintraub's intention to return to the Property as his only home, even though this is to happen only once he has exercised his right to buy the Property, is sufficient to satisfy the tenant condition.

38. Mr Paget suggested that such a conclusion would open the floodgates to applications from tenants who were not currently in occupation of secure tenancies, and who were never intended to fall within the right to buy provisions of the 1985 Act. I consider that this overstates the dangers. It will always be necessary to identify a real and genuine intention to resume occupying the premises as the only or principal home. The facts of this case are unusual: there was a highly specific reason for ceasing to occupy the Property as a principal home – the fear of sleeping in the Property alone – which can readily be overcome by the alterations which Rabbi Weintraub plans to carry out on his return. The reason for ceasing to use the Property overnight, and the proposed solution, reinforce that there is a real and genuine intention by Rabbi Weintraub to restart occupying the Property as his principal home.

39. For the above reasons, I allow the appeal.