Loosening the Limits of Statutory Interpretation?

Livewest V Bamber

Introduction

1. What can the courts do when the apparent effect of legislation clearly cannot be what Parliament intended? This issue may arise in two circumstances. Firstly, where there are two (or more) possible interpretations of a statutory provision: in this case the Court will construe the provision on the basis of that meaning which is most sensible. Secondly, if given their obvious literal meaning, clearly cannot have been what Parliament intended.

2. The court's power in relation to the second of these circumstances is strictly limited; principally for the public policy reason that Parliament is elected to pass legislation and the court should not lightly interfere with statutory provisions that have been tested by debate in Parliament.

3. The reason for the limits and the principles were set out Lord Nicholls in *Inco Europe Ltd. v First Choice Distribution* [2000] 1 WLR 586, @ p. 592 C to H:

> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74 …

4. So, for the court to have the power to 're-write' legislation it must be 'abundantly sure' of all three things:
   - 4.1 What Parliament intended the statute or provision to achieve;
   - 4.2 That the failure of the provision to have that effect arises by inadvertence; and
   - 4.3 The substance of the provision (in general) had the error not occurred.

5. In recent cases where the court's power to rewrite legislation has arisen, the court has set out the amendment to the relevant provision which in the view of the court give

effect to the legislature's intended purpose: see e.g. *Inco v First Choice* and *R (Noone) v Governor HMP Drake Hall* [2010] 1 WLR 1743. It has been held that the alternative words inserted into a legislation should, ideally, be minimal: e.g. in *R v Lehair* [2015] EWCA Crim 1324, the word 'date' in provisions relating to the recovery of the proceeds of crime was replaced by the court with the word 'time' and in *Qader v Esure Services Ltd* [2016] EWCA Civ 1109 it was held that the phrase "and for so long as the claim is not allocated to the multi-track" should have been added into the rules to disapply fixed costs where a claim started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents was subsequently allocated to the multi-track.

***Livewest v Bamber* [2019] EWCA Civ 1174**

6. In *Livewest v Bamber* the Court of Appeal found, applying the *Inco v First Choice* rules, that it had power to interpret ss. 21(1A) and (1B) of the Housing Act 1988 ("HA 88") so that those sections had some sensible application.

7. HA 88, Part 1, Chapters 1 and 2, create assured and assured shorthold tenancies ("ASTs"), respectively. Since 15.1.1989 residential tenancies granted by private sector landlords, including Housing Associations ("HAs"), have been governed by these sections of the HA 88.

8. Sections 21(1A) and (1B) were inserted into the HA 88 by the Localism Act 2011 as part of wholesale reform of social housing tenure across both Council tenancies and those provided by HAs that are Registered Providers of Social Housing ("RPSHs").

9. The purpose of these reforms was to allow Councils and RPSH to grant new tenants fixed-term tenancies, usually for between 5 and 10 years, but exceptionally for two years, at the end of which period the landlord is entitled to regain the premises without the need to establish a ground for possession. The rationale behind these reforms was to free up social housing for re-letting more quickly than has historically been the case with most social housing tenants being granted 'lifetime' tenancies; i.e. weekly periodic secure (Council) or assured (HA) tenancies where in order to obtain possession the landlord must establish a ground for possession and in most cases that 'it is reasonable in all the circumstances to make a possession order'.

10. For new Council tenants the reform was achieved by the creation of a new form of secure tenancy, called 'secure flexible tenancies', through the insertion of ss. 107A to

107E into the Housing Act 1985 ("HA 85"). These sections were inserted into the HA 85 by the Localism Act 2011. We will return to these sections below.

11. For new HAs tenants the right for RPSH to grant tenants fixed-term ASTs to which the Shorthold Procedure applies was achieved by regulatory changes. The Shorthold Procedure is the process under HA 88, s. 21, by which landlords can obtain possession of premises let on an AST without having a ground for possession.

12. The draconian effect of giving Councils and RPSH the right to obtain possession of premises let, respectively, on secure flexible tenancies and ASTs at the end of the tenancy without the need to establish a ground for possession has been ameliorated by a requirement that the landlord give the tenant at least six months' notice before a possession order can be made.

13. In relation to secure flexible tenancies there are detailed provisions for how this was to operate under the HA 85, s. 107D(1) to (8), inclusive, which provide as follows:

107D Recovery of possession on expiry of flexible tenancy

(1) Subject as follows, on or after the coming to an end of a flexible tenancy a court must make an order for possession of the dwelling-house let on the tenancy if it is satisfied that the following conditions are met.

(2) Condition 1 is that the flexible tenancy has come to an end and no further secure tenancy (whether or not a flexible tenancy) is for the time being in existence, other than a secure tenancy that is a periodic tenancy (whether or not arising by virtue of section 86).

(3) Condition 2 is that the landlord has given the tenant not less than six months' notice in writing -

(a) stating that the landlord does not propose to grant another tenancy on the expiry of the flexible tenancy,

(b) setting out the landlord's reasons for not proposing to grant another tenancy, and

(c) informing the tenant of the tenant's right to request a review of the landlord's proposal and of the time within which such a request must be made.

(4) Condition 3 is that the landlord has given the tenant not less than two months' notice in writing stating that the landlord requires possession of the dwelling-house.

(5) A notice under subsection (4) may be given before or on the day on which the tenancy comes to an end.

(6) The court may refuse to grant an order for possession under this section if -

(a) the tenant has in accordance with section 107E requested a review of the landlord's proposal not to grant another tenancy on the expiry of the flexible tenancy, and

(b) the court is satisfied that the landlord has failed to carry out the review in accordance with provision made by or under that section or that the decision on the review is otherwise wrong in law.

(7) If a court refuses to grant an order for possession by virtue of subsection (6) it may make such directions as to the holding of a review or further review under section 107E as it thinks fit.

(8) This section has effect notwithstanding that, on the coming to an end of the flexible tenancy, a periodic tenancy arises by virtue of section 86.

14. These provisions are pretty clear; by ss. 107D(1) if the three conditions are met, the court **must** make a possession order; the three conditions are:

(1) The flexible tenancy must have come to an end: condition 1, ss. 107D(2);

(2) The landlord must have given the tenant six-months' notice telling the tenant that after the expiry of the tenancy the landlord did not intend to grant the tenant a new tenancy: condition 2, ss. 107D(3);

(3) The landlord must have also given the tenant two months' notice stating that the landlord required possession of the premises: condition 3, ss. 107D(4);

By ss. 107D(8) it is clear that the six-months' notice and the two-months' notice can both be served before or after the flexible tenancy expires (ss. 107D(8)).

15. Significantly, it is clear that the date on which these conditions must be met is the date when a possession claim is before the court: see ss. 107D(1).

16. Returning to RSPH and the AST regime; the only change needed so as to mirror the notices position in relation to secure flexible tenancies was to require RPSH to serve a six-month notice; this is because HA 88, s. 21 has always required a two-month notices before the shorthold procedure can be relied on.

17. To achieve this ss. 21(1A) and (1B) were inserted into the HA 88, s. 21.

(1A) Subsection (1B) applies to an [AST] *for a term certain of a dwelling-house in England if –*
(a) it is a fixed term tenancy for a term certain of not less than two years, and
(b) the landlord is a private registered provider of social housing.

(1B) The court may not make an order for possession of the dwelling-house let on the tenancy unless the landlord has given to the tenant not less than six months' notice in writing –
(a) stating that the landlord does not propose to grant another tenancy on the expiry of the fixed term tenancy, and
(b) informing the tenant of how to obtain help or advice about the notice and, in particular, of any obligation of the landlord to provide help or advice.

The case turned on when the two requirements in ss. 21(1A) must be satisfied.

The facts *Livewest v Bamber*

- Livewest ("L") is a housing association and RPSH.
- L granted Ms Bamber ("B") a 7 year fixed-term Assured Shorthold Tenancy.
- During the 1st year L could end the fixed-term tenancy by a break notice.
- The first year was called the 'starter period'.
- The Housing Act 1988 ("HA 88") applied.
- L received reports of A-SB by B.
- L exercised the break option by serving a notice pursuant to HA 88, s. 21(1).
- The tenancy became a statutory periodic weekly tenancy
- L issued a possession claim relying on the 'Shorthold Procedure'.

The issue in *Livewest v Bamber*

- In her defence B pleaded that HA 88, ss. 21(1A) and (1B) applied.
- These add an additional requirement to the Shorthold Procedure where:
  - The tenancy is for a fixed-term of 2 years, or more, and
  - The landlord is a registered provider of social housing ("RPSH").
- That is that the landlord has also served a six-month notice.
- L had not served a six-month notice.

The Issue = Was Livewest required to serve a six-month notice under ss. 21(1A) and 21(1B) in this case?

What was not in dispute between the parties

18. The parties agreed that the literal effect of ss. 21(1A) is that the two requirements have to be considered at the date of the hearing; in effect consistent with the requirements in ss. 107D. This is also consistent with the general requirement, under HA s. 21, that the landlord must have given the tenant two months' notice. Such a two-month notice can be served under ss 21(1)(b) or (4)(a) which, respectively, provide as follows:

21 Recovery of possession on expiry or termination of [AST]

(1) … on or after the coming to an end of an [AST] which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied—

(a) that the [AST] has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than an assured shorthold periodic tenancy (whether statutory or not); and

(b) the landlord or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house.

(4) Without prejudice to any such right as is referred to in subsection (1) above, a court shall make an order for possession of a dwelling-house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied -

(a) that the landlord or, in the case of joint landlords, at least one of them has given to the tenant a notice in writing stating that, after a date specified in the notice, being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling-house is required by virtue of this section; and

19. However, if the two requirements in ss. 21(1A) must apply on the date of the hearing then the second requirement; i.e. that the tenancy is for a fixed term of two years or more will never be met if the landlord is otherwise entitled to possession under the Shorthold Procedure because before the court can make a possession order under s. 21 it must be satisfied that any fixed-term tenancy has come to an end and that any tenancy in existence at the time of the hearing is a periodic one.

20. The parties agreed that on a literal interpretation of s. 21(1A)(a) RPSH landlords would never have to serve a six-month notice.

The Arguments – Ms Bamber

21. It was argued by B that the word '*is*' in ss. 21(1A)(a) should be read as '*was*'; so that the date on which the court was to assess whether the first of the conditions precedent was satisfied was the date of grant of the tenancy. She relied on the *Inco v First Choice* principles.

22. In her case the effect of Ms B's argument was that because at its grant her tenancy was for a fixed term of not less than two years, notwithstanding that her tenancy was being ended during the starter period, Livewest had to give her six months' notice in addition to the usual two-months' notice required under HA 88 s. 21.

The Arguments - Livewest

23. The argument on behalf of Livewest, in relation to this issue was that:
    (1) On the literal meaning of the words the date on which the pre-conditions in ss. 21(1)(a) must be met is when the claim is before the court; i.e. consistent with the other provisions of ss. 21 and HA 85, s. 107D;
    (2) That cannot have been what Parliament intended;
    (3) However, the court cannot be sure what the Parliamentary intention was: if Parliament intended that the pre-condition of service of a notice continue to apply after the fixed-term tenancy had come to an end why not use the same language as was used in HA 88, ss. 21(1)(a) and HA 85 ss. 107D(2), particularly bearing in mind the new HA 85 ss. 107A to 107E were contained in

the Localism Act 2011, i.e. the same Act that introduced ss. 21(1A) and (1B) to the HA 88;

(4) It is not possible to give effect what parliament intended, if that can be divined, by a small change in the wording of the legislation.

In effect, the court could not be 'abundantly sure' either of what Parliament had intended nor the substance of the provision would have been had there been no error.

24. On Livewest's argument the failure to serve a six-month notice was not fatal to its use of the Shorthold Procedure because the requirement to do so never arose.

25. As further evidence of the paucity of the drafting of ss. 21(1A) and (1B) Livewest also submitted out that the literal effect of ss. 21(1B)(a) is that the six-month notice could not be served after the end of the fixed-term tenancy and thus that if a six-month notice was not served before the expiry of the tenancy that would have the effect that a RPSH landlord could not thereafter rely on the Shorthold Procedure thus elevating the tenancy to an assured tenancy rather than an AST. Livewest argued that given the purpose of the legislation, to reduce social housing tenants' security of tenure, that cannot have been what Parliament intended.

The Decision

26. In relation to the date on which the pre-condition in ss. 21(1A)(a); that the tenancy is a tenancy for a fixed term of not less than two-years, has to be determined the Court of Appeal appears, at [42] to fudge the issue; although the effect of the decision must be that the condition is to be considered at the date of grant of the tenancy:

> 42. Against this background I can return to ss.21(1A)-(1B) and to the construction which Dingmans J relied upon. The judge was, I think, wrong to construe the word "is" in s.21(1A) as importing a requirement that the tenancy should remain a fixed term tenancy for a term certain of not less than two years as at the date of the hearing or the date of issue of the possession proceedings. I agree with Mr James (and with Judge Mitchell) that this would make the new statutory provisions inoperable and cannot have been what Parliament intended. Dingmans J's view that the word "is" should be applied literally would also cause difficulties in a case where a fixed term tenancy granted for a term of two years or more was allowed to expire by effluxion of time before the landlord served a s.21(1B) notice. It seems unlikely to me that Parliament can have intended that the RPSH should be able to avoid giving six months' notice under s.21(1B) simply by waiting until the contractual expiry of the term. A more rational explanation is that s.21(1A) does no more than to identify the type of tenancy to which the notice provisions in s.21(1B) apply. Looked at in that way, the use of the word "is" makes sense. The use of the present tense was not itself intended to provide a condition which had to be satisfied as at the date of the possession hearing. In the case of a fixed term tenancy of the type described in s.21(1A), the operative provisions are those contained in s.21(1B) which restrict the Court's power to make the

possession order sought unless the notice provisions it contains have been complied with.

27. The court decided, however, that the requirement for a six-month notice to be served only applies when possession is sought after the end of the contractual term of the tenancy. To make this finding the court construed the word 'expiry' in ss. 21(1B)(a) as meaning at the end of the fixed-term and not on any earlier determination of the fixed-term:

> 41. The same use of language occurs in s.21 HA 1988. Section 21(1)(a) and (2), which apply both where a fixed term expires by effluxion of time and when an AST is terminated by notice, use the phrase "coming to an end". But s.21(1B) refers to expiry which, consistently with the object of the six months' notice provisions, is concerned with the expiry of the fixed term by effluxion of time.
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> 43. …The purpose of a s.21(1B) notice is to inform the tenant under the AST that the tenancy will not be renewed at the end of the contractual term: not on its termination at any earlier point in time. That information is of no relevance to a tenant whose tenancy is brought to an end on notice or by forfeiture earlier during its term. It seems to me that s.21(1B) should therefore be read as a bar to the Court making an order for possession only where the term of the AST has expired by effluxion of time. The careful draftsman might have chosen to insert into s.21(1B) after the word "unless" words such as "where applicable". But that reading of s.21(1B) arises by necessary implication given the obvious purpose and limitation of the s.21(1B) notice itself. This, I think, was the view taken by Judge Mitchell and, in my judgment, it is the correct construction of these provisions. It also avoids giving s.21(1A) a construction which would render the intended purpose of the amendments unachievable.

Criticism of the Decision

28. Whilst this achieves a sensible outcome; i.e. that a s. 21(1B) notice is only required where the landlord is seeking possession using the Shorthold Procedure after the end of the expiry of the contractual term, it is difficult to see how the word 'expiry' in ss. 21(1B)(a) can be determinative of when the requirement to serve a six-month notice applies: The pre-conditions for service of a six-month notice are set out in ss. 21(1A)(a) and (b) whereas ss. 21(1B)(a) contains the requirements of the notice; that is that it states that 'the landlord does not propose to grant another tenancy on the expiry of the fixed term tenancy'. How then, does that inform the circumstances in which the six-month notice must be served?

29. The Court proposed the insertion of the words 'where applicable' after the word unless in ss. 21(1B): so that section would read:

> *(1B) The court may not make an order for possession of the dwelling-house let on the tenancy unless,* ***where applicable****, the landlord has given to the tenant not less than six months' notice in writing –*

It is not clear how these additional two words cause the section to apply only after the original fixed-term tenancy has come to an end. If, as in this case, the landlord has ended the fixed term tenancy before it has completed its full contractual term why, on the court's alternative wording of the section, should the landlord still not be obliged to tell the tenant that on the date on which the tenancy would have expired the landlord will not be granting the tenant a new tenancy? The words 'where applicable' add no clarification.

31. In coming to the above conclusion, the Court relied heavily on the intention of Parliament as illustrated by ss. 107D of the HA 1985 (both HA 88 ss. 21(A) and (B) and HA 85, ss. 107A to 107D were introduced by the Localism Act 2011). Whilst it is accepted that the courts can use legislative history to assist in statutory interpretation, the Court, in this instance, took into consideration an entirely different Act. This potentially increases the scope of the Court's use of legislative history to parallel but separate regimes. Moreover, the Court of Appeal in this case ignored the obvious response to its interpretation: 'if Parliament had intended to achieve the same results why not use the same wording!' Indeed, the provisions of HA 85, ss. 107D(1) and (2) have an earlier progenitor in HA 88, ss 21(1).

32. The Court of Appeal did not decide the issue raised by Livewest that on a literal interpretation of ss. 21(1B)(a) the six-month notice has to be served before the expiry of the fixed term: see Judgment [51].

Conclusion

33. It seems to us that this case comes close to, and possibly goes beyond, the very limited circumstances in which the court can re-write legislation.

34. However, it does mean that HAs can continue to grant fixed term ASTs with a probationary period and if they do end the fixed-term during the probationary period and thereafter rely on the shorthold procedure for possession they can do so without also having to serve a six-month notice.

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Five Paper