

The Absent Tenant: The “Only or Principal Home” Test

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This article gives an overview of the relevant principles that are applied by the courts when a landlord seeks possession on the ground that the tenant no longer occupies the property as their only or principal home. In particular, it examines the guidelines laid down in London Borough of Islington v Boyle [2011] EWCA Civ 1450, and considers a number of cases in which possession was refused on this ground.

The phrase “only or principal home” is used in relation to secure tenancies under the Housing Act 1985 and assured tenancies under the Housing Act 1988. It is a fundamental requirement of a secure or assured tenancy. If a tenant does not occupy a dwelling as their only or principal home, the tenant loses security of tenure and the tenancy can be brought to an end by a notice to quit.

There may be any number of reasons why a tenant no longer occupies the property as their only or principal home. Common reasons for lengthy or indefinite periods of absence include illness see *Wigley v Leigh* [1950] 2 KB 305, and also prolonged illness which causes the tenant to move out of the property into a care home see *Hammersmith and Fulham v Clarke* (2001) 33 HLR 26, or into hospital see *Tickner v Hearn* [1961] 1 All ER 65. A tenant may also have moved into a second home, for example a country home see *Brickfield Properties v Hughes* [1988] 1 EGLR 106 and *Beck v Scholz* [1953] 1 QB 570, or even abroad see *Gofer Investments Ltd v Roberts* (1975) 29 P & CR 366. In other cases, the tenant may have moved into their partner’s property see *Crawley BC v Sawyer* (1987) 20 HLR 108, be detained at her majesty’s pleasure see *Brown v Brash and Ambrose* [1948] 2 KB 247, or have moved away from the property for the needs of their children see *Islington v Boyle* [2011] EWCA Civ 1450 and *Gofer Investments Ltd v Roberts* (1975) 29 P & CR 366.

Non-occupation as a ground for possession is commonly pleaded in conjunction with the ground of subletting, see *Ujimah Housing Association v Ansah* [1997] 30 HLR 831, *Waltham Forest Housing Association v Fanning* [2001] L & TR 41, and *Hussey v London Borough of Camden* 27 HLR 5. If subletting is established in the case of both assured and secure tenancies, the tenant loses security of tenure for that reason alone.

The relevant legislation

Section 79(1) of the Housing Act 1985 provides:

“A tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied.”

Section 81 of the Housing Act 1985 provides:

“The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; or, where the tenancy is a joint tenancy, that each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home.”

Section 1(1)(b) of the Housing Act 1988, in relation to assured tenancies, makes it a condition of the assured tenancy that;

“... the tenant, or as the case may be, at least one of the joint tenants occupies the dwelling-house as his only or principal home.”

The wording of s.81 of the 1985 Act and s.1(1)(b) of the 1988 Act demonstrates a fundamental shift from the language of the Rent Act 1977 which requires that the tenant “occupies the dwelling-house as his residence”. Under the 1977 Act, therefore, a tenant can benefit from having two tenancies of two different properties both of which may qualify for statutory protection, see *Bevington v Crawford* (1974) 232 Estates Gazette 191, CA. This is no longer the case: a secure or assured tenant may now only have the benefit of statutory protection in respect of one property under the 1985 Act and the 1988 Act. Cases decided under the Rent Act 1977, however, are still useful law.

A question of fact and degree

The question of whether a tenant occupies a dwelling-house as their only or principal home involves an objective test, having regard to all the facts. It is not an inquiry into the tenant’s subjective intention see *Ujimah*. A common sense approach has been adopted by the courts and a tenant is not expected to reside in their property every day of the year. As Asquith LJ stated in *Brown v Brash and Ambrose*:

“... the term ‘non-occupying tenant’ cannot cover every tenant who, for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend twenty-four hours in all weathers under his own roof for three hundred and sixty-five days of the year. . . But absence may be sufficiently prolonged or unintermittent to compel the inference prima facie of a cesser of occupation. The issue is one of fact and of degree.”

This view was endorsed by Ormerod LJ in *Tickner v Hearn*:

“If a man is personally absent from his house, he does not thereby necessarily cease to be entitled to the protection of the Acts. A man may be temporarily absent for business or holiday purposes and he does not thereby cease to be in occupation.”

Thus, a sea captain who is away for long periods, but returns to the house between his voyages, while his wife and family stay in the house while he is away would not be a “non-occupying” tenant - the example given by Scrutton LJ in *Skinner v Geary* [1931] 2 KB 546. Where the tenant sleeps, however, is a significant factor in determining whether that is his only or principal home see *Semeghova v McMahon* [2003] HLR 346, Longmore LJ at paragraph 10.

London Borough of Islington v Boyle

The case of *London Borough of Islington v Boyle* [2011] EWCA Civ 1450 is now the leading case on the question of whether the tenant occupies the property as their only or principal home. In his judgment, Etherton LJ stated at paragraph 55 that 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 *Boyle*, possession proceedings were brought on the basis that Ms Boyle had lost her security of tenure because she failed to occupy her secure flat as her only or principal home between 2004 and September 2008, contrary to s.81 of the Housing Act 1985 and she only resumed occupation after the service and expiry of the notice to quit. Her evidence at trial was that she

always thought that she would come back to London and live in her flat, although she did not know when. The trial judge, in dismissing the claim for possession, stated:

“The fact that she was not actually living in the Islington flat at the relevant date does not necessarily mean that the question whether she had a secure tenancy at the time must be answered in the negative. It depends on how she viewed her long term future. Equally she may or may not have changed her mind from time to time. The onus is on her to establish that she had a long term intention to return to the Islington flat and to occupy it as her sole or principal home.”

On appeal, the Court of Appeal remitted the case for a re-trial on the basis that Ms Boyle had failed to discharge the burden of her proving that, despite the fact that she was no longer living at the flat at the time the notice to quit expired, it nevertheless remained her principal home.

Absence due to illness

It is not necessary for the tenant to show that the “tenant condition” has been satisfied at all times since the grant of the secure tenancy. Occupiers may pass in and out of secure status so that s.79(1) of the Housing Act 1985 has “ambulatory effect” see *Basingstoke and Deane Borough Council v Paice* (1995) 27 HLR 433 (CA) at p. 437. However, where a notice to quit has been served to terminate the contractual tenancy, the tenant condition must be satisfied at the date of the expiry of the notice to quit. If the tenant resumes occupation of the property before the notice to quit has expired, the tenancy remains protected under statute. In *London Borough of Hammersmith and Fulham v Clarke* (2001) 33 HLR 26, Keene J emphasised at paragraph 30 that it is necessary to look at all the evidence. The relevant date for determining the question whether the tenant condition is fulfilled is at the date of the expiry of the notice to quit; however, evidence relating to periods before and after that date may be relevant: the focus is not on fleeting changes of mind but on the enduring intention of the tenant.

In *Clarke*, the tenant suffered a number of health complications including a severe stroke and was admitted to a nursing home. The council formed the view that the tenant had decided to live permanently in the nursing home and she had also signed a note written by her social worker at the nursing home in support of this intention which read:

“I have decided, following my six week review at the . . . Nursing Home . . . to become a permanent resident of the above establishment. When I originally made my application for the right to buy, my intention was to live at [property address] but now this is not my choice.”

In evidence, the tenant said with regard to the signed note that she had been very depressed at the time that she had signed it and that she had just got her medication sorted out. The trial judge accepted the tenant’s explanation and did not make the order for possession. In dismissing the landlord’s appeal against that decision, the Court of Appeal emphasised that

being in a hospital or in a care home may be different from a situation where possession of the dwelling is relinquished to someone else. The physical and mental condition of the person may fluctuate. The individual in question may get better, and one should be slow to place too much reliance on particular comments made at any one time. The other evidence suggested an enduring intention to return.

Another case involving illness is *Tickner v Hearn* [1961] 1 All ER 65, where the tenant, who had been granted a statutory tenancy under the Rent Restriction Acts, was taken ill with schizophrenia and was admitted to a mental hospital in 1954. By 1959, the tenant's mental condition had improved to the extent that her status was voluntary and she could leave the hospital at any time by giving 72 hours' notice. At all times, she had regarded the property as her home and had frequently expressed hope of returning there. The tenant's daughter occupied the property during the tenant's absence. The trial judge refused to make an order for possession, stating that: "who am I to say that the stage might not be reached within a reasonable time when the authorities would say that her relationship has so improved as to make it safe to let her out to the care of her daughter? I cannot say that she is incurable". On appeal by the landlord, the Court of Appeal left the judgment undisturbed and dismissed the appeal, notwithstanding that it was a borderline case.

Absence due to prison sentence

Cases that have also been decided in the tenant's favour include those where the statutory tenant has been sent to prison. Applying strictly the principles as set out in *Boyle*, a tenant may well be able to establish that he has nowhere else to go, intends to return to the property and has left some possessions there. However, it is questionable from a policy point of view, whether tenants who have been sent to prison for a considerable length of time, should still be entitled to keep hold of the tenancy that has the benefit of statutory intention.

In *Amoah v Barking and Dagenham LBC* (2001) L. & T. Rev 41, the tenant, who had a statutory tenancy under the Housing Act 1985 was sentenced to 12 years' imprisonment and yet successfully appealed the trial judge's order for possession. Similarly, in *Notting Hill Housing Trust v Etoria* [1989] CLY 1912 a life prisoner retained statutory protection of their property. One way, however, of getting around this situation from a landlord's perspective is to include in the tenancy agreement an additional discretionary ground for possession, for example that committing an indictable offence is in breach of the tenancy agreement.

Cases such as the life prisoner retaining statutory protection do raise the question of whether the law is still unduly tenant-friendly notwithstanding the tightening up of the residence condition in the Housing Act 1985. It is certainly not easy to obtain an order for possession in cases in which possession is brought solely on this ground. The only obvious further tightening of the wording would be to change "only or principal home" to "only home", but this might be going too far in the other direction.

Rent Act cases

As noted earlier, the wording of the condition for the tenant to retain statutory protection was changed by the Housing Act 1985 from the definition under the Rent Act 1977 (“occupies the dwelling house as his residence”) to “occupies the dwelling house as his only or principal home”.

In *Brickfield Properties v Hughes* [1988] 1 EGLR 106, the statutory tenant of a flat in London granted under the Rent Act 1977, which began in 1968, moved in with his wife to a cottage that she had inherited in Lancashire in 1978. From 1978, the flat had been occupied by the couple’s four children and the tenant had not been back to the flat at all from this date for eight and a half years although he had left his furniture and books there. The tenant’s wife had been back only three times before 1982, each time for a specific purpose (to visit a sick child, to be present at the property for some re-wiring and to attend a burglary). The tenant’s evidence was that he intended to live indefinitely in Lancashire; however, that he regarded his flat as his London home and intended to go back there one day to live. The trial judge dismissed the claim for possession. He took into account: (1) the fact that the couple were in their early 70s and the wife was not well. Should the tenant’s wife pre-decease him, he would probably have to go back to the flat; (2) the couple might need to return in five years or so if the wife could not continue to live in the cottage; and (3) the tenant had a close tie with his daughter who had expressed an intention to look after him. The Court of Appeal, although commenting that it was a borderline case, dismissed the landlord’s appeal.

By contrast, in *Gofor Investments Limited v Roberts*, also a Rent Act case, the tenant had gone out of occupation of the flat in 1970, and her intention was to return after a period of “not more than 10 years”. Her children were undertaking their education in Malta and her husband was “on a pension”. The trial judge dismissed the claim for possession and this was upheld by the Court of Appeal.

Conclusion

A landlord wishing to bring a claim for possession on this ground would be well advised to gather compelling evidence by way of: video surveillance, Experian searches linking the tenant to another property, witness evidence from neighbours, finding out whether the tenant has any electricity, water, the property (gas) register, and correspondence from the tenant which may show a different property address. If it is suspected that the tenant is linked to another property or has moved elsewhere, the landlord should find out the address of that other property. From a landlord’s perspective, where possible, it is certainly always advisable to rely on an additional ground for possession.

The law is stated as at June 20, 2015.