Neutral Citation Number: [2020] EWHC 838 QB

Case No: QB-2016-004371

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 April 2020

Before :

Master Sullivan

- -

Between :

Hertfordshire County Council	**Claimant/Respondent**
- and –	
Bryn Davies	**Defendant/Applicant**

- -
- -

Mr Andrew Lane (instructed by **Hertfordshire County Council Legal Services**) for the **Claimant/Respondent**
Mr Toby Vanhegan (instructed by **Arkrights Solicitors**) for the **Defendant/Applicant**

Hearing dates: 23 March 2020

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Judgment Approved by the court for handing down

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.00 on 9 April 2020.

Master Sullivan :

1. The claimant County Council employed the defendant as a resident caretaker at a school. He and his family lived in a bungalow tied to the employment. On 12 June 2015 his employment was terminated. The employment contract specified that the right to live in the bungalow would end on termination of employment.

2. After a long procedural history, the defendant and his family were evicted from the bungalow on 3 February 2020 by High Court Enforcement officers. The defendant now applies to set aside the order giving permission to issue the writ of possession, to set aside the writ of possession and to reinstate the defendant and his household into the bungalow.

3. Following the defendant's dismissal in June 2015, the claimant commenced possession proceedings in September 2015. A possession order was granted by Elisabeth Laing J on 21 June 2017. Possession was to be given 28 days from the date of the order. In coming to her decision Laing J heard evidence from the defendant, his wife and two of their four children.

4. Laing J refused permission to appeal and an application for a stay was also refused.

5. On 11 July 2017, the defendant applied for permission to appeal to the Court of Appeal. On 14 July 2017 the defendant's solicitor wrote to the claimant notifying them that they had made the application and requesting that the claimant confirm their instructions as to enforcement.

6. On 18 July 2017 the claimant replied stating that they had told the appeals office that, as the 28 days for possession had not yet elapsed, there were currently no enforcement proceedings being undertaken by the claimant.

7. Permission to appeal was granted by the Court of Appeal on 16 August 2017.

8. On 18 August 2017 the defendant's solicitors notified the claimant of the permission to appeal and asking the claimant to confirm their instructions in respect of enforcement now the 28 days had expired. There was no response to that letter.

9. On 29 September 2017, before the appeal was determined, the claimant made an application for permission to issue a writ of possession and control without notice to the defendant. That application did not mention that there was an outstanding appeal. No copy of the application was sent to the defendant or his family.

10. Master Eastman gave permission to issue a combined writ of possession and control on 29 September 2017. The order, in standard form, includes the words "AND UPON THE COURT BEING SATISFIED that it is shown that every person in actual occupation of the whole or any part of the said land ("the occupant") had received such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled". The order was not subsequently served on the defendant.

11. The Court of Appeal heard argument on 29 November 2017.

12. By a decision dated 6 March 2018 followed by an order dated 12 March 2018, the Court of Appeal dismissed the appeal, refused permission to appeal to the Supreme Court, and ordered that "the application for a stay on enforcement of the possession order pending any determination of any application for permission to appeal in the Supreme Court is refused."

13. The decision of the Court of Appeal concerned whether the defendant could raise the claimant's public law duties as a defence to the possession order and if so whether there was any such defence. The Court of Appeal found that the defendant could raise public law defences although he had no private law right, but that there was no evidence that at the stage of deciding to give a notice to quit there were any matters relating to his own disability or his children which would have made any difference to the outcome of the possession proceedings.

14. On 26 April 2018 the claimant notified the defendant's solicitor that it would not agree to a stay of execution pending any application to the Supreme Court and would be seeking to enforce the possession order.

15. The defendant then indicated it was seeking funding to make an application for permission to appeal to the Supreme Court and the claimant agreed to defer seeking possession pending that process. The application for permission was made in December 2018. The Supreme Court refused permission to appeal on 27 June 2019.

16. On 27 June 2019 the claimant wrote to the defendant asking to discuss the defendant's plans to vacate the bungalow as "it would be good to avoid the need for enforcement action".

17. On 1 July 2019 the claimant agreed to wait until 19 July for the defendant to reply but that they would want possession as soon as possible. It was also noted that it expected the defendant would vacate somewhere towards the end of July 2019.

18. During July 2019 the defendant's solicitor asked if the clamant would be willing to rent or sell the bungalow to the defendant. The claimant refused.

19. On 30 July 2019 the claimant wrote to the defendant's solicitor summarising the correspondence since the Supreme Court rejected the appeal and stating "On 19th July the Council repeated its request for your client to give a voluntary departure date, and reiterated the importance of having vacant possession before the coming term. No reply has been received from you since 19th July. In the light of the above, the Council is minded to initiate eviction proceedings without further notice."

20. On 14 January 2020 a writ was issued in standard terms by the High Court. This involved no further judicial decision, but was an administrative function following the permission to issue in 2017.

21. On 3 February 2020 the High Court enforcement officer attended the bungalow to enforce possession. An urgent application was made that day on behalf of the defendant to "make an order suspended/setting aside the writ of possession issues and if already executed to seek an order reinstating the defendant to the property". The evidence in support noted that no notice of the application for the writ was given nor was any notice that the writ was due to be executed that day. Reference was made to

CPR 83.13(8)(a) and that no notice of the eviction was given so there was no opportunity to make an application to seek to stay or suspend the writ. The application noted that the defendant was disabled. The court was asked to stay the writ pursuant to CPR 83.7 to enable the defendant to make a full application to stay/set aside the writ.

22. The defendant's application was heard by Cavanagh J that day with no attendance by the claimant. The application was dismissed.

23. The defendant and his family approached the local housing authority (which is not the claimant) for the first time on 3rd February 2020 for alternative accommodation as they were homeless.

24. The defendant and his family have since been housed by the local authority in a variety of properties; they have been housed in hotel rooms, studio flats and have had one night where the local authority was unable to house them.

Application for permission to issue a writ of possession.

25. Once a possession order is made in the High Court, if the defendant does not vacate the property a claimant may make an application to issue a writ of possession. The writ of possession enables the High Court Enforcement officers to enforce possession.

26. Permission to issue the writ must be requested and that is done by way of application to a Master under CPR 83.13 which provides (as relevant):

> (1) A judgment or order for the giving of possession of land may be enforced in the High Court by one or more of the following means—
>
> (a) writ of possession;
>
> …
>
> (2) Subject to paragraphs (3), (5) and (6), a writ of possession to enforce a judgment or order for the giving of possession of any land, or to enforce a notice under section 33D of the Immigration Act 2014, will not be issued without the permission of the court.
>
> ….
>
> (8) Permission referred to in paragraph (2) will not be granted unless it is shown—
>
> (a) that every person in actual possession of the whole or any part of the land ("the occupant") has received such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled; and
>
> …

27. There is a standard form of order for possession as set out above. The application for permission to issue is ordinarily made on a without notice basis (although a copy of the application notice is commonly sent to defendants prior to the application being made).

28. Once permission is granted, and unless otherwise ordered, the writ is issued administratively and may be executed immediately.

29. An application for stay of execution may be made to a Judge or Master at any time after a possession order is made.

Application on 3rd February 2020

30. The claimant submits that the application I am considering is an abuse of process as the application is in substantively the same terms as was made and dismissed by Cavanagh J on 3 February 2020.

31. The defendant's case is that it was not the same application. That application was to set aside the writ, they had not at that stage seen the application for permission to issue. That application was not to do with the application for permission and the current application is. The defendant did not see a copy of the application for permission to issue the writ until 20 February 2020.

32. I do not accept that the application was not about the permission to issue. It is clear that the application was based, as this is, on defects of notice under CPR 83.13(8). However the application was on its face an application for a stay to enable the defendant "to make a full application to stay/set aside the writ". It is not clear whether that "full application" was intended to be this one, or some application based on the claimant's public sector equality duty.

33. It is right that the defendant had not seen the application for permission to issue the writ at the date of that application and it is not clear if in fact only a limited stay was sought. Whilst I have some doubts, I am prepared to accept that this application is not an abuse of process and proceed to consider the application. Both parties made full argument before me and I will therefore go on to consider the application on its merits.

The application dated 10 February 2020

34. It is said that when the application for permission to issue was made in September 2017, the claimant did not inform the court (i) that it had not served a copy of the application on the defendant or the other occupants of the bungalow, his family, (ii) that the defendant had an appeal pending in the Court of Appeal and for which permission had been granted and (iii) they had told the defendant's solicitor that no enforcement action was being taken and had not updated them since. On that basis, it is argued that the permission to issue the writ and consequently the writ should be set aside and the defendant allowed re-entry.

35. The first two complaints are factually correct. I do not accept the third. By September 2017 the only correspondence from the claimant was that it would not enforce within the 28 day period given in the possession order. It was silent as to the period beyond that, and it is clear that the defendant's solicitor understood that there was no agreement not to enforce beyond then as she wrote to ask, after the 28 days expired, what the intention was. I therefore do not deal with that allegation further.

36. It is right that the Master should have been told that there was an extant appeal at the time of permission to issue. But it does not follow either that permission to issue would have been refused or that the permission should necessarily be set aside as a result of that failure.

37. If the appeal had been raised, the Master may have given permission to issue conditional upon the appeal having concluded.

38. I have been taken to *Ahmed v Mahmood* [2013] EWHC 3176 where a failure to inform the Master of an appeal led to the writ being set aside. In that case at the time of the decision to set aside the writ of possession, the appeal was still live. In this case there is no ongoing appeal; that leads in my view to different considerations. The mischief intended to be avoided is enforcement during an appeal which is later successful. That did not occur. I am therefore not persuaded that the permission or writ should be set aside on that ground.

39. Following the decisions in *Gupta v Partridge* [2017] EWHC 2110 (QB) and *Brooker & Wilson v Sandi St Paul* [2017] EWHC 3510, in my view it is clear that there is no requirement under CPR 83.13(8) that the application itself be served on the occupants of a property. There is no requirement for the application or the time it is to be heard to be sent to the defendant.

40. What is required is evidence that "every person in actual possession of the whole or any part of the land ("the occupant") has received such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled." I do not accept that "the proceedings" in this context is just the application for permission to issue the writ. The proceedings are the possession proceedings culminating in a possession order which is to be enforced.

41. In this case, in September 2017 the defendant (and, given that they were involved in the trial and no submission has been made otherwise, his family) was aware of the possession order and that it may be enforced.

42. Is that "such notice of the proceedings as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant may be entitled" in the context of this case?

43. I am of the view that without some warning or request that possession be given up, mere knowledge of the possession order was not sufficient notice of "the proceedings". Given the ongoing appeals I am of the view some notice of an intent to enforce was required; there was no requirement to give notice that there was an application to enforce in progress, just of an intent to enforce.

44. That is consistent with the analysis of Foskett J in *Gupta v Partridge*, that "where there is a sole occupant who is the subject matter of the possession order and she had full knowledge of the possession proceedings, a reminder of the effect of the court order and a request that possession is given up is generally speaking sufficient notice".

45. Therefore prior to the application for permission, adequate notice had not been given either to the defendant or to his family.

46. Should that default lead to the order giving permission and therefore the writ to be set aside? The claimant submits that any default should not so lead and the court should treat the enforcement as not being invalidated under CPR 3.10.

47. The claimant relies on the 1st July 2019 letter as giving sufficient notice under CPR 83.13. Had that letter been sent prior to the permission being sought in my judgment it would have been sufficient. It, and the rest of the July correspondence, clearly indicate that if possession is not given up by the end of July, there is an intent to enforce. That correspondence is to the defendant's solicitor rather than the defendant or the occupants but there has been no suggestion that the defendant or any of his family were not aware of the content of the correspondence and I am therefore of the view it would have been adequate notice to the defendant and all members of his family.

48. The defendant had ample time between the July 2019 correspondence and the writ being issued in January 2020 to make such an application for a stay of enforcement.

49. If the claimant had made the application for permission after the July 2019 letter, it could have been made without notice and would undoubtedly have been granted and executed. The parties would have ended up in the same place had the correct procedure been used.

50. The defendant argues that an application for a stay of enforcement could be made based on the claimant's public sector equality duty and therefore there could have been and indeed could now be a stay of enforcement if they were allowed to re-enter. Ms Fox's witness statement dated 10 February 2020 notes that the defendant is disabled under the Equality Act, his youngest child suffers severe anxiety and is undergoing counselling and in seeking to execute the possession order the claimant has not complied with its public sector equality duty. In her second witness statement dated 24 February 2020, she states that since the eviction the claimant's wife has been suffering severe anxiety and has been referred to MIND. It is not in dispute that the defendant has no private law right to stay in the bungalow and has in fact been staying there rent free for 4 ½ years.

51. I do not accept that there is an arguable case that any enforcement should be stayed based on the claimant's public sector equality duties, even taking into account the low threshold required. The local housing authority has a duty to house the defendant and his family adequately. The statement that the defendant's wife has suffered anxiety subsequent to the eviction and that the youngest child has severe anxiety do not in my view raise a credible argument, that even if the claimant has failed to consider relevant matters, it would have made a difference to an application for a stay.

52. The Defendant remains disabled as he was at the date of the possession order. Even if his wife and youngest child's illnesses to amount to a relevant disability, the claimant would inevitably have decided to enforce as they did. The claimant decided to pursue enforcement in a case where the private right to reside in the property ceased 4 ½ years earlier, a possession order was made around 2 ½ years earlier. 6 months was left between the notice of an intent to enforce and actual enforcement. The defendant and his family were able at any time since June 2015 to apply to the local housing authority to house them. Any application for a stay under the PSED would be bound to fail.

53. I have considered whether the failure of notice and the failure to disclose the fact of the appeal together mean that I should not exercise my discretion pursuant to CPR

3.10 to correct an error of procedure. I am of the view that on the fact of this case, they do not.

Other bases of the application

54. For the sake of completeness, the defendant also made his application to set aside the permission to issue on the basis that the application was made on the incorrect form and that the Senior Master's Practice Note of 21 March 2016 was not followed. That Practice Note refers to cases where a possession order was made in the County Court and transferred to the High Court and does not apply to this case and I therefore do not need to deal further with those arguments.

55. In addition it was argued that the application, having been made on an N244 had to comply with the rules in Part 23 and the Queen's Bench Guide paragraph 15.9 and the application and the order should have been served on the defendant as soon as was practicable following the application. The application was made on the N244 under CPR 83 (in accordance with Practice Form 91), not CPR 23 and the rules under CPR 83 apply. There is no requirement to serve the application and order prior to issuing the writ.

Conclusion

56. The application for permission to issue should have disclosed that permission to appeal to the Court of Appeal had been given. Adequate notice of the proceedings was not given prior to the application to issue. Nonetheless, prior to enforcement of the writ the appeals fell away and adequate notice of the intent to enforce was given.

57. In my judgment, neither the defendant nor his family has any basis for an application for a stay.

58. In the circumstances I do not set aside the permission to issue or the writ and I will order under CPR 3.10 that the writ of possession was validly issued despite the defaults.