



Neutral Citation Number: [2019] EWCA Civ 445

Case No: B5/2018/1591

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MANCHESTER COUNTY COURT
DDJ Thexton
D3PP7703

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LORD JUSTICE IRWIN

Between :

SALIX HOMES
- and -
Graciano MANTATO

Appellant

Respondent

Andrew Lane and Kirsty Varley (instructed by Croftons Solicitors LLP) for the Appellant
James Stark (instructed by Greater Manchester Law Centre) for the Respondent

Hearing date : 7 March 2019

Approved Judgment

Sir Terence Etherton MR, Lord Justice Lewison and Lord Justice Irwin :

1. The central issue on this appeal is whether, both in principle and on the particular facts of the present case, a landlord is precluded by cause of action estoppel from obtaining an order for possession of property by reason of the tenant's non-payment of rent when there is an existing undischarged order for payment of earlier arrears and for possession for non-payment of those arrears.
2. The appeal is from the order of Deputy District Judge Thexton of 8 June 2018 by which he ordered, among other things, that the order for possession of 20 James Henry Avenue, Salford, Manchester ("the Property") made by District Judge Khan on 9 June 2017 (in the absence of the respondent, Graciano Mantato) be set aside, the claim in the present proceedings by the appellant, Salix Homes, against Mr Mantato, be struck out and Mr Mantato be re-admitted to the Property.
3. The Deputy District Judge gave permission to appeal and indicated that the appeal should be referred to the Court of Appeal. The transfer to the Court of Appeal was accepted by Asplin LJ pursuant to CPR 52.23.

CPR provisions relevant to setting aside the order of 9 June 2017

4. CPR 3.1 describes the court's general powers of management. CPR 3.1(2)(m) provides that, except where the CPR provide otherwise, the court may "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective ..."
5. CPR 3.1(7) provides that a power of the court under the CPR to make an order includes a power to vary or revoke the order.
6. CPR 39.3 addresses the situation where a party fails to attend the trial. CPR 39.3(5) provides as follows:

"(5) Where an application is made [to set aside an order] ... by a party who failed to attend the trial, the court may grant the application only if the applicant—

(a) acted promptly when he found out that the court had exercised its power ... to enter judgment or make an order against him;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial."

Background

7. By a tenancy agreement signed on 18 October 2004 Salford City Council ("the Council") granted Mr Mantato a weekly tenancy of the Property at a weekly rent of £56.47. That was a secure tenancy within the Housing Act 1985 ("HA 1985").
8. On 22 April 2008 the Council obtained an order in the Salford County Court against Mr Mantato ("the original possession order") for £1431.66 arrears of rent and £120.00

in respect of costs, making a total judgment debt of £1551.66, and for postponed possession of the Property (on the ground of rent arrears). It was ordered that Mr Mantato give up possession of the Property to the Council, but the date for possession was postponed to a date to be fixed by the court on an application by the Council, with Mr Mantato's tenancy continuing in the meantime, and that (in accordance with HA 1985 s.85(3)) the Council "shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of [Mr Mantato's] tenancy so long as [Mr Mantato] pays [the Council] the current rent together with instalments of £3.05 per week towards the judgment debt".

9. Pursuant to that order of 22 April 2008 District Judge Relph made an order on 8 June 2009 that Mr Mantato give the Council possession of the Property on or before 8 June 2009. There followed successive warrants for possession between 13 July 2009 and 12 December 2013, each one suspended on terms that Mr Mantato pay the current rent plus a specified weekly sum towards the arrears.
10. In March 2015 the landlord's interest in the Property was transferred by the Council to Salix Homes. Upon that transfer Mr Mantato's tenancy ceased to be a secure tenancy within HA 1985 and became an assured tenancy within the Housing Act 1988 ("HA 1988").
11. Mr Mantato never succeeded in paying off the entirety of the judgment debt under the original possession order and keeping up with current payments of rent. At one point, on 25 November 2016, Mr Mantato had reduced the arrears to £82.04 but they then rose again. The original possession order was never discharged. A warrant of possession could not have been issued without the permission of the court, however, both because six years had elapsed since the original possession order and because there had been a change in the party entitled to enforce the original possession order: CPR 83.2(3)(a) and (b), schedule 2 CPR, CCR Ord. 26, rule. 5. Further, the latest warrant of possession in December 2013 had by then expired: CPR 83.3(3), 2 CPR, CCR Ord. 26, rule. 6.
12. Pursuant to HA 1988 s.8, Salix Homes served Mr Mantato with a notice dated 23 March 2017 of its intention to seek possession on Ground 10 (arrears of rent) and Ground 11 (persistent delay in payment of rent) in schedule 2 to HA 1988. The notice stated that the arrears then stood at £724.78. It also stated that the proceedings would not begin until after 24 April 2017.

The proceedings

13. On 4 May 2017 Salix Homes began proceedings for possession of the Property. The claim form stated that the claim would be heard on Friday 9 June 2017 at 10.00 am in the County Court at Manchester. The Particulars of Claim stated that the reason for the claim for possession was because Mr Mantato had not paid the rent due under the terms of the tenancy, which was £1104.58 in arrears, and possession was sought under Grounds 10 and 11. An attachment to the Particulars of Claim, headed "Payment History", showed the accumulated weekly arrears between 12 March 2017 and 23 April 2017. There was no reference to the previous possession proceedings by the Council or the original possession order.

14. No defence was filed on behalf of Mr Mantato. He did not appear in court on the return date, 9 June 2017, when the claim came before DJ Khan. DJ Khan made an order for possession of the Property on or before 7 July 2017, suspended on terms that Mr Mantato pay the current rent as and when due plus £25.05 per week towards the outstanding arrears of £1074.28. The order also contained a money judgment for the £1074.28 outstanding arrears, not to be enforced so long as the possession order remained suspended, and an order for £325.00 in respect of Salix Homes' costs, to be added to the judgment debt. On 16 August 2017 Salix Homes was granted permission for the issue of a new warrant of possession. Mr Mantato was evicted on 12 September 2017 pursuant to that warrant.
15. On the same day as he was evicted, but after the eviction had taken place, Mr Mantato paid all arrears of rent and costs.
16. On 31 January 2018 Mr Mantato issued an application to set aside the September 2017 warrant which had led to his eviction and to discharge or rescind the June 2017 possession order and for interim relief. That application was stated to be based on various grounds, including abuse of process or oppression in the execution of the warrant. The facts and matters relied upon in support of those grounds were set out in an attachment to the application notice. It is not necessary, for the purposes of this appeal, to set out those reasons.
17. On 19 March 2018 Mr Mantato issued a further application notice to set aside the June 2017 possession order on the ground that, in view of the undischarged original possession order, the claim for a further possession order was an abuse of process because it was barred by *res judicata*.

The judgment of DDJ Thexton

18. The two applications to set aside the June 2017 possession order and the warrant for possession came before DDJ Thexton on 9 May 2018. After hearing oral evidence, he requested counsel for both parties to make written submissions. He handed down his careful reserved judgment on 8 June 2018.
19. The Deputy District Judge held that there was no oppression in the execution of the September 2017 warrant but the current proceedings could not lawfully be brought because they were barred by the doctrine of *res judicata*. His reasoning on *res judicata* was that the first set of possession proceedings leading to the original possession order were based on arrears or rent, the original possession order remained extant and enforceable, arrears under the original possession order had not necessarily been cleared by the time of the current proceedings, the current proceedings were based on the same facts, namely arrears of rent under the same tenancy, and sought possession of the same Property.
20. The Deputy District Judge observed that, contrary to CPR PD 55A para. 2.3(4) (which requires the particulars of claim in a possession action for non-payment of rent to set out "any previous steps taken to recover the arrears of rent with full details of any court proceedings"), the Particulars of Claim in the present proceedings were silent as to the previous proceedings. He also observed that, as six years had elapsed since the original possession order, Salix Homes would have required the permission of the court to issue a warrant of possession.

21. Turning to the question of delay in making the application to set aside dated 19 March 2018, some nine months after the June 2017 possession order, the Deputy District Judge said that CPR 39.3 was not applicable (because the hearing on the return date was not a “trial”) and he should apply the court’s management powers under CPR 3.1.2(m).
22. He said that, had DJ Khan been aware of the original possession order, it was “highly likely that he would have sought more information and the resulting [June 2017] order could well have been different”.
23. He said that the defence of cause of action estoppel was an absolute bar to the proceedings, and that “a breach of the substantive law must trump a procedural argument”, and that it followed that the claim should be struck out and the warrant be set aside.
24. As mentioned above, the formal order of the Deputy District Judge was that the June 2017 possession order and the September 2017 warrant of possession be set aside and the claim be struck out, and that Mr Mantato be readmitted to the Property.

Grounds of appeal

25. The grounds of appeal are, in substance, that (1) *res judicata* and the original possession order did not bar the issue of the current proceedings; and (2) the Deputy District Judge wrongly held that CPR 39.3(5) was of no application or guide on the question of delay, and wrongly failed to apply the requirements in CPR 39.3(5) with sufficient rigour and to find that delay on the part of Mr Mantato in seeking to set aside the June 2017 possession order did not impact on the ability to set aside that order.
26. There is no appeal against the finding of the Deputy District Judge that there was no oppression in the execution of the warrant of possession.

Discussion

Cause of action estoppel, merger and abuse of process

27. The most recent authoritative exposition of *res judicata* and the relationship between cause of action estoppel and abuse of process was given by Lord Sumption in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2013] UKSC 46, [2014] AC 160. He said the following at [17]:

“Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is “cause of action estoppel”. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the

claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as “of a higher nature” and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). ...Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355. “Issue estoppel” was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”

28. He added at [25]:

“Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.”

29. In *Letang v Cooper* [1965] 1 QB 232 at 243-244 Diplock LJ defined a cause of action in the following terms:

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

30. At the heart of the decision of the Deputy District Judge on the issue of cause of action estoppel were his findings as follows:

“The second action the subject of this application was based on the same facts namely rent arrears and sought possession of the same property. The same tenancy agreement was still in place and was referred to specifically within the pleadings.

At the time the second action was brought there were still arrears of rent outstanding. The arrears had never in fact been cleared thus paragraph 7 of the original possession order was still effective.”

31. Mr James Stark, counsel for Mr Mantato, expanded upon the point in his oral submissions. He said that the cause of action in the present proceedings was the statutory ground for possession, namely Ground 10 (rent lawfully due from the tenant was in arrears at the date of the notice under HA 1988 s.8 and was unpaid at the date on which the proceedings for possession were begun). He observed that, although possession was also claimed under Ground 11 (persistent delay in payment of rent), the Particulars of Claim contained no details of that claim. He said that both the original possession order and the June 2017 order for possession were based on the same ground for possession, namely arrears of rent; and therefore, as it was in substance the same cause of action, the present proceedings are barred because the cause of action merged in the judgment in the first set of proceedings.
32. We consider, with all due respect to the Deputy District Judge and Mr Stark, that their analysis is plainly wrong. The facts entitling Salix Homes to possession were not the same as those which entitled the Council to the original possession order. In the first place, the original possession order was for arrears of rent of £1431.66 that had accrued due but were unpaid at that time. Although, under the terms of that order, the Council was not entitled to apply for a date for possession so long as Mr Mantato paid the current rent together with weekly instalments of £3.05 towards the judgment debt, there was no judgment for the current rent as it accrued due. Mr Stark accepted that, as far as a claim for a money judgment was concerned, the claim for the arrears of rent particularised in the current proceedings was a different cause of action from the claim for arrears of rent which led to the original possession order.
33. As Mr Andrew Lane, for Salix Homes, submitted, the condition of payment of current rent in the original possession order was no more than a condition for postponing the fixing of a date for possession and, in that regard, the condition was spent when Mr Mantato defaulted and a date for possession was fixed for 8 June 2009 by DJ Relph’s order of the same date. Salix Homes could not have relied upon the original possession order in order to obtain, for example, an attachment of earnings order or a third party debt order for recovery of rent arrears accruing after the date of the original possession order as those arrears were not part of the judgment debt specified in that order. The current proceedings were necessary for that purpose.
34. Secondly, it is not correct in principle, as Mr Stark contended, to detach the claim for possession from the claim for arrears of rent when considering whether the cause of action in the present proceedings was the same or different from that in the proceedings leading to the original possession order. Following Diplock LJ’s approach in *Letang v Cooper*, it was a necessary and sufficient factual ingredient of the right to an order for possession in the present proceedings that there were arrears of rent which had accrued and were unpaid since the date of the original possession

order. The fact that it may not have been necessary to bring the present proceedings in order obtain possession of the Property is not to the point. That may give rise to an argument about abuse of process but the absence of necessity to bring fresh proceedings for possession, in view of an earlier order, is neither a paraphrase nor a substitute for the test for cause of action estoppel.

35. Thirdly, in any event, quite apart from the fact of unpaid rent since the date of the original possession order, there are other necessary ingredients of the cause of action for possession in the earlier proceedings which were different, and necessarily different, from those founding the right to a possession order in the present action. When the landlord was the Council, the tenancy was a secure tenancy within HA 1985. In order for the Council to obtain possession the necessary matters which had to be established in order to obtain possession were that the “landlord condition” and the “tenant condition” in HA 1985 ss. 79(1), 80 and 81 were satisfied, one of the grounds for possession in schedule 2 to HA 1985 was satisfied, the relevant one being Ground 1, and it was reasonable to make the order. The cause of action for possession in the present proceedings did not arise under HA 1985 but under HA 1988 because, on the transfer of the reversion of the tenancy to Salix Homes, the tenancy ceased to be a secure tenancy and became an assured tenancy. In order to establish a right to possession it was necessary to show that the tenancy is an assured tenancy and that either one of the mandatory grounds or one of the discretionary grounds in schedule 2 to HA 1988 was satisfied, and, in the case of a discretionary ground, that (pursuant to HA 1988 s.7(4)) it was reasonable to make the order. Grounds 10 and 11, which are relied on in the present proceedings, are discretionary grounds. Accordingly, looking at the matter broadly, the cause of action for possession in the earlier proceedings was for possession for arrears of rent in respect of a secure tenancy pursuant to Part IV of HA 1985. The cause of action for possession in the present proceedings is both for arrears of rent and, separately and additionally, persistent delay in the payment of that rent, in respect of an assured tenancy, pursuant to schedule 2 to HA 1988.
36. For all those reasons the causes of action entitling the Council to the original possession order and Salix Homes to the June 2017 order were not the same or even, as Mr Stark submitted, substantially the same.
37. Mr Stark criticized Salix Homes for failing to disclose to DJ Khan the previous possession proceedings, the original possession order and the successive warrants for possession. He submitted that this was a breach of PD 55A 2.3(4) and that, had DJ Khan been aware of those matters, he might have made a different order or no order at all. Mr Stark made the related point that if, in circumstances such as the present, a landlord had the benefit of two different orders for possession, with different conditions for paying current rent and arrears, there could be unfairness to the tenant as the tenant would not know which conditions to comply with and the landlord could choose whichever set of conditions and order were most favourable. We can see that those matters might, depending on the facts, give rise to argument about abuse of process but that concept is, as Lord Sumption emphasised in the *Virgin Atlantic Airways* case, much broader than the principle of cause of action estoppel. The Deputy District Judge did not set aside the June 2017 possession order on the basis of anything other than cause of action estoppel and the merger of the cause of action in the original possession order. Nor is there any respondent’s notice seeking to uphold

the order of the Deputy District Judge on the alternative or additional ground of abuse of process short of cause of action estoppel.

Delay and other matters in CPR 39.3(5)

38. The Deputy District Judge considered that the proper approach to Mr Mantato's application to set aside the June 2017 possession order was to apply the court's general powers of management under CPR 3.1(2)(m) and (7) to make any order for the purpose of managing the case and furthering the overriding objective, including a power to vary or revoke an order, and to apply CPR 39.3(5) by way of a loose analogy rather than strictly. He took that approach to the application of CPR 39.3(5) because he considered that the situation in the present case was governed by the approach of the court in *Forcelux Ltd v Binnie* [2009] EWCA Civ 854, [2010] HLR 20, rather than *Hackney LBC v Findlay* [2011] EWCA Civ 8, [2011] HLR 15.
39. The *Forcelux* case concerned an application to set aside an order for possession forfeiting a long lease at a ground rent on the ground of non-payment of rent and service charge. The Court of Appeal held that the hearing under CPR Part 55, at which the order had been made, was not a "trial" for the purposes of CPR Part 39.3; but it also held that the court had an analogous power to set aside the order under CPR Part 3.1(2)(m). The Court of Appeal held that, although Mr Binnie had not acted promptly, there was nevertheless a compelling case for setting aside the order. He had a strong claim for relief against forfeiture, and the denial of that claim would result in a large windfall for the landlord.
40. The *Findlay* case concerned an application to set aside an order for possession against a secure tenant which had been based on non-payment of rent. By the time that the tenant applied to have the order set aside it had also been executed. Arden LJ (with whom Wilson and Toulson LJJ agreed) said (at [24]):
- "... a court that is asked to set aside a possession order under CPR r.3.1 should in general apply the requirements of CPR r.39.3(5) by analogy. This is in addition to, and not in derogation of, applying CPR r.3.9 by analogy, as this court did in *Forcelux*, as that provision requires the court to have regard to all the circumstances in any event. However, in my judgement, for the reasons given above, in the absence of the unusual and compelling circumstances of a case such as *Forcelux*, this court should give precedence to the provisions of CPR r.39.3(5) above those enumerated in CPR r.3.9. Even that is subject to a qualification in the case of a secure tenant. Parliament clearly contemplated in s.85(2) of the Housing Act 1985 that the tenant should have the chance there described of persuading a court to modify an outright possession order. It follows that the requirements of CPR r.39.3(5) need not be applied in such a case with the same rigour as in the case of a final order that does not have this characteristic."
41. The Deputy District Judge considered that there were unusual and compelling circumstances in the present case because the doctrine of *res judicata* applied, the original possession order "operated by virtue of the merger of the cause of action in

the judgment to prevent the issue of new proceedings” and so “the current proceedings should never have been brought”.

42. Although we have concluded that the present proceedings are not barred by cause of action estoppel, Mr Stark contends that there are other features which bring them within the category of “unusual and compelling circumstances” mentioned by Arden LJ in the *Findlay* case. He appeared initially to contend that, to give rise to an unusual and compelling circumstances, it was sufficient that the cause of action estoppel defence was arguable. He then appeared to contend that it was an unusual and compelling circumstance that there cannot be a default judgment for possession but the actual hearing was probably no more than some 10 minutes. He also contended that it was an unusual and compelling circumstance that DJ Khan was not informed of the earlier proceedings and the original possession order and the successive warrants of possession, which might have led him to make a different form of order or at least require more information about the circumstances.
43. We do not consider that any of those matters takes the application to set aside the original possession order outside the usual approach specified by Arden LJ in the *Findlay* case. Contrary to the view of the Deputy District Judge, cause of action estoppel does not bar the present proceedings and so is completely irrelevant to the exercise of any power of the court to allow an application to set aside the original possession order. The second matter relied upon, namely the inability to obtain a default judgment for possession and the brevity of a hearing for an order for possession when the tenant has not filed a defence and is not present at the hearing, is not unusual but standard in the case of actions for possession of an assured tenancy for non-payment of rent. The third matter relied upon, namely the failure of Salix Homes to disclose the previous history to DJ Khan, may be relevant to the prospects of success on any re-hearing of the claim for possession in the present proceedings, in the sense of Mr Mantato obtaining an order which will be more likely to enable him to continue in possession than the June 2017 order. It is not, however, an unusual and compelling circumstance in any way comparable to that in the *Forcelux* case, in which the tenant stood to lose a highly valuable long lease on the ground of a very small amount of unpaid rent and service charges. The same is true of Mr Stark’s criticism of Salix Homes that the Particulars of Claim in the present proceedings did not have a schedule for the rental history for the preceding two years, contrary to PD 55B 6.3, and that there was no evidence that such a schedule had been provided to Mr Mantato prior to the commencement of the proceedings in accordance with PD 55B 6.3A.
44. It follows that, in deciding whether to allow Mr Mantato’s application to set aside the June 2017 possession order, the Deputy District Judge ought to have paid close attention, by way of analogy, to the three conditions in CPR 39.3(5). He did not do so. The only relevant observation he made in that regard concerned the condition in CPR 39.3(5)(a) that the applicant acted promptly when he found out that the court entered judgment or made an order against him. He observed that the application to set aside the June 2017 possession order was made on 19 March 2018, some nine months later, and he found as a fact that, at the very latest, by the end of August 2017 Mr Mantato should have been aware of the precarious situation in which he found himself. The Deputy District Judge did not express a conclusion about whether or not CPR 39.3(5)(a) was satisfied because, having reached the conclusion that the June 2017

possession order was barred by cause of action estoppel and the cause of action had merged in the original possession order, he said that he did not accept that CPR 39.3 was applicable at all.

45. The Deputy District Judge expressed no view at all about whether, for the purposes of CPR 39.3(5)(b), Mr Mantato, whom the Deputy District Judge described as “not a reliable witness”, had a good reason for not attending the hearing of the possession claim on the return date.
46. Mr Mantato faces the insuperable problem in this court that it was never argued before the Deputy District Judge that, even if Mr Mantato failed on the allegation of oppression in the execution of the warrant and on the cause of action estoppel point, and even if CPR 39.3(5) applied by way of close analogy, he nevertheless satisfied all the conditions in that sub-rule. Although Mr Mantato’s set-aside application of 19 March 2018 said that he was unaware of the proceedings until he received notice of the eviction, and that he was mentally unwell at the time and had been neglecting his affairs, his witness statement that was placed before Deputy District Judge on the hearing of the application gave no reason at all as to why Mr Mantato did not attend the hearing before DJ Khan. It is not surprising, in the circumstances, that no respondent’s notice has been filed seeking to uphold the order of the Deputy District Judge on other grounds.

Conclusion

47. For the reasons above, we allow this appeal and restore the June 2017 possession order.