Neutral Citation Number: : [2019] EWCA Civ 446

Case No: B2/2018/0746

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour Judge Luba QC
C01BR087

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2019

Before :

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

- -

Between :

DEAN GOLDING	**Appellant**
- and -	
DEBORAH ALLEN MARTIN	**Respondent**

- -
- -

MR SIMON SINNATT AND MR MICHAEL WALKER (instructed by **Wannops LLP**) for the **Appellant**
MR PHILIP RAINEY QC AND MR FAISEL SADIQ (instructed by **SA Law LLP**) for the **Respondent**

Hearing date : 6th March 2019

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Approved Judgment

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

Introduction and background

1. The background to this appeal is a cautionary tale about the danger to a lessee in leaving a flat unoccupied and moving abroad without giving the landlord a forwarding address for correspondence.

2. The issue for which Asplin LJ gave permission to bring this second appeal was what counts as "success at the trial" in a claim to relief against forfeiture for non-payment of rent. DDJ Mohabir held that the grant of relief against forfeiture did not count as "success". But HHJ Luba QC disagreed with him.

3. Ms Martin was the lessee of a flat in Sidcup. She held under a long lease, which had been extended under the Leasehold Reform, Housing and Urban Development Act 1993, in return for a substantial premium. That lease incorporated the terms of a previous lease. Those terms included an obligation to pay a service charge, which was reserved as rent. Under the terms of the lease, it was liable to forfeiture if the rent remained unpaid for 21 days.

4. In 2003 Ms Martin moved to Majorca, leaving the flat unoccupied. She left no forwarding address. Mr Golding acquired the reversion in 2012. He carried out extensive refurbishment work to the block containing Ms Martin's flat. There was a dispute about how much of that work fell within the scope of the service charge. Ms Martin left her brother Paul to deal with the dispute, with the aid of a surveyor called Nigel Watson. Ms Martin's brother also instructed solicitors to help. The firm in question was Parker Arrenberg, who also acted for her on the grant of the extension lease. Mr Harrington, who is employed by Mr Golding's solicitors, asked Parker Arrenberg at least twice (in July and August 2015) for a correspondence address for Ms Martin. But the requests appear to have gone unanswered.

5. In November 2015 Mr Golding's solicitors sent a demand for service charge to Ms Martin at the flat. A copy was also sent to Mr Watson. Following that, an application was made to the FTT for determination of the amount that Ms Martin was required to pay by way of service charge. On 23 February 2016 the FTT decided that her liability was £11,794.66. At some point it appears that a money judgment for that sum was given by the county court at Bromley. We have not seen a copy of that order.

The possession order and its aftermath

6. On 15 June 2016 Mr Golding began proceedings in the county court seeking forfeiture of the lease. DDJ Thomas made an order for possession on 15 July 2016. We will return to the form of order shortly. On 23 August 2016 Mr Golding took possession of the empty flat. On 17 October 2016 he granted a new lease of it to his daughter, by way of gift. She has subsequently sold it to a third party purchaser. In early December Ms Martin learned of the existence of the order; and on 23 January 2017 she applied to have it set aside under CPR Part 39.3 (5). On 23 February 2017 the period of six months from the date of Mr Golding's resumption of possession expired.

The legislative and procedural framework

7. In the county court, forfeiture of a lease for non-payment of rent is governed by section 138 of the County Courts Act 1984. That provides, so far as material:

> "(1) This section has effect where a lessor is proceeding by action in the county court (being an action in which the county court has jurisdiction) to enforce against a lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent.
>
> (2) If the lessee pays into court or to the lessor not less than 5 clear days before the return day all the rent in arrear and the costs of the action, the action shall cease, and the lessee shall hold the land according to the lease without any new lease.
>
> (3) If—
>
> (a) the action does not cease under subsection (2); and
>
> (b) the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture,
>
> the court shall order possession of the land to be given to the lessor at the expiration of such period, not being less than 4 weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court or to the lessor all the rent in arrear and the costs of the action.
>
> (4) The court may extend the period specified under subsection (3) at any time before possession of the land is recovered in pursuance of the order under that subsection.
>
> (5) If—
>
> (a) within the period specified in the order; or
>
> (b) within that period as extended under subsection (4),
>
> the lessee pays into court or to the lessor—
>
> (i) all the rent in arrear; and
>
> (ii) the costs of the action,
>
> he shall hold the land according to the lease without any new lease.
>
> (6) ….
>
> (7) If the lessee does not—

> (a) within the period specified in the order; or
>
> (b) within that period as extended under subsection (4),
>
> pay into court or to the lessor—
>
> (i) all the rent in arrear; and
>
> (ii) the costs of the action,
>
> the order shall be enforceable in the prescribed manner and so long as the order remains unreversed the lessee shall, subject to subsections (8) and (9A), be barred from all relief.
>
> (8) The extension under subsection (4) of a period fixed by a court shall not be treated as relief from which the lessee is barred by subsection (7) if he fails to pay into court or to the lessor all the rent in arrear and the costs of the action within that period.
>
> (9) Where the court extends a period under subsection (4) at a time when—
>
> (a) that period has expired; and
>
> (b) a warrant has been issued for the possession of the land, the court shall suspend the warrant for the extended period; and, if, before the expiration of the extended period, the lessee pays into court or to the lessor all the rent in arrear and all the costs of the action, the court shall cancel the warrant.
>
> (9A) Where the lessor recovers possession of the land at any time after the making of the order under subsection (3) (whether as a result of the enforcement of the order or otherwise) the lessee may, at any time within six months from the date on which the lessor recovers possession, apply to the court for relief; and on any such application the court may, if it thinks fit, grant to the lessee such relief, subject to such terms and conditions, as it thinks fit.
>
> (9B) Where the lessee is granted relief on an application under subsection (9A) he shall hold the land according to the lease without any new lease."

8. Procedurally, a claim by a landlord for possession is governed by Part 55 of the CPR. Once the claim has been started, the court will fix a date for hearing it: CPR Part 55.5(1). Witness statements in support of the claim must be filed at least 2 days before the hearing: CPR Part 55.8 (5). At the hearing the court may either (a) decide the claim or (b) give case management directions: CPR Part 55.8(1). Where the tenant does not appear at the hearing, and has not filed a defence, the court will normally decide the claim.

9. CPR Part 39.3 (5) provides:

> "(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."

10. The court also has the general powers of case management conferred by CPR Part 3. These include a power to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective:" CPR Part 3.1 (2) (m). In addition, a power to make an order includes a power to revoke or vary the order: CPR Part 3.1 (7).

The proceedings below

11. The application to set aside the order came before DDJ Mohabir on 27 June 2017. He noted that it was implicit in the application that the judgment was a regular judgment; and therefore inferred that it had been properly served, even though Ms Martin lived in Spain. He decided:

    i) Ms Martin had acted promptly in seeking to set the order aside once she learned of its existence;

    ii) She had a good reason for not attending the hearing; but

    iii) She did not have a good prospect of success at trial. She had no defence to the claim for possession. Although she could have applied for relief against forfeiture, that was not a defence to the claim for possession.

12. Ms Martin appealed. HHJ Luba QC heard the appeal. He upheld the district judge's decision on promptness. He then considered the question of "success at the trial." He held that if the tenant has a reasonable prospect of obtaining relief against forfeiture at a hearing following the setting aside of the possession order, that counts as "success at the trial". With the permission of Asplin LJ, Mr Golding brings this second appeal.

Grounds of appeal and Respondent's Notice

13. The ground of appeal, as set out in the Appellant's Notice, is that the grant of relief against forfeiture is not "success at the trial".

14. By way of Respondent's Notice, Mr Rainey QC, on Ms Martin's behalf, sought to argue:

    i) That the possession order was defective with the consequence that Ms Martin was entitled to have it set aside as of right.

ii) That this was not a case in which CPR Part 39.3 (5) ought to have been applied.

iii) That Mr Golding had waived his right to forfeit.

iv) That the proceedings for possession had not been properly served.

Discussion

15. In a case which is governed by section 138, the form of order that the court must make is that prescribed by section 138 (3) ("the court *shall* order"). The required form of order is an order for possession of the land to be given to the lessor at the expiration of such period, not being less than 4 weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court or to the lessor all the rent in arrear and the costs of the action. There are, therefore, two constraints on the court's powers under section 138 (3):

    i) It may not make an order for possession to take effect in less than four weeks from the date of the order; and

    ii) It may not make an unconditional order for possession.

16. In the present case DDJ Thomas' order stated:

    > "The lease [held] in respect of Flat 7 … under Land Registry Title Number [the number is given] be forfeited and that possession of the flat be granted to the Claimant."

17. There are two defects in that order. First, it does not specify any period which is to expire before possession of the flat is given. Second, it does not provide for any possibility of payment of the arrears and costs before the expiry of that period.

18. As mentioned, Mr Rainey wished to argue that the order was a nullity because it failed to comply with the requirements of section 138 (3). It was not an order that the court had power to make. This was not a point that was taken below. For that reason, Mr Sinnatt, for Mr Golding, objected to the point being taken for the first time on a second appeal. There is obvious force in that contention. But there are two reasons why we would reject that objection. The first is that the point is a pure point of law. In *Pittalis v Grant* [1989] QB 605 Nourse LJ said:

    > "Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

19. The second, and more important reason, is that if the point is a good one it goes to the jurisdiction of the court. The principle that (subject to the discretion of the court) a new point should not be raised for the first time on appeal has always been subject to limited exceptions. In *Pittalis v Grant* itself Nourse LJ, in discussing the former rule that a point of law could not be taken on appeal from the county court unless it had been taken below, said:

> "…we find it convenient to deal next with the exceptions to the rule which have so far been established and then to consider whether they support a further exception in this case.
>
> The first exception is where the county court has acted without jurisdiction, for example by making an order for possession of premises which are protected by the Rent Acts (see e.g. *Davies v Warwick* [1943] KB 329, 336, per Goddard LJ and *Francis Jackson Developments Ltd v Stemp* [1943] 2 All ER 601, 602-603) or by making an order on a false hypothesis of fact: see *Whall v Bulman* [1953] 2 QB 198, as explained by Diplock LJ in *Oscroft v Benabo* [1967] 1 WLR 1087, 1099F-G. The second is where the county court has enforced an illegal contract: see *Snell v Unity Finance Co Ltd* [1964] 2 QB 203. The third is where the plaintiff's proceedings are liable to be struck out as disclosing no cause of action: see *Jones v Department of Employment* [1989] QB 1."

20. In our judgment, the point that Mr Rainey wishes to take comes within the first of those exceptions. The discrepancy between the order as made and the order required by section 138 (3) is no mere technicality. Where the forfeiture of a long (and potentially valuable) lease is in issue it is plainly of the utmost importance that the lessee be given the right to pay. If payment is made within the stipulated time, then relief against forfeiture follows automatically: section 138 (5) ("the lessee *shall* hold the land according to the lease").

21. *Spurgeons Homes v Gentles* [1971] 1 WLR 1514 concerned the statutory predecessor of section 138 (which was first introduced by section 52 of the County Courts Amendment Act 1856). The order in that case simply ordered possession to be given on a specified date, without allowing for the payment of the arrears of rent in the meantime. Buckley LJ said:

> "In those circumstances, the order having been made in a form which was inappropriate to the terms of the section, it was, in my judgment, an order which the court had no power to make under section 191 of the Act of 1959, and while the order stood in that form it was an order which I think the defendant, if he had known his legal rights (of which I have no doubt he was ignorant in fact) would have been perfectly entitled to disregard as being an order of the kind which the court had no power to grant."

22. Mr Rainey accepted that it was debatable whether the order was a nullity, because in general court orders must be obeyed unless and until set aside. But otherwise, he said,

the proposition that the court had no power to make the order that it did was sound. *Spurgeons Homes* was not cited in *Croydon (Unique) Ltd v Wright* [2001] Ch 318, where this court reached a similar conclusion. The defect in the order in that case was that it did not give the lessee four weeks in which to pay off the arrears. Sir Christopher Staughton said:

> "There is, however, another route by which the creditors can in my opinion have the order for possession set aside. The order was, as I have said, defective. Instead of allowing four weeks for the outstanding rent to be paid, it allowed no time at all. It is true that this may well have been a slip; it is also true that in all probability nothing would have happened differently if the order had said 30 November instead of 30 October. But those who live by the sword shall die by the sword, and the same applies to those who live by the Rules. The court had no jurisdiction to make such an order, and the creditors are entitled to have it set aside."

23. Mr Sinnatt argued that the hearing date fixed under CPR Part 55.5(1) is not a "trial"; and that therefore the statutory requirements of section 138 (3) do not apply. It followed that DDJ Thomas' order was one that he had power to make. He drew attention to the contrast in language between section 138 (2) which refers to the "return day" and section 138 (3) which refers to a "trial". He argued that there was a gap in the statutory code (which may have been a mistake on the part of the drafter) which meant that any summary disposal of a claim for possession fell outside the statutory code.

24. Mr Sinnatt accepted that the logic of his argument that section 138 (3) did not apply meant that no relief against forfeiture could be granted under that section; either before or after the lessor had recovered possession. He also accepted that, since the county court is a court of limited jurisdiction, it had no inherent power to grant relief. That leads to the consequence that if (as is usual) forfeiture claims proceed by way of CPR Part 55 the county court has no power to grant relief at all. A further capricious effect of Mr Sinnatt's argument is that if service charges *are* reserved as rent, no relief is available to a lessee; whereas, if they are *not* reserved as rent, the county court would be able to exercise the statutory jurisdiction to grant relief against forfeiture under section 146 of the Law of Property Act 1925. Mr Sinnatt recognised that this was an unattractive outcome. He suggested that a lessee might be entitled to relief following the resumption of possession under section 139 (9A). But section 138 (9A) only applies after an order has been made under section 138 (3). The real choice, then, is to interpret a "trial" in section 138 as encompassing a hearing under CPR Part 55, or to disregard part of section 138 (9A).

25. In approaching the interpretation of section 138 it is important not to lose sight of the fact that the section is designed to give relief against forfeiture to tenants. For that reason, the court should eschew a literal interpretation of words unless driven to do so: *Maryland Estates Ltd v Joseph* [1999] 1 WLR 83. We regard Mr Sinnatt's argument as an over-literal approach to the interpretation of section 138 (3).

26. At the time when the Act was drafted, it was not possible to obtain summary judgment in the county court for possession of land. There had to be a hearing before

a judge, at which evidence was called. Even if such a claim was undefended, the process by which the court came to make its order was, in our judgment, properly described as a "trial". In *Forcelux Ltd v Binnie* [2009] EWCA Civ 854, [2010] HLR 20 Warren J (with whom Ward and Jacob LJJ agreed) said that the meaning of the word "trial" in section 138 was not necessarily the same as its meaning under the CPR. We agree. A "trial" for the purposes of section 138 includes any proceeding by which a claim for possession on the ground of non-payment of rent is disposed of.

27. In our judgment, Mr Sinnatt's argument is entirely dependent on developments in procedure since the original enactment of section 138. If (as is now common) forfeiture claims proceed under Part 55, it is in our judgment inconceivable to imagine that Parliament could have intended that an important safeguard for tenants should be completely by-passed in the event of a summary disposal of a claim to forfeit on the ground of non-payment of rent. To attribute such an intention to Parliament would be to attribute to it an intention to legislate for an irrational scheme.

28. In our judgment, it follows that Mr Rainey's point is a good one. DDJ Thomas made an order which he had no power to make; and the court should set it aside.

29. We do not need to decide whether the order made by DDJ Thomas is a nullity; or whether it is simply one that must be set aside. It makes no difference to the outcome of the appeal.

30. As regards other new points that Mr Rainey sought to raise in the Respondent's Notice, they are not pure points of law; and, as Mr Rainey accepted, they can all be raised if the matter is returned to the county court following the setting aside of the order. In addition, we consider that the court should discourage new points being raised for the first time on a *second* appeal.

31. Strictly speaking, our conclusion thus far makes it unnecessary to deal with the point on which permission to appeal was granted, namely: what counts as "success at the trial" in a claim in the county court for forfeiture for non-payment of rent? However, since it is a point of importance; and it was the point for which permission to bring a second appeal was given, we will deal with it.

32. The argument for the landlord is that in a typical forfeiture action the landlord obtains an order for possession. The tenant may or may not counterclaim for relief against forfeiture, but that does not alter the fact that the landlord has obtained the relief that they seek. The existence of a possible right to relief against forfeiture is not a defence to the landlord's claim.

33. There was authority under the Rules of the Supreme Court, which used to govern procedural matters in the High Court. Under those rules a plaintiff could apply for summary judgment under Order 14 if there was no defence to the action. In *Liverpool Properties Ltd v Oldbridge Investments Ltd* [1985] 2 EGLR 111 a landlord claimed to be entitled to forfeit a lease on the ground of breach of repairing covenant. It was accepted that there were breaches of covenant; and that, subject to a claim for relief against forfeiture, the landlord's claim was good. The question was whether the tenant should be given leave to defend under Order 14. Parker LJ (with whom Croom-Johnson LJ agreed) said:

> "Although the right to relief against forfeiture is now statutory, it is in origin an equitable defence. It was a means by which equity stepped in to prevent the enforcement of a legal right. It is inextricably mixed with the claim for forfeiture, and it is, in my judgment, a true equitable defence to the legal claim for forfeiture. In those circumstances, it is something which should be viewed quite without regard to the words of Order 14, rule 3 upon which the judge relied. It is a counterclaim which ought to result in unconditional leave to defend being given."

34. In *Sambrin Investments Ltd v Taborn* [1990] 1 EGLR 61 Peter Gibson J followed that decision. He said of it:

> "The ratio of that decision therefore is that the claim for relief from forfeiture was an equitable counterclaim inextricably involved in the claim, and the learned judge posed as the test that the counterclaim for relief should be a genuine claim which might succeed."

35. In fact, Parker LJ had said that the right to relief was an equitable *defence* rather than a counterclaim. But whatever the technicalities, it is the case that a claim for relief is inextricably involved in the claim; particularly where the claim is governed by section 138.

36. That approach can be seen to have been carried forward into the CPR era. In *Forcelux Ltd v Binnie* the landlord forfeited Mr Binnie's long lease for non-payment of rent and service charges. It obtained an order for possession at a hearing on 11 September 2007. On 25 February 2008 Mr Binnie applied to set it aside. The district judge, applying CPR Part 39.3(5), granted that application and set the possession order aside. This court held that the disposal of a claim under Part 55 was not a "trial" for the purposes of CPR Part 39.3(5); but that the court had alternative powers under CPR 3.1(2)(m) and 3.1(7) to set aside an order for possession made at a hearing that was not a "trial" for those purposes. In the course of his judgment in this court Warren J (with whom Ward and Jacob LJJ agreed) said at [57]:

> "Nonetheless, what he [i.e. the district judge] had to say about the merits of the case are entitled to the greatest respect. He said that Mr Binnie had a real prospect of successfully *defending the claim* were the possession order to be set aside. *I agree.* The claim for relief from forfeiture was, I consider, compelling given the comparatively small amount of money outstanding (which Mr Binnie was able and willing to pay) and the consequence of forfeiture for Mr Binnie, namely the loss of the Lease, a valuable lease at a ground rent with 94 years then left to run." (Emphasis added)

37. It is plain from that extract that the grant of relief against forfeiture was treated, for the purposes of the CPR, as a defence to the claim; and hence as success at trial. Accordingly, we would hold that the position adopted under the RSC should apply equally to the CPR. In addition, as a consequence of *Forcelux*, the present application to set aside the order is not, strictly speaking, within the ambit of CPR Part 39.3 (5).

It comes within the ambit of CPR Part 3.1(2) (m) and 3.1(7). Thus, Part 39.3 (5) is only to be applied by analogy. The analogy may require some adaptation to meet the facts of a particular case. We do not consider that the expression "success at the trial" should be interpreted with excessive technicality. To do that would not, in our judgment, serve the overriding objective; particularly where CPR Part 39.3 (5) is only being applied by analogy: *Hackney LBC v Findlay* [2011] EWCA Civ 8, [2011] HLR 15.

38. Where, as in *Forcelux* and the present case, the lessee faces the loss of a valuable capital asset the court is entitled to take a broader view of what counts as "success" than it does in a case involving the potential loss of a rack rented tenancy. That was a distinction drawn in *Forcelux* at [67]; and in our view was the reason why this court distinguished *Forcelux* in *Hackney LBC v Findlay*.

39. Mr Sinnat argued that, accepting that a successful claim to relief against forfeiture could count as "success at trial," that was because the grant of relief against forfeiture was a discretionary decision to be made by the court. Here, by contrast, if the order made by DDJ Thomas is set aside, there is only one order that the court can make; namely an order in the form required by section 138 (3). There is no discretion for the court to exercise. That is so; but in our judgment it does not detract from the point that the restoration of a long lease is, from the lessee's point of view, a "success". If the order is set aside, and a new trial or hearing takes place, Ms Martin will obtain an order which is far more favourable to her than the order that is currently in place. In our judgment, that will be a "success". As well as giving her the right to relief against forfeiture, it will also be more favourable both in terms of the period allowed for paying the arrears; and the terms of payment.

40. In his judgment HHJ Luba QC said at [73]:

> "… the question is whether the tenant can obtain such succour from the court as will avoid [the] order for possession causing the loss of the tenancy."

41. If the answer to that question was "yes", then the tenant would achieve "success". We agree.

Result

42. We consider, therefore, that Ms Martin is entitled as of right to have the order set aside; and that she has real prospects of success at trial. For the reasons we have given, we dismiss the appeal.