Neutral Citation Number: [2024] EWCA Civ 1005

Case No: CA-2024-001307-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
His Honour Judge Klein (sitting as a High Court Judge)
Judgment given on 16 May 2024
Claim No. CR-2023-LDS-001028

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 5 September 2024

Before :

LORD JUSTICE SNOWDEN

- -

Between :

SIMON CARVILL-BIGGS **MILES ANDREW NEEDHAM** **(As Joint Administrators of Rose Cottage Farm Limited)**	**Applicants/ Respondents**
- and - **ASHLEY VALENTINE READING**	**Respondent/ Appellant**

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Eleanor Temple KC and Jonathan Fletcher-Wright (instructed by **Ashtons Legal LLP**) for the **Applicants**
Faisal Saifee (instructed by **William Sturges LLP**) for the **Respondent**

Hearing date : 28 August 2024

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Approved Judgment

This judgment was handed down remotely at 10am on Thursday 5 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Snowden :

Background

1. The Appellant, together with his wife and other family members are in occupation of a property known as Furzefield, Holwood Park Avenue, Orpington BR6 8NQ (the "Property"). The Property is a large six-bedroomed house set in about one acre in a gated estate. The freehold title to the Property is held by Rose Cottage Farm Limited (the "Company") which was a special purpose vehicle set up by the Appellant to acquire the Property in 2022 and of which he was the sole director. The purchase price was about £2.5 million.

2. TFG Capital No.2 Limited ("TFG2") lent a total of £2.85 million to the Company in August 2022 secured by a legal charge by way of mortgage over the Property (the "Mortgage") and a floating charge over any other assets and undertaking of the Company. At the time the Property was valued for the purposes of TFG2's security at between £3.5 million and £4 million. It was noted in the valuation report that it had recently been let on an assured shorthold tenancy for £9,250 pcm.

3. TFG2's loan documents contained a covenant by the Company not to permit occupation of the Property as a dwelling by any person related to the Company. However, the Appellant and various members of his family and other dependents took up residence at the Property in early 2023. They have not contended that they have any formal lease or other agreement with the Company entitling them to remain there.

4. The Company defaulted on the loans from TFG2 in about April 2023. On 3 August 2023 TFG2 appointed LPA receivers over the Property pursuant to Mortgage (the "LPA Receivers").

5. On 16 August 2023, TFG2 issued proceedings in the Bromley County Court under CPR 55 as mortgagee seeking an order for possession of the Property (the "Bromley proceedings"). The Company and the Appellant were joined as defendants. TFG2's claim form sought possession in order that it could invoke the power of sale in the Mortgage and sell the Property free from occupation by the Appellant and the other persons connected with him.

6. Although the details are not included in the papers before me, the Appellant indicated an intention to contest the Bromley proceedings on various grounds that included challenges to TFG2's security. Ms. Temple KC told me that, faced with the prospect of delays in the resolution of the Bromley proceedings in the County Court, TFG2 decided to adopt another course. To that end, on 20 November 2023 TFG2 appointed the Respondents (the "Administrators") as joint administrators of the Company pursuant to its floating charge.

7. The purposes of the administration are not clear from the documents before me. However, in evidence, Mr. Carvill-Biggs, who is one of the Administrators, has asserted that,

> "… the Property is the sole asset that vests in the Company, and I am duty bound to realise the asset for the benefit of the Company's creditors generally."

I confess that I have some difficulty understanding that evidence given that the Property is subject to the legal Mortgage and LPA Receivers had been appointed prior to the appointment of the Administrators. The administrators of a company are not entitled, still less duty bound, to realise property of a company which is subject to a fixed charge unless and until they obtain an order from the court under paragraph 71 of Schedule B1 to the Insolvency Act 1986 (the "IA 1986") authorising them to dispose of the property as if it were not subject to the fixed charge.

8. Returning to the Bromley proceedings, the automatic stay of proceedings against the Company under paragraph 43 of Schedule B1 to the IA 1986 which followed the appointment of the Administrators had no effect upon the continuation of the Bromley proceedings against the Appellant as an individual defendant. It was also open in any event to the Administrators to consent under paragraph 43(6) of Schedule B1 to the continuation of the Bromley proceedings against the Company. Had they done so, then the County Court in Bromley would have been able (if necessary after joining any other occupiers) to consider whether to make an order for possession of the Property under CPR 55. However, that did not occur.

9. Instead, on 20 March 2024 the Administrators issued an application against the Appellant under the IA 1986 in the Insolvency and Companies List of the Business and Property Courts in Leeds (the "IA Application"). Amongst other things, that application sought possession of the Property. Leeds appears to have been chosen as a venue because TFG2 is based in Doncaster and its then solicitors were based in Leeds. The other adult occupiers of the Property were subsequently joined to the IA Application and served with it.

10. By his Order made in the IA Application on 16 May 2024, HHJ Klein ("the Judge") required the Appellant and the other occupiers to deliver up possession of the Property to the Administrators. He did so on the basis that the Administrators' application was (by then) being pursued under section 234(2) of the IA 1986 which provides that,

> "Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person … to pay, deliver, convey, surrender or transfer the property, books, papers or records to the [administrator]."

11. The Judge held that the Company "appeared to be entitled to the Property" within the meaning of section 234(2) and that the IA Application was not a "possession claim" that was required to be brought in accordance with CPR 55. The Judge also considered that he was able to give the Appellant and the other occupiers of the Property all the substantive protections in the IA Application that would have been afforded to them in proceedings under CPR 55.

12. By an appellant's notice sealed on 18 June 2024 the Appellant sought permission to appeal the Judge's order for possession. The Appellant's Notice also sought a stay of execution of the possession order made by the Judge pending appeal. The basis for the application for a stay was that the appeal would be rendered academic if the order for possession was enforced.

13. On 28 June 2024 the Administrators filed a statement as to why permission to appeal should be refused pursuant to CPR PD 52C para 19(1). They contended that the Judge was entitled to make the order that he did, that the appeal was one of form and not substance, and that it would have no real prospect of success.

14. On 9 July 2024 I granted permission to appeal on three grounds. Those are,

    i) that in circumstances in which the LPA Receivers have been appointed to the Property under fixed charges and the Company is only entitled to the equity of redemption, the Property should not be regarded as "property to which the company appears to be entitled" for the purposes of section 234(2) IA 1986;

    ii) that the Judge was wrong to hold that CPR 55 did not apply, so that any order for possession should have been made in the Bromley proceedings which had been commenced under CPR 55 rather than pursuant to the IA Application; and/or

    iii) that it was an abuse of process for the Administrators (at the instigation, or with the consent of, TFG2) to seek to by-pass the existing Bromley proceedings by commencing a second set of proceedings also seeking possession of the Property but in another court centre far removed from the Property.

15. In granting permission to appeal, I made the point that the appeal raises points of law (e.g. as to the scope of section 234(2) IA 1986) upon which there is no direct authority, together with wider points of practice and principle as to the relationship between possession claims under CPR 55 and proceedings by office-holders under the IA 1986.

16. CPR PD 52C para 19(2) expressly provides that if an appellant makes an application in addition to an application for permission to appeal, such as an application for a stay of execution, a respondent should include in its written statement under paragraph 19(1) any reasons why that application should be refused or granted only on terms. The respondent can also file any evidence upon which it wishes to rely for that purpose together with its statement under paragraph 19(1). The Administrators' statement under paragraph 19 of CPR PD 52C did not, however, object to a stay being granted and they did not file any evidence in opposition to the application for a stay.

17. In the absence of any opposition from the Administrators, I granted a stay pending determination of the appeal. Although I did not say so explicitly in my reasons, I had regard to the well-known principles governing such applications which are summarised in the White Book commentary on CPR 52.16. In particular, I stated that notwithstanding the lack of underlying merit in the Appellant's position (given that he seems to be occupying the Property as a trespasser without any legal right to be there), if he were forced to give up possession of the Property before an appeal was heard, this would likely make his appeal academic and would cause him prejudice.

18. After receipt of that order, the Administrators issued an application on 18 July 2024 (the "Variation Application"). The Variation Application asked that my order for a stay be set aside, varied or made subject to conditions and sought an oral hearing, ostensibly pursuant to CPR 3.3(5)(a), on the basis that my order had been made without a hearing.

19. The Variation Application was not supported by any evidence save for a number of unsubstantiated assertions in the application form to the effect that delaying the delivery up of possession of the Property would have a detrimental effect upon the administration of the Company. The Administrators also complained that the order for a stay did not provide for any payment of interest, compensation or occupation rent by the Appellant.

20. After the Application had been issued, the Appellant and the Administrators each expanded upon their rival positions in further evidence and correspondence. Pursuant to an order which I made on 7 August 2024, they also filed short Skeleton Arguments.

The correct procedure under CPR 52

21. I should say at once that I do not consider that the Administrators followed the appropriate procedure in making their Variation Application. I also reject the assertion made by Ms. Temple KC that the oral hearing of the Variation Application was the Administrators' first opportunity to be heard on the subject of a stay.

22. The provisions of paragraph 19(2) of CPR PD 52 are clear. They apply where an appellant has sought a stay pending appeal in his appellant's notice and contain express provision for a respondent to file submissions and evidence on that issue. The provisions of paragraph 19(2) are manifestly designed to enable a single judge of the Court of Appeal to consider the question of a stay at the same time as considering whether to grant permission to appeal. The provisions of paragraph 19(2) plainly envisage that the single judge may be able to dispose of the application for a stay on paper without a hearing, but if, having regard to the objections raised by the respondent, the single judge considers an oral hearing would be appropriate, the judge can direct such a hearing to take place to achieve an orderly resolution of the application.

23. A party who is dissatisfied by a decision made by a single judge of the Court of Appeal without a hearing (other than a decision determining an application for permission to appeal) is entitled to apply for the decision to be reconsidered under CPR 52.24(6). The party is not, however, entitled to demand that the reconsideration take place at an oral hearing. Under CPR 52.24(6), that is a decision for the single judge.

24. In any event, the ability to request the reconsideration of a decision made by a single judge without a hearing is not contained in CPR 3.3(5)(a) as suggested by the Administrators. That provision deals only with decisions made by a court of its own motion.

25. Notwithstanding the availability of the reconsideration regime under CPR 52.24(6), in my view it is clear that the primary route by which it is intended that a respondent should be able to contest the grant of a stay pending appeal is by following the procedure under paragraph 19(2) of CPR PD 52. Depending on the facts, a respondent who does not do so, but instead stays silent and then applies for the single judge to reconsider their decision at a subsequent hearing, without there having been any material change in circumstances, could have no cause for complaint if the single judge were simply to refuse their application.

26. In the instant case, Mr. Saifee did not, however, suggest that I should simply refuse to entertain the Administrators' application on procedural grounds. I therefore turn to the substance of the Variation Application.

Should the stay be continued?

27. There was a degree of common ground between the parties that the approach that I should adopt when reconsidering my decision to grant a stay of the Judge's order pending appeal is that which was set out in Hammond Suddard Solicitors v Agrichem [2001] EWCA Civ 2065. In essence that requires the Court to ask whether, having regard to all the circumstances of the case, there is a risk of injustice to one or both parties if a stay pending appeal is granted or refused.

28. In that regard, Ms. Temple KC did not seriously dispute that lifting the stay to allow the Judge's order for possession to be enforced immediately would render the Appellant's appeal academic. Without a stay, the Appellant would be evicted, would have no right to return to the Property, and would not in practice be permitted to do so by the LPA Receivers or the Administrators. Ms. Temple KC herself suggested that it would be most unlikely that the Court of Appeal would be willing to hear an appeal in such a situation.

29. However, Ms. Temple KC submitted, by reference to the decision in R (Van Hoogstraaten v Governor of Belmarsh Prison [2002] EWHC 2015 (Admin), that the fact that an appeal might be rendered academic was not determinative. Rather, she contended that on the particular facts of the case, the risk of greater injustice came down in favour of the Administrators.

30. In essence, Ms. Temple KC contended that since the Appellant has no valid legal basis to be in occupation of the Property, his appeal is on "a pure point of form and not substance, and seeks only to delay the inevitable" – namely that the Appellant will be evicted from the Property by one means or another. She contended that preventing the Appellant from exercising his right to appeal would therefore be no injustice. In similar vein, Ms. Temple KC added that the Appellant could not complain of the inconvenience and expense of having to relocate with his family members and dependents if they were evicted by enforcement of the Judge's order, since they had no right to be at the Property in the first place.

31. Ms. Temple KC submitted that a greater injustice would be caused to the Administrators if the stay were maintained pending determination of the appeal. She suggested that by granting a stay, the court would be "authorising a trespass", and that a stay would prevent or delay the Administrators from taking steps to market and sell the Property with vacant possession. She indicated that this was essential so that the Administrators could make a distribution of the sale proceeds to reduce the Company's indebtedness to TFG2 and hence reduce the substantial amounts of interest that are accruing on the Company's debt to TFG2. Ms. Temple KC further submitted that a stay would prejudice the Administrators by enabling persons to stay in occupation of the Property who are under no obligation to pay rent.

32. I do not accept those submissions. Although the Appellant does not suggest that he has any legal right to occupy the Property, that does not mean that the law is indifferent to the legality of the means by which he is compelled to leave. Even persons who have

no right against a landowner to be on land have a right not to be forced to leave it save in accordance with the law. The Appellant's appeal against the legality of the Judge's order is one that has a realistic prospect of success, and in my judgment the Appellant is entitled to complain that it would be unjust if he were to be prevented from pursuing it.

33. In that respect I do not agree that the Appellant's appeal is on "a pure point of form and not substance". On the first ground, if the Judge had no jurisdiction to make the order for possession under section 234(2) IA 1986, that is a point of substance and not of form. And if the Judge did have jurisdiction under section 234(2) IA 1986, the questions (i) whether he should have exercised it when there were extant proceedings under CPR 55 in the County Court serving the land where the Property was located, and (ii) whether the Judge actually replicated the procedural protections given to occupiers of residential property under CPR 55, might also be thought to be matters of substance and not form. As I have indicated above, they are certainly issues that are of real practical significance to the court system dealing with possession claims.

34. For similar reasons, I also do not see why I cannot take into account, when assessing the risk of injustice, the financial costs and logistical difficulties faced by the Appellant and those connected with him of being evicted from the Property pursuant to a court order that might turn out to have been wrongly made.

35. On the other hand, considering the risk of injustice to the Administrators, I do not accept that by granting a stay of the Judge's order, I would be "authorising a trespass". The stay of the order for possession does not prevent any appropriate remedies being sought by the Administrators against the Appellant in relation to his continued occupation of the Property. The stay simply prevents the enforcement of a court order requiring the Appellant to give up possession of the Property (which might carry penal sanctions for disobedience) that has arguably been made without jurisdiction or otherwise wrongly.

36. Moreover, and importantly when weighing up the justice of the matter, I do not accept that there is any evidence (as opposed to mere assertion) that a stay for a limited period pending determination of the appeal would cause the Administrators any material financial prejudice arising from a delay in being able to sell the Property or rent it out.

37. As regards sale of the Property, the Administrators have not adduced any evidence to show that they (as opposed to the LPA Receivers or TFG2 as mortgagee) are currently, or could in the near future, be entitled to take steps to sell the Property or that they have any plans in place to do so.

38. The undisputed evidence is that the Company's only asset is its interest in the Property, but the Property is subject to the Mortgage in favour of TFG2 and the LPA Receivers have been appointed to sell the Property. As such, as I have indicated, the only basis upon which the Administrators could dispose of the Property would be if the court made an order under paragraph 71 of Schedule B1 of the IA 1986 authorising the Administrators to sell the Property as if it were not subject to the Mortgage. However, the court can only make such an order if such sale would be likely to promote the purpose of the administration of the Company, and then only on terms that the net proceeds of sale be applied towards discharge of the secured debt.

39. On the basis of the figures that I was given at the hearing by Ms. Temple KC, the amount owing to TFG2 (including interest) secured by the Mortgage is currently £4.442 million. That exceeds even the most optimistic valuation of the Property obtained by TFG2 in 2022 (£4 million), and far exceeds a more recent valuation of the Property obtained by the Appellant from Savills in March this year (£2.7 million). On the basis of this evidence, the Company's limited interest in the Property (its equity of redemption) is therefore worthless and there is no prospect of any surplus monies falling into the administration of the Company after payment of the proceeds of sale towards satisfaction of TFG2's secured debt. As such, it is entirely unclear to me on what basis the Administrators might intend to ask the court for authority to sell the Property under paragraph 71 of Schedule B1, still less to retain any part of the proceeds, and I repeat that there was no evidence whatever of any steps they intend to take in that respect.

40. A similar point can be made in relation to the Administrators' complaint that a continued stay would deprive them of rent in respect of the Property. Ms. Temple KC was constrained to accept that it is the LPA Receivers and not the Company or the Administrators who would be entitled to payment of any occupational rent derived from the Property. And in any event, there is no evidence of prospective tenants wishing to rent the Property in the near future.

41. The short point is that the only persons who have any right to take steps to sell the Property or rent it out so as to reduce the amounts owing to TFG2 are the LPA Receivers, who were appointed for such very purposes, and not the Administrators. When I put that point to Ms. Temple KC she ventured the view – whilst emphasising that she did not act for the LPA Receivers or for TFG2 - that the LPA Receivers might be willing to vacate office or enter into some arrangement leaving such matters to the Administrators. That was, with respect, pure speculation, and there was no evidence to support it.

42. It is also relevant to the risk of injustice that in the ordinary course of events it is possible that the Court of Appeal could accommodate a hearing of the appeal as soon as December 2024, and it can certainly do so from January 2025. Any financial disadvantage to TFG2 caused by a delay in commencing a sales process, or any non-payment of occupational rent in the period before an appeal is determined, will therefore be of relatively limited duration.

43. For these reasons, in my judgment the balance of the risk of injustice in granting or refusing a stay pending determination of the appeal falls clearly in favour of continuing the stay.

<u>Should the stay be made subject to conditions?</u>

44. Whilst maintaining that there should be no stay at all, the Variation Application sought in the alternative that I should impose a condition that the Appellant should pay £10,000 pcm (which was said to be a market rent) for continued occupation of the Property pending determination of the appeal. In response, on the basis that the stay continued, the Appellant made an open offer to pay £2,000 pcm in respect of his occupation of the Property pending the determination of the appeal. That would appear to be considerably less than the market rental that the Property could be expected to fetch in the open market, but the Appellant has filed evidence to the effect that it is all that he can afford.

45. I would, for the reasons that I have given, have been prepared to continue the stay in any event. That said, common sense suggests that if the Appellant is willing to pay something in respect of his occupation of the Property pending determination of his appeal, the risk of injustice to those affected by the stay is reduced by such offer, and so it should not be rejected but should be made a condition of the stay.

46. However, it became apparent at the hearing that no real thought had been given by either side as to whom, or on what basis, the Appellant should make such payments. In particular, the Administrators did not seem to have considered that, prima facie, it would be the LPA Receivers in right of TFG2, and not the Administrators on behalf of the Company, that would be entitled to any payments in respect of occupation of the Property. In answer to that point, Ms. Temple KC rather optimistically submitted that such payments could be made to the Administrators on account of a claim by the Company for damages for trespass, albeit that she accepted that such claim had not yet been formulated or made. In the end, the only thing that seemed to be agreed between the parties was that by making such payments, the Appellant would not obtain any rights in relation to occupation of the Property.

47. After these points had been raised at the hearing, Ms. Temple KC and Mr. Saifee both suggested that the monies offered could be paid into court, and they agreed to consider the terms upon which such payments might be made after the hearing. They subsequently notified me that they had agreed the following formulation of a condition to be attached to the stay,

> "The condition shall be that until the Court of Appeal hands down judgment or further order, the Appellant shall by the 28th day of each month pay £[a specified amount] in cleared funds into Court. The sum accumulated in the court account shall be released in accordance with the joint written agreement of the Administrators and LPA Receivers (if still in office) or, in default of any such agreement being reached within 28 days of handing down the judgment, the Administrators or LPA Receivers (if any) shall commence proceedings to enable a court to decide to whom the accumulated sum should be released."

48. I am content with that formulation, save that I consider that if the LPA Receivers are for some reason no longer in office, the agreement of TFG2 should be required instead. The amount I would specify is the £2,000 pcm offered by the Appellant.

49. For the avoidance of doubt, I should make it clear that for the reasons that I have given, the imposition of this condition does not involve any determination on my part that £2,000 is an appropriate occupational rent in respect of the Property and it in no way affects any rights of the Administrators, the LPA Receivers or TFG2 to take any other proceedings that might be open to them seeking compensation in respect of the Appellant's unauthorised occupation of the Property.

50. For those reasons I refuse to discharge or vary the order for a stay that I granted on 7 August 2024, but I will vary the order by imposing a condition in the form referred to above. I would ask counsel to draw up an agreed order accordingly, and to submit it with an agreed order for costs, or if agreement cannot be reached, with short written submissions on costs that I will determine on paper.

Postscript

51. At the hearing I was asked by Ms. Temple KC to state, apparently for the purposes of clarification, that the stay that I have granted applies only to the order for possession granted by the Judge in the IA Application, and that it does not apply to the Bromley proceedings under CPR 55. That is self-evident, not least because, for reasons that I have explained, no order for possession has been made in the Bromley proceedings and those proceedings are not before the Court of Appeal. Indeed, I was told that following the making of the Judge's order in the IA Application, TFG2 applied to discontinue the Bromley proceedings.

52. One implication of Ms. Temple KC's request might be that TFG2 intends to apply to the County Court to withdraw its notice of discontinuance in order to keep the Bromley proceedings on foot until after the result of the appeal to this Court is known. I do not see that this would be objectionable. As Ms. Temple KC put it, if the Appellant succeeds in this Court on the basis that the Bromley proceedings should have been pursued rather the IA Application, he can hardly complain if they then are.

53. However, I have much greater difficulty with the suggestion that TFG2 might seek to revive the Bromley proceedings and press ahead with them to obtain an order for possession from the County Court whilst the appeal against the Judge's order in the IA Application is pending in this Court. That would require the Appellant to fight simultaneously on two fronts and might be seen as an attempt to undermine his appeal to this Court. However, since I did not hear full argument on the point I shall say no more about it, save to make it clear that if such a course were to be attempted by TFG2, it would be for the County Court to determine what to do with the Bromley proceedings.