Neutral Citation [2021] EWHC 70 (Ch)

Case No: PT-2020-000869
Appeal No: CH-2020-000271

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

On appeal from the order of Deputy Master Linwood dated 17 November 2020

Remotely at:

Royal Courts of Justice
Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 18 January 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

NELSON LOVERIDGE

Appellant
(Defendant in the proceedings below)

- and -

THE MAJOR AND BURGESSES OF THE LONDON BOROUGH OF ISLINGTON

Respondent
(Claimant in the proceedings below)

- -

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Ms Marie Demetriou, QC and **Mr Jeremy Frost** (instructed by **Hodge, Jones & Allen Solicitors**) for the Applicants

Mr Ranjit Bhose, QC and **Mr Alex Cunliffe** (instructed by **Legal Services Department, the London Borough of Islington**) for the Respondents

Hearing date: 13 January 2021

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Approved Judgment

I direct that no official note or transcription shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

1. By an order dated 17 November 2020 (the **Order**), Deputy Master Linwood ordered that the defendants to these proceedings – then identified as *(i)* a Ms Teresa Wells and *(ii)* persons unknown occupying without consent land at Dixon Clark Court (the **Site**) – give possession of the Site (which was more specifically described in the Order) on or before 12 noon on Wednesday 18 November 2020.

2. The Order also provided for the removal of Ms Wells as a defendant. Mr Loveridge has been named as a defendant (effectively, in her place) by the order of Roth J dated 18 November 2020. It is Mr Loveridge who brings this appeal against the Order, with the permission of Roth J. Roth J also ordered that the appeal be expedited and that the Order be stayed until determination of the appeal, or further order.

3. Roth J gave Mr Loveridge permission to appeal on three grounds:

   (1) *Ground 1*. That the procedure adopted by the Deputy Master at the hearing was unfair in that he failed to read any of the 20 witness statements adduced on behalf of Mr Loveridge and the other protestors at the Site. These set out the factual basis for the defence to the claim brought by the Respondents to this appeal – that is, the Mayor and Burgesses of the London Borough of Islington (**Islington**). These proceedings were – as should already be apparent – possession proceedings brought by a public authority against protestors – including Mr Loveridge – who were exercising their rights under Articles 8, 10 and 11 of the European Convention on Human Rights (**ECHR**), as enacted into English law by the Human Rights Act 1998 (the **Proceedings**).

   (2) *Ground 3 and Ground 4*. That, as a consequence of this procedural error, the Deputy Master failed properly to consider the defence raised by Mr Loveridge and the other protestors pursuant to Articles 8, 10 and 11 ECHR (Ground 3) and/or failed to put himself in a proper position to determine whether or not the Order was proportionate (Ground 4).

   Roth J did not give permission to appeal in relation to Mr Loveridge's second ground of appeal (Ground 2) and I need consider it no further.

4. The substance of Mr Loveridge's grounds of appeal was that the appeal should be allowed because the Order was unjust because of a serious procedural or other irregularity in the proceedings in the lower court (under rule 52.21(30(b) of the Civil Procedure Rules (**CPR**)). It was <u>not</u> contended that the decision of the lower court was wrong (under CPR 52.21(3)(a)).

5. The appeal was heard before me on 13 January 2021. At that hearing, having heard and been greatly assisted by the able submissions of Ms Marie Demetriou, QC (appearing *pro bono* on behalf of Mr Loveridge) and Mr Ranjit Bhose, QC (on behalf of Islington), I allowed the appeal, with my reasons to follow. This judgment sets out those reasons.

6. My reason for taking this course was to enable the swift re-hearing of the possession claim: I did not want the arrangements for ensuring a swift re-hearing to be slowed by awaiting this reserved judgment (even if it has not been reserved for long). It will be necessary to return to this point later on in this judgment, because one of the points

advanced by Mr Bhose was that – if, as I was, against him – I should re-hear the claim for possession at the appeal. It is evident that I have rejected this suggested approach, and I briefly explain why towards the end of this judgment.

7. There was one other point that arose out of Islington's respondent's notice. This was that, even if Mr Loveridge was right in that the Order was impeachable on grounds of procedural unfairness, the Order should nonetheless be upheld on the basis that the Deputy Master "would" or "should" have made the Order in any event. I consider this point in the course of my consideration of the three grounds of appeal advanced before me by Mr Loveridge.

8. It is necessary, in the first instance, to describe the proceedings before the Deputy Master:

(1) This was a possession claim under CPR Part 55. Specifically, it was a "possession claim against trespassers" within the meaning of CPR 55.1(b). It is unnecessary to describe that procedure in any detail, save to note that the procedure is – for entirely understandable reasons – an expedited processs, where the claim (and the evidence in support) is served shortly before a hearing (which is fixed when the claim form is issued: CPR 55.5(1)) at which possession may be granted. There is, therefore, very limited scope for a trespasser to challenge the claim to possession.

(2) The process – whilst undoubtedly expedited – is a fair one (and, to be clear, Ms Demetriou at no point suggested otherwise). CPR 55.8 provides:

> "(1) At the hearing fixed in accordance with [CPR 55.5(1)] or at any adjournment of that hearing, the court may –
>
> (a) decide the claim; or
>
> (b) give case management directions.
>
> (2) Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under paragraph (1)(b) will include the allocation of the claim to a track or directions to enable it to be allocated."

Thus, it may – and often will – be possible to determine the claim summarily. But the court must be open to the question of <u>whether</u> the claim is genuinely disputed on grounds which appear to be substantial. The existence of such grounds does <u>not</u> necessarily mean that the claim cannot be determined summarily – it may be that there is sufficient time to do so at the hearing, and no need for further evidence. The court will have well in mind the importance of expedition. But the court must be alive to the point in CPR 55.8(2), and must consider whether the claim can fairly be so decided and – if not – give the appropriate case management directions.

(3) In the case of the Proceedings, the hearing fixed under CPR 55.5(1) was fixed for 12 November 2020. The order of Roth J directed that a transcript of the proceedings be provided, and (save where the contrary is stated) all page references in this paragraph are to the **Transcript**.

(4) The Transcript shows that Mr Alex Cunliffe of counsel represented Islington before the Deputy Master: he appeared, led by Mr Bhose, for Islington on this appeal. The hearing commenced without any appearance by, or representation on behalf of, the

defendants. That is not – in and of itself – surprising in proceedings of this sort, and the Deputy Master, quite rightly, commenced the hearing. It is quite evident that the Deputy Master was on top of the materials, and that he was being carefully addressed by Mr Cunliffe on both the law and the facts.

(5) The proceedings were interrupted (Transcript/page 5) by the arrival of the defendants, who had (mistakenly, and given the geography of the Royal Courts of Justice, quite understandably) gone to Consultation Room 23 and not to Court 23 (where the hearing was taking place). After ensuring that the defendants were appropriately seated (social distancing was, of course, being observed, in light of the COVID-19 pandemic), Mr Gregory Horne introduced himself as a student lawyer representing the defendants. The Deputy Master permitted him to speak for the defendants, and (again, quite rightly) recommenced the hearing (Transcript/page 7).

(6) Mr Horne drew to the Deputy Master's attention to the fact that "[t]here's some paperwork that the defendants put together, just some witness statements" (Transcript/page 7). Neither Mr Cunliffe nor the Deputy Master had seen these before. Mr Cunliffe, quite rightly, drew to the Deputy Master's attention to the fact tthat there was no obligation on the defendants to file a defence in advance; and (to be clear) there was in this case very limited opportunity for the defendants to do so. As I have described, the CPR 55 process is an expedited one, and it is neither a valid criticism of either Islington or the defendants that the witness statements were produced to the Deputy Master in the manner that they were. Islington was entitled to bring the Proceedings on what would be – in other cases – extremely short notice; and that created the limited time frame within which the defendants could mount a response.

(7) Mr Horne made quite clear to the Deputy Master that he had had limited opportunity to review these statements (Transcript/page 8):

> "I've just been handed quite a large bundle of witness statements that – some of which I haven't read. I can give you the ones that I have read. I don't know what you want me to do."

That is not to say that Mr Horne was unfamiliar with the case: he had had time to prepared written submissions and – as we shall see – proceeded to address the Deputy Master on the points therein.

(8) There was then an exchange between Mr Cunliffe, the Deputy Master and Mr Horne as to what to do. It was resolved that the Deputy Master would adjourn for 15 minutes to enable Mr Cunliffe and Mr Horne to "work through the witness statements", so as to see what they contained. The court adjourned until 3:35pm.

(9) When the hearing resumed, Mr Cunliffe set out what <u>he</u> drew from the witness statements he had just reviewed with Mr Horne, and he continued with his submissions. Mr Cunliffe chiefly addressed the points he understood to be at large arising out of Mr Horne's written submissions (Transcript/pages 8*ff*).

(10) The Deputy Master then heard from Mr Horne (Transcript/pages 20*ff*) and it is plain that the Deputy Master took pains to draw from Mr Horne the points that Mr

Horne was seeking to make and made very clear that he was not cutting Mr Horne short on any point he wished to make (Transcript/page 20). Mr Horne made five points in the course of his submissions. It is unnecessary to go through all five, but Mr Horne's third point is important in the present context (Transcript/pages 24*ff*). It was, essentially, a request for a short adjournment, "for the defendants to seek out and get further legal advice and properly put forward their case" (Transcript/pages 25-26). It is fair to say that Mr Horne did not press the question of an adjournment very hard: it was not his first point (forensically speaking, he probably should have made it when the parties came back into court after the 15 minute adjournment granted by the Deputy Master) and the request for an adjournment was not made with the force that an established advocate might have pressed it.

(11) Mr Cunliffe then replied (Transcript/pages 29*ff*), and it is important to note that the Deputy Master pressed Mr Cunliffe on when Islington's claim form (and material in support) might have been served on the defendants, noting that whilst the process had been procedurally correct, this material might have been served earlier.

(12) The Deputy Master then gave judgment (which has also been transcribed, and which I have read) which was in favour of Islington and resulted in the Order.

9. As I have noted, the substance of Mr Loveridge's grounds of appeal was that the appeal should be allowed because the Order was unjust because of a serious procedural or other irregularity in the proceedings in the lower court (under CPR 52.21(3)(b)). Ordinarily, this would imply some kind of criticism of at least one of the protagonists below – the parties' representatives and/or the judge – and (before explaining why I allowed the appeal) I think it is important to place on the record that this is an unusual appeal because such implied criticism would be misconceived. I consider that both advocates, and the judge, sought to do their very best in a difficult situation. Mr Cunliffe presented his client's case clearly and well, and went out of his way to ensure that he addressed points that he considered the Deputy Master ought to be addressed on. The Deputy Master, for his part, conducted the hearing courteously and patiently, and was obviously seeking to reach the correct result in a procedurally fair way. Mr Horne was appearing *pro bono* and (although obviously both capable and undaunted by addressing the court) was unqualified as an advocate.

10. Nevertheless, the Order must be set aside because of a serious procedural irregularity in the proceedings which renders it unjust for the Order to stand. Mr Bhose rightly stressed that the test under CPR 52.21(3)(b) is a high one – the procedural irregularity must be "serious" rendering the order made "unjust". These are strong words, and it is not <u>any</u> procedural irregularity that can have the effect of causing an order – otherwise rightly made on the material before the court below – to be set aside.

11. It is important to stress that there was no criticism of the Deputy Master's judgment based upon the submissions that he heard and the material that was drawn to his attention. It has, for that reason, been unnecessary to consider in any detail the Deputy Master's judgment: Ms Demetriou made no criticism of it.

12. The essence of the point is that there might have been something in the witness statements produced to the Deputy Master, in the circumstances that I have described, that <u>might</u> have made a difference. That is the point directly arising out of Grounds 3 and 4 of the

appeal (described in paragraph 3(2) above) and the first ground of the respondent's notice (described in paragraph 7 above). It seems to me that none of these points take the matter any further. Of course, the Deputy Master did not consider – in that he did not read – the witness statements produced by the defendants. That failure is the essence of Ground 1 of the appeal, to which I shall come in a moment. But, sticking with the points other than Ground 1, I fail to see how an appellate court can properly decide that material which the judge below did not consider would or would not have made a difference. That is to convert an argument of procedural irregularity into an argument that the judgment (or, rather, the order consequential on judgment) was rightly or wrongly made and (to my mind, improperly) to elide the two very distinct limbs of CPR 52.21(3)(a) and (b) into a single test. The fact is that a "wrong" outcome – the province of CPR 52.21(3)(a) – is a very different matter from a procedural injustice – the province of CPR 52.21(3)(b).

13. For this reason I reject the first ground in the respondent's notice and – at least as self-standing grounds – I reject Grounds 3 and 4 of the appeal. However, I prefer to see Grounds 3 and 4 as illustrative of what the Deputy Master might have missed had there been no procedural irregularity.

14. That brings me to Ground 1. Although Ground 1 baldly asserts that the Order was procedurally irregular because the Deputy Master failed to read all of the witness statements adduced on behalf of Mr Loveridge, the essence of Ground 1 is that – given the very specific circumstances before the Deputy Master – he failed to put himself in a position where he could determine whether Islington's claim was "genuinely disputed on grounds which appear to be substantial".[1] I quite accept – and Ms Demetriou did not contend otherwise – that the Deputy Master dealt quite rightly in his judgment with the points that were advanced before him. But that is precisely the problem: the Deputy Master did not have drawn to his attention points that might have lurked within the (unread) body of the (many) witness statements adduced by the defendants.

15. I cannot and do not go so far as to say that reading the witness statements would have made any difference at all to the Deputy Master's Order. That is not, as I have noted, a point that I should decide on an appeal: indeed, the point is not a relevant one on appeal. The reason there was a procedural irregularity is because the Deputy Master failed to put himself in a position where he could determine whether Islington's claim was "genuinely disputed on grounds which appear to be substantial" within CPR 55.8(2). As to this:

(1) I regard the fact that the Deputy Master did not read the witness statements produced by Mr Horne as a relevant factor, but certainly not a decisive one. Substantial materials are regularly produced to judges and judges do their best to apprise themselves of the material that is before them. But they rely on the professionalism and ability of the advocates who appear before them to draw material points to the court's attention. In particular, in *inter partes* proceedings (as these were), the court can and should expect an advocate for a party to draw salient points in his client's favour to the court's attention.

[1] Lest it be thought that this is an impermissible reformulation of Ground 1, I should be clear that the argument before me proceeded on these lines, and I made very clear to both counsel how I regarded the substance of Ground 1. They both fully and very skillfully addressed me on this basis. Mr Bhose did not suggest that this approach fell outside the scope of the permission granted by Roth J; and – had he done so – I would have rejected that submission, but also permitted (for the avoidance of doubt) Ms Demetriou to amend Ground 1 to this extent. There would have been no conceivable prejudice to Islington in taking this course.

(2) This practice – on which the speedy and efficient conduct of business before the courts in material part depends – is reflected in the fact that judges will often indicate to the parties before them precisely what they have read and what they have not read.

(3) If a point on the facts could have been made before the court below, by reference to material that was properly before that court, but where that point was not made by the advocate representing that party, then to my judgment it would very difficult for an order adverse to that party to be attacked on appeal on the ground that, had the point been argued below (when it was not), the order would have been different.

(4) *Prima facie*, that is this case, and for that reason the *prima facie* position is that Ground 1, too, should be dismissed. However, there are several features which – when considered cumulatively – alter the case that would ordinarily pertain:

(a) As was submitted in paragraph 2(a) of Mr Loveridge's written submissions, the issue in these proceedings was the appropriate balance to be struck between Islington's interests in the Site and the rights of Mr Loveridge and the other protesters under Articles 8, 10 and 11 ECHR. The Deputy Master was accordingly called upon to carry out a fact-sensitive, evaluative assessment of those rights and the extent to which it was permissible for Islington to interfere with them, even though Islington was asserting its undisputed possessory rights over the land.

(b) Clearly the Deputy Master could not properly perform that assessment without properly considering the protesters' evidence. Normally, as I say, that process would occur through the advocates' submissions in *inter partes* hearings.

(c) In this case, the Deputy Master was presented with *(i)* an unqualified advocate, who *(ii)* had not read (or at least not read all) of the statements on which the defendants were relying, in circumstances *(iii)* where the advocate could not be criticised for this, where *(iv)* that advocate was (albeit a little *sotto voce*) seeking a limited adjournment of the proceedings, in order to get the defendants' "house in order".

(5) In these circumstances, the Deputy Master either had to adjourn in order to enable himself (that is, the Deputy Master) to be satisfied that Mr Horne had not missed anything was was in all the circumstances properly prepared or – noting the circumstances in which Mr Horne was appearing – take upon himself the burden and read the witness statements, in their entirety, to himself. I stress that this is a course that was in my view compelled by the very unusual circumstances described in the preceding sub-paragraph (paragraph 15(4)).

16. For these reasons, Ground 1 of the appeal succeeds, and the Order must be set aside. I have made directions to ensure that the re-hearing of the claim comes on very quickly, because I am very conscious of the prejudice that delay causes to Islington.

17. The second point advanced by Mr Bhose in Islington's respondent's notice was that – having allowed the appeal – I should re-hear it *de novo*. I accept that I have jurisdiction to do so, but I declined to do so when the matter was before me on 13 January 2021. That

was because *(i)* most of the day had been spent dealing with the appeal, and I did not consider that there was time fairly to re-hear the claim; and *(ii)* Mr Loveridge wanted the opportunity to consider whether further evidence should be adduced by him, which was an opportunity I considered Mr Loveridge (and, indeed, any "person unknown") ought to have, albeit subject to fairly tight deadlines.