Case No: KB-2023-001195

Neutral Citation Number: [2023] EWHC 1853 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

ON AN APPLICATION TO SET ASIDE
AN ORDER OF
THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MASTER THORNETT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2023

Before:

MRS JUSTICE HILL DBE

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Between:

KIERAN UPADRASTA	**Claimant**
- and –	
THE COMMISSIONER OF THE CITY OF LONDON POLICE	**Defendant**

- -
- -

Stephen Simblet KC (instructed by Broudie Jackson Canter) for the **Claimant**
Russell Fortt (instructed by Weightmans) for the **Defendant**

Hearing date: 12 July 2023

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APPROVED JUDGMENT

Mrs Justice Hill DBE:

Introduction

1. By a claim issued on 7 March 2023 the Claimant seeks damages for false imprisonment arising out of an incident which occurred on 11 September 2020. On that date, several of the Defendant's officers attended at his home and purported to exercise their powers under the Mental Health Act 1983 ("the MHA"), section 136 to detain him.

2. The Particulars of Claim also allege that the Defendant's officers committed a trespass by entering into his home and that the threatened and actual use of force on him constituted assaults. The Claimant intends to apply to amend the claim form to ensure it aligns with the Particulars of Claim and will no doubt do so promptly if the claim proceeds. The Defendant does not object to such an amendment to the claim form.

3. Because the Claimant's claim amounts to "civil proceedings" in respect of acts "purporting to be done" in pursuance of the MHA, against a defendant not excluded from the relevant provisions, it was necessary for him to obtain leave to bring the claim under the MHA, section 139(2). Such leave was granted by the Master by way of an order dated 4 April 2022. In fact, under the CPR, Masters are not permitted to make orders giving section 139 leave.

4. No Defence to the claim has been filed. By an application dated 3 April 2023 the Defendant seeks to set aside the Master's order and have the claim struck out; alternatively summary judgment granted to the Defendant in respect of the entire claim. The application was supported by a statement from Nicola Howlett, the Defendant's solicitor.

5. By an application dated 19 June 2023, if the Defendant succeeds in her application, the Claimant seeks a grant of retrospective section 139 leave to run from 14 April 2022; alternatively prospective leave to bring fresh proceedings. This application was supported by a statement from Christopher Topping, the Claimant's solicitor.

6. Although normally an application to set aside a Master's order would be heard by a Master, by letter dated 9 June 2023 the Defendant sought a hearing before a High Court judge given the nature of the issues. This course was rendered necessary in any event by the Claimant's application. Both applications were argued before me on 12 July 2023. I was greatly assisted by the clear and concise submissions from both counsel.

The relevant provisions of the MHA

7. Section 136 provides in material part as follows:

> **"136 Removal etc of mentally disordered persons without a warrant**
>
> (1) If a person appears to a constable to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person or for the protection of other persons-
> (a) remove the person to a place of safety within the meaning of section 135…
>
> (1A) The power of a constable under subsection (1) may be exercised where the mentally disordered person is at any place, other than—
> (a) any house, flat or room where that person, or any other person, is living, or
> (b) any yard, garden, garage or outhouse that is used in connection with the house, flat or room, other than one that is also used in connection with one or more other houses, flats or rooms.
>
> (1B) For the purpose of exercising the power under subsection (1), a constable may enter any place where the power may be exercised, if need be by force.
>
> (1C) Before deciding to remove a person to, or to keep a person at, a place of safety under subsection (1), the constable must, if it is practicable to do so, consult-
> (a) a registered medical practitioner,
> (b) a registered nurse,
> (c) an approved mental health professional, or
> (d) a person of a description specified in regulations made by the Secretary of State."

8. Section 139 provides in material part:

> "**139 Protection for acts done in pursuance of this Act**
>
> (1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, unless the act was done in bad faith or without reasonable care.
>
> (2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions.

> (3) This section does not apply to proceedings for an offence under this Act, being proceedings which, under any other provision of this Act, can be instituted only by or with the consent of the Director of Public Prosecutions.
>
> (4) This section does not apply to proceedings against the Secretary of State or against NHS England, an integrated care board, a Local Health Board or Special Health Authority or against a National Health Service trust established under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006 or NHS foundation trust or against the Department of Justice in Northern Ireland or against a person who has functions under this Act by virtue of section 12ZA in so far as the proceedings relate to the exercise of those functions…".

The facts

9. The following summary of the facts is taken from the Particulars of Claim, the Defendant's reply to the letter of claim and the various contemporaneous documents exhibited to the applications. I have also watched some body worn video ("BWV") footage of the incident with which I was provided.

10. The incident took place during the COVID-19 pandemic, at a time when there were social distancing measures in place including substantial restrictions on people's abilities to leave their homes. The Claimant was "shielding", i.e. isolating himself so far as was possible in his flat in an area of London EC4.

11. It appears that an issue arose about the housing benefit the Claimant needed to pay his rent. According to the Defendant's Incident Dispatch Record ("IDR"), at 4.44 pm on 11 September 2020, the Defendant's control room received a 999 call from a social worker advising them that the Claimant had sent an e-mail earlier that day to the housing benefits team expressing an intention to take his own life.

12. At 4.50 pm five of the Defendant's officers arrived at the Claimant's property and obtained a set of keys from the building concierge. After ringing the doorbell, they entered the property using the keys. The IDR records that they had gained access to the property by 5.03 pm and that the Claimant was safe and well.

13. The first sentence of paragraph 7 of the Particulars of Claim avers that the police officers told the Claimant not to move and that he was being detained. Mr Simblet KC accepted that this was not borne out by the BWV footage and was content for this part of the Particulars to be treated as deleted.

14. A number of police officers searched through the Claimant's flat. His pleaded case is that he was told he was not suspected of any crime but that there were concerns about his welfare; that he was told he was required to leave the flat

and go with the police officers; and that the officers reiterated this when he explained that he was shielding and could not go out. The IDR indicates that the welfare concern for the Claimant arose because he had both windows in the flat closed and had decanted a full can of insecticide.

15. The Defendant's case is that because the officers were concerned about the Claimant's safety, they asked him to leave the flat and come into the communal corridor.

16. The Claimant left the flat with the officers. The IDR notes that by 5.05 pm he was outside the flat. An ambulance was requested.

17. The BWV footage makes clear that the officers chatted with the Claimant for several minutes in the corridor. According to the response to the letter of claim officers considered that it was necessary to ask the Claimant to leave the building and go into the fresh air. The IDR records that by 5.10 pm the Claimant had been "removed" from the property and was outside the premises with the officers. At 5.12 pm it was recorded that the officers were "considering Mental Capacity Act".

18. According to the response to the letter of claim, and the BWV, while on the way down to the ground floor, around 12 minutes after the officers arrived, the officers explained to the Claimant that he was being detained under the MHA, section 136 because the officers were concerned about his ability to look after himself. The IDR records that by 5.14 pm the Claimant had been detained under the "MCA".

19. At 5.15 pm the ambulance arrived. The Claimant was asked to follow the officers to the ambulance which he did. According to the Defendant's Mental Health Form, at 7 pm he arrived at a place of safety namely the section 136 suite at the Homerton Hospital; he was received by a Dr Kevin McCarthy; and he left the place of safety at 8.29 pm.

The procedural background

20. On 21 December 2020 the Claimant's solicitor sent a letter of claim, to which the Defendant's solicitor replied on 13 May 2021.

21. Page 4 of the reply to the letter of claim drew the Claimant's solicitor's attention to the provisions of section 139. Despite that, on 2 December 2021, the Claimant's solicitor issued a claim on the Claimant's behalf without the relevant leave having been obtained. In his witness statement provided in support of the 19 June 2023 application, the Claimant's solicitor said that this was very unfortunate since he had previously had cause to apply for section 139 leave from the High Court in other cases. He accepted that the effect of caselaw, specifically the House of Lords decision in *Seal v Chief Constable of*

South Wales Police [2007] UKHL 31; 1 WLR 1910, was that proceedings commenced without leave are a nullity. These proceedings were struck out.

22. On 20 December 2021 the Claimant's solicitor wrote to the Defendant's solicitor explaining that proceedings had erroneously been issued and seeking the Defendant's consent to the grant of section 139 leave. The letter made clear that no costs in relation to the aborted proceedings would be sought from the Defendant.

23. On 4 January 2022 the Defendant's solicitor replied, making clear that no such consent would be given and that if the Claimant proceeded to make an application for section 139 leave, it would be opposed.

24. On 25 January 2022 the Claimant's solicitor filed an application notice seeking section 139 leave. The application notice indicated that the application was to be served on the Defendant and dealt with at a hearing with a time estimate of 30 minutes, by a Master. The Claimant's solicitor provided a short witness statement in support of the application which was also accompanied by draft Particulars of Claim.

25. The Claimant's solicitor did not serve a copy of the application notice on the Defendant's solicitor, despite the provisions of CPR 23.7(1) requiring such service. The court did not serve a copy of the application notice on the Defendant's solicitor either.

26. On 31 March 2022, a member of court staff referred the application to the Master. The Master considered the application, as a result of which the member of court staff emailed the Claimant's solicitor seeking further information. The further information sought was as to "the factual basis on which the Claimant proposes to argue that permission should be granted because the proposed defendant comes within the exception in s.139(1)".

27. On 1 April 2022 the Claimant's solicitor wrote to the Master setting out the factual background to the claim. The letter concluded as follows:

> "It is clear that the Officers were therefore purporting to use their powers under the Mental Health Act.
>
> Section 136 of the Mental Health Act does not authorise a Police Officer to force entry into anybody's private residence, to detain them and remove them from the residence. Section 136… requires that a person is found in a public place.
>
> Consequently the powers which the Defendants officers were purporting to utilise on this occasion were not in fact powers which were available to them."

28. Neither the court's email of 31 March 2022 nor the Claimant's solicitor's letter of 1 April 2022 were copied to the Defendant's solicitor, who remained unaware of the existence of the application.

29. On 4 April 2022 the Master made the order granting the Claimant leave under section 139.

30. The preamble to the order recorded that the 1 April 2022 letter had clarified that "the allegation is that the proposed Defendant entered the Claimant's property purporting to exercise powers under the [Mental Health Act 1983] when there was no such power and therefore insufficient care had been taken in the exercise of purported powers".

31. The preamble also recorded that the application had been made "without notice". It did not contain a statement of the Defendant's right to apply to have the order set aside under CPR 23.10, contrary to CPR 23.9.

32. Neither the Claimant's solicitor nor the court served a copy of the 4 April 2022 order on the Defendant's solicitor.

33. Accordingly, the first time the Defendant's solicitor became aware that the application for leave under section 139 had been made, and indeed had been granted, was when the Claimant's claim was served on the Defendant on 17 March 2023.

34. On 22 March 2023 the Defendant's solicitor asked the Claimant's solicitor for a copy of the application and related documentation. The Defendant's solicitor also sought clarification of whether the 4 January 2022 letter making clear that the application for section 139 leave would be opposed had been placed before the Master. On 28 March 2023 Claimant's solicitor replied as follows:

> "We did not provide a copy of your letter of the 4th January to the Court, the letter did not request that we did so and as you will have noted we asked the matter to be listed by way of a hearing which the Court decided not to do".

The issues

35. The parties agreed that in light of the two applications before the court, five issues arose for determination.

Issue (1): Should the Master's order be declared invalid under CPR 3.10(a) in light of the prohibition on Masters making such orders?

36. Mr Fortt for the Defendant contended that the answer to this question was yes.

37. The starting point was CPR 2.4 dealing with the "Power to perform an act of the court". This provides that:

> "[w]here these Rules provide for the court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed – (a) in relation to proceedings in the High Court, by any judge, Master, Registrar in Bankruptcy or District Judge of that Court…".

38. However, in respect of section 139 leave, a "practice direction" does "provide…otherwise" in that Practice Direction 2B, which addresses Allocation of Cases to Levels of Judiciary, provides as follows:

> "3.1 A Master or District Judge may not make orders or grant interim remedies…
> g) in applications under section 139 of the Mental Health Act 1983 for permission to bring proceedings against a person".

39. Mr Fortt cited CPR 3.10 which provides as follows:

> "3.10. Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

40. He submitted that the combined effect of CPR 2.4 and Practice Direction 2B, paragraph 3.1(g) was "an error of procedure" for the purposes of CPR 3.10. This rendered the Master's order invalid and it should be declared as such under CPR 3.10(a). The consequence of that would be, applying *Seal*, that this second claim brought by the Claimant was also a nullity.

41. Mr Simblet argued that CPR 2.4 did not confer jurisdiction on the Master, which exists under statute. In any event he contended that the Master's order was valid under the common law doctrine of de facto authority. This holds that:

> "The acts of an officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so": *Fawdry v Murfitt* [2003] QB 104, at 112A-B, per Hale LJ (as she then was), citing *Wade & Forsyth, Administrative Law*, 8th ed (2000), pp.291-292.

42. In *Fawdry* a trial was heard by a judge authorised to sit in the Technology and Construction Court ("the TCC") but not in the Queen's Bench Division (as it then was). Just before the trial an order was made transferring the case to the

TCC. However, no order was ever drawn up and contrary to the relevant practice direction parties had not been given the opportunity to be heard on the issue of transfer. On appeal, the Court of Appeal held that the case had been validly transferred to the TCC such that the judge had the power to hear it. The Court also considered the alternative argument that, even if the case had not been validly transferred, the de facto authority doctrine applied to render the judge's order valid. At [18]-[28], Hale LJ reviewed the authorities in detail. She concluded at [29] that the circumstances of the case fell within the doctrine:

> "Judge Davies is indeed a judge, validly appointed as such. All those involved in arranging for her to hear this case believed that the case had been properly assigned to her. She herself believed the same. She sat as such and was treated as such by everyone involved…It could not be said that her want of authority was notorious".

43. Ward LJ agreed with Hale LJ's conclusion on the de facto authority issue: [59]. Sedley LJ made clear in his judgment that he would have been less supportive of the argument had the case depended on it: he was concerned about whether it might be said that the judge's want of authority in her capacity as a High Court judge (as the judge had described herself) was or should have been known to her: [40]-[48].

44. In *Baldock v Webster* [2006] QB 315, a preliminary issue was tried by a Recorder who mistakenly thought he was sitting in the County Court. In fact, the case was a High Court matter which the Recorder was not authorised to hear. The Court of Appeal held that the Recorder's decision was validated by the de facto authority doctrine. Laws LJ (with whom Arden LJ and Kennedy LJ agreed) referred to the public policy on which the de facto doctrine is based. At [15], he quoted the extract from *Wade & Forsyth* cited in *Fawdry* and continued:

> "No doubt the general reputation of the law and the public's confidence in it must be protected as surely as the interests of individual parties who have proceeded on the assumption that a judgment in their case is perfectly valid, where that is exactly how it seems to all the world. Public confidence as well as individual parties are, in my judgment, protected by the requirement that there be a court of competent jurisdiction convened to hear the case, that the judicial officer be not a usurper and that he has a colourable title to sit where he does".

45. At [16] Laws LJ found that the Recorder was entitled to "suppose that the case was advisedly listed before him". At [17], he held that the fact that the Recorder was mistaken as to the status of the court in which he was sitting rather than as to the nature or the extent of his own jurisdiction made no difference to the application of the de facto authority doctrine.

46. At [19], Laws LJ concluded:

> "The plain fact here is that the case was proceeding in a court competent to hear it. The judge was not a usurper. The parties and the judge apprehended no defect in his appointment or authority. He had what has been called "colourable authority" or "colourable title" because he was a duly appointed recorder eligible to be authorised by the Lord Chancellor to sit in the High Court".

47. At [22] Arden LJ expressed the view that:

> "To draw over-technical distinctions in the application of the de facto doctrine would…provide an undesirable incentive for a party dissatisfied by the judgment of a judge to investigate and challenge his authority to hear the case".

48. Both Arden LJ and Kennedy LJ drew attention to the possibility in the last resort of an appeal on the merits: [21] and [24].

49. More recently, in *Popely v Popely* [2018] EWHC 276 (Ch), an application for permission to continue a derivative action had been heard by a Deputy Master. This was said to be contrary to Practice Direction 19C – Derivative Claims, paragraph 6(1) of which provides that such applications in the High Court "will be…decided by a High Court judge". On appeal David Stone (sitting as a Deputy High Court Judge) dismissed this argument because on closer examination of the dates in question, it was apparent that the application fell to be dealt with under the regime in place before the Practice Direction had come into effect, such that the Master was not excluded from hearing the application.

50. However, he went on at [62] to hold that he would, otherwise, have upheld the Master's order under the de facto authority doctrine, holding as follows:

> "It is clear from the Court of Appeal's judgment in *Baldock v Webster* that the doctrine is not to be applied technically - but rather in light of the evil it is designed to avoid. Whilst I appreciate that there is a difference between a Recorder who mistakenly thought he was sitting in the court for which he was authorised, and a Master who considered that he could hear a case that ought to have been assigned to a judge, I do not consider that the principles differ. The Master was not "a usurper". He had absolute "title" to sit where he sat, and can be excused for not referring the case to a judge when he was not asked to do so. An appeal was available (with permission) from his decision. Public confidence requires that the *de facto* office doctrine also apply on the facts of this case."

51. Mr Simblet relied on this line of authorities to submit that the Master was not a "usurper". The Master had granted the application in good faith. He and the Claimant were unaware that Practice Direction 2B precluded the Master from granting section 139 leave (perhaps because, somewhat anomalously, Masters can grant the permission that is required under the Criminal Justice Act 2003, section 329 for a claimant who seeks to bring proceedings arising out of an incident following which the Claimant has been convicted of an imprisonable offence). However, the fact that the Master did grant leave means that the order remains valid.

52. Mr Simblet submitted that this approach was consistent with the long-standing constitutional principle that court orders must be obeyed unless and until they are set aside: see, for example, *R (Majera, formerly SM (Rwanda)) v Secretary of State for the Home Department* [2021] UKSC 46 at [44], where reference was made to the principle applying to orders "whether null or valid, regular or irregular".

53. Mr Fortt disputed that the de facto doctrine applied. He argued that in all three cases, the parties had treated the judge as competent to act in the case. That key feature was plainly absent here: in fact, due to the failure to serve the application on the Defendant, the Defendant had no idea that the matter had been placed before a Master and would have objected if she had known.

54. However, in my judgment, Mr Simblet was right to contend that the genesis of the de facto authority doctrine is not directly related to the parties' explicit or implicit consent. Rather, the authorities emphasise that it is a rule of law that promotes the strong public interest in orders being treated as final, and made with proper authority, unless there is good reason to set them aside.

55. The case-law makes clear that, as Arden LJ said in *Baldock*, an "over-technical" approach to the application of the doctrine is inappropriate. The fact that the order in this case was made on a without notice basis, unlike those in the cases cited above, is not, in my judgment, a reason to find that the doctrine does not apply. Further, even if express or implied consent of the parties was a requirement, it was present here: the only party before the Master was (wrongly) the Claimant and his solicitor (wrongly) understood that a Master could deal with the application.

56. Rather, I consider that this case is on all fours with *Popely*. In both cases the disputed order was made contrary to a Practice Direction about the allocation of judicial business. These were similarly worded: in *Popely*, the applicable Practice Direction provided that the application in question "will" be decided by a judge rather than a Master; here, the Practice Direction stated that a Master "may not" hear the application. For the same reasons as the judge gave in *Popely* at [62], I find that the doctrine of de facto authority applied to the Master's order. The Master was not "a usurper". He had absolute "title" to sit where he sat. An appeal was available (with permission) from his decision.

Further, as his order was made without a hearing and without notice to the Defendant, there was a right to apply to set it aside or vary it under CPR 23.10.

57. On that basis CPR 3.10(a) applies: there has been "error of procedure" in the form of a "failure to comply with a…practice direction" but the error does not invalidate the steps taken in the proceedings after the Master's order. The Claimant's claim was therefore validly commenced, as he had leave under section 139 to bring the claim.

Issue (2): Should the Master's order be declared invalid under CPR 3.10(a) by reason of other procedural failings and/or instances of impropriety by the Claimant?

58. Mr Fortt contended that there had been significant procedural failings and unfairness due to the Claimant's failure to bring to the Master's attention highly significant matters. He argued that irrespective of the outcome of Issue (1), these matters justified a declaration that the order was invalid.

59. *First*, he relied on the Master's decision to determine the matter without notice, which he argued was procedurally improper having regard to the importance of the nature of the application. This had been compounded by the failure of the Claimant to bring to the Master's attention the fact that the Defendant had indicated that any such application would be opposed (as the Defendant's 4 January 2022 letter had not been placed before the Master). In light of the recognition of the danger of dealing with important applications on paper (see, for example, *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 WLR 1945 at [38]), it is likely that the Master only proceeded to do so, as he assumed that the application was not opposed.

60. *Second*, he submitted that the Claimant had failed to ensure that the Master had an accurate picture of events. He relied on the absence from any of the Claimant's paperwork of the fact that the police officers had entered his flat due to his threat to take his own life; and the plainly incorrect assertion to the effect that he was told that he was being detained while he was in the flat. Further, when the Master sought further information, he was wrongly informed in the Claimant's solicitor's letter dated 1 April 2022 that the officers had purported to exercise the section 136 power in the flat. These matters meant that the Master was unable to make a fair decision on the section 139 application.

61. *Third*, he relied on the Claimant's failure to comply with the important safeguards under CPR 23.9(2). This provides that where the court has dealt with an application without notice, and where the court has made an order on the application, a copy of the application notice and any evidence in support must, unless the court orders otherwise, be served with the order on any party or other person against whom the order was made or sought. Although CPR

23.9 does not include a time limit for service, Mr Fortt submitted that the implication is plainly that this occurs as soon as possible. However, here, the Claimant's solicitor did not serve the Master's order when it was made, and did not serve it for almost a year, by which point the proceedings had been issued. By then the Defendant had been deprived of the opportunity to stop the proceedings being issued by applying to set aside the Master's order under CPR 23.10 (albeit that the order did not refer to this right, as it should have done).

62. In my judgment, there is some force in each of these points. However, I was taken to no authority to support the proposition that any of these issues, or any combination of them, actually rendered the Master's order invalid. To the extent that some of them evidence errors of procedure in the form of failures to comply with the rules, in my judgment CPR 3.10 applies, and the errors do not, of themselves, invalidate any steps taken in consequence of the Master's order.

Issue (3): Should the claim be struck out pursuant to CPR 3.4(2)(c) and/or (b)?

63. CPR 3.4(2)(b) permits the court to strike out a statement of case if it appears to the court that the statement of case is "an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".

64. CPR 3.4(2)(c) provides such a power if it appears to the court that "that there has been a failure to comply with a rule, practice direction or court order".

65. Mr Fortt submitted that because the Master's order was a nullity for the reasons given under Issue (1), the claim should be struck out under CPR 3.4(2)(c) because the Claimant had failed to comply with a rule, namely that encompassed by section 139. It is not entirely clear that the primary legislation in which section 139 is located is, in fact, a "rule" for the purposes of CPR 3.4(2)(c). Given the consequences of *Seal*, any relevant proceedings brought without section 139 leave are a nullity in any event and an order for strike out would arguably be unnecessary. In any event, on the facts of this case, for the reasons given under Issue (1), I am not satisfied that the Master's order was a nullity and so I decline to strike the claim out for this reason.

66. Mr Fortt contended that the matters relied on under Issue (2) also merited the claim being struck out (i) under CPR 3.4(2)(c) because they were clear examples of the Claimant failing to comply with the rules; and/or (ii) under CPR 3.4(2)(b), because the matters were so serious they constituted an abuse of the court's process. For these purposes he also relied on the fact that the Claimant had issued the first claim without making a section 139 application at all (despite having the need for it drawn to his attention by the Defendant's solicitor) and had sought to have the section 139 application heard by a Master, when that was not permissible.

67. The fact that the Claimant has already brought one claim, struck out as being a nullity, is, in my judgment, of no real relevance to the question of whether this claim should be struck out: the Claimant's solicitor accepted that the first claim was issued in error, the Defendant was never served with it; and the Claimant has borne the costs of it.

68. Similarly, I do not find the fact that the Claimant's solicitor incorrectly asked for this application to be determined by a Master particularly persuasive in the context of a strike out application. This was, as the Claimant's solicitor accepted, a mistake, but it was one that was not picked up by either the court staff or the Master himself.

69. It is a feature of the chronology that the Master dealt with the application without notice and appears to have assumed that the application was not opposed. However, I am not persuaded that the Claimant can be properly criticised for this state of affairs. The Claimant's solicitor had made clear on the application notice that the application was to be served on the Defendant's solicitor; he had sought a hearing; and he had given a time estimate for it. Although I have not seen the draft order appended to the application, the Claimant's solicitor's evidence is that the draft order did not reflect the application being granted on a without notice basis. Further, paragraph 6 of the solicitor's witness statement in support of the application had made clear that it was the Defendant's case that the officers' actions were lawful.

70. The Claimant's solicitor therefore clearly anticipated that the application would be dealt with as one made on notice, and at an inter partes hearing. He was therefore entitled to assume that the Defendant's opposition to the application, if maintained, would be made clear at the hearing.

71. It is arguable that once the Master sought further information from the Claimant's solicitor as to the basis of the application, it should have become apparent that the Master was proposing to deal with the application on the papers; and that the Claimant's solicitor should have copied his 1 April 2022 letter to the Defendant even though the original email from the court staff had not done so. However, in my judgment it is likely that the significance of this exchange of correspondence is being assessed with the benefit of hindsight, because it is now known that the correspondence led very rapidly to the without notice order being made. That would not necessarily have been apparent to the solicitor who received the query from the Master and who may have thought the matter was still proceeding towards a hearing.

72. The key procedural failing by the Claimant's solicitor was, in my judgment, not serving a copy of the Master's order on the Defendant's solicitor in breach of CPR 23.9. This was especially important given that it was by this point apparent that the order had been obtained without notice or a hearing, both of which the Claimant's solicitor had anticipated would have occurred. However, that failing was capable of remedy by the Defendant's right to apply to set

aside or vary the order under CPR 23.10. That right has now been exercised by the Defendant. If there is force in the arguments that the Master's order should not have been made either for the reasons advanced under Issue (1), or on its merits, it is capable of being set aside.

73. As to the argument that the Claimant had advanced a factually inaccurate picture to the Master in several respects:

(i) Mr Simblet was right to contend that the burden of justifying the decision to enter the Claimant's flat is on the Defendant (given that the fact of entering the flat is admitted). The Claimant cannot therefore be criticised for not emphasising in his Particulars of Claim the basis on which the officers may seek to justify their actions (even if some of the factual background to that rationale is later admitted by the Claimant). In any event paragraph 8 of the Particulars of Claim and the 1 April 2022 letter had referred to the Claimant being told by the officers that they had concerns about his welfare.

(ii) The pleaded assertion that the Claimant was told that he was being detained while he was in the flat has now been accepted as an error, but does not alter the thrust of the Claimant's case, to the effect that he was <u>in fact</u> detained while in the flat.

(iii) As to the Claimant's solicitor's 1 April 2022 letter, there is presently a factual dispute as to whether and if so when the officers exercised their section 136 powers. There was nothing factually inaccurate in the contents of the letter. The letter was also legally accurate, save for the assertion that the section 136 power requires that a person be "found" in a public place (which it no longer does); but this error does not negate all the other points being made in the letter.

In any event these are precisely the sort of issues that the Claimant's solicitor anticipated would be dealt with on the hearing of the application; and which can now be dealt with on the Defendant's application to set aside the Master's order.

74. I am therefore not persuaded that the Claimant's conduct of the claim has constituted an abuse of process for the purposes of CPR 3.4(2)(b); or that strike out is merited under either CPR 3.4(2)(b) or (c). I make this finding not least because strike out is a "draconian remedy and one that should be seen as a last resort": see, for example, *Cable v Liverpool Victoria Insurance Co. Ltd* [2020] EWCA Civ 1015; [2020] 4 WLR 110 at [45].

75. For these reasons I dismiss the Defendant's application for strike out under CPR 3.4.

Issue (4): Should summary judgment be granted to the Defendant under CPR 24?

76. Under CPR 24.2, the court give summary judgment against a claimant on the whole of a claim or on a particular issue if "(a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or…(b) there is no other compelling reason why the case or issue should be disposed of at a trial".

77. Mr Fortt relied on the following facts which he contended were clear from the BWV and the IDR: (i) the Claimant had stated that he intended to take his own life; (ii) the dispatcher reminded the officers of the powers to enter premises under the Police and Criminal Evidence Act ("PACE"), section 17, which includes at section 17(1)(e) a power to do so to save "life and limb"; (iii) having so entered, the Claimant was at no time told by officers whilst in his flat that he was being detained (such that the Claimant's case that section 136 powers were so exercised in the flat is untenable); (iv) the Claimant was told that he needed to leave his flat for his own safety due to the presence of fumes which were making the officers feel unwell; and (v) once he was in the corridor the Claimant was asked questions at some length about his wellbeing and the reasons for the overpowering fumes.

78. He submitted that it was following that conversation in the corridor that the officers decided to exercise their section 136 powers. Accordingly, at that time, they formed the view that the Claimant appeared to meet the criteria for the exercise of section 136 powers. He was already in a public area for reasons connected entirely to his own safety. There had been no conduct on the part of the officers to suggest any detention before the exercise of the section 136 and at the time that the officers formed the view that such a course was appropriate, he was encountered in a public place. Summary judgment was therefore appropriate because the pleaded factual case had an "absence of reality": *Three Rivers DC v Bank of England (No.3)* [2001] 2 All ER 513 at 568, per Lord Hobhouse.

79. Mr Simblet relied on the fact that until the police officers arrived, the Claimant was inside his own home. He noted that it did not appear to be suggested by the Defendant that he had been given any choice in the events that took place. It was therefore the Claimant's case that the officers had used compulsory powers to enter his flat, to detain him in it and to remove him from it. The latter point was also suggested by documentation referring to the fact that the officers "have him" outside the flat.

80. On that basis, it was trite law that the Defendant will bear the burden of justifying the trespass to his home (see *O'Loughlin v Chief Constable of Essex* [1998] 1 WLR 374, especially Roch LJ at 382-383), any detention found proved, such detention being challenged as false imprisonment (see, for example, *R v Governor of Brockhill Prison, ex parte Evans (no. 2)* [2001] AC

19, at [32], [35] and [42]) and the threatened and actual use of force on him which is challenged as assault (see *Ashley v Chief Constable of Sussex* [2008] UKHL 1 AC 962).

81. He argued that based on the material before the court, the Defendant could not meet the threshold for summary judgment. The Claimant's pleaded case was, in essence, that the officers had compelled him to leave his own home under their immediate control and sometime after that detention had begun, had purported to inform him of the legal basis for the detention. Detention does not necessarily begin when a detainee is informed of the detention.

82. However, there was no evidence before the court making clear what legal power the officers had, and had used, to remove the Claimant from the flat. There was some uncertainty among the officers at the scene as to their powers: there was reference, for example, to the Mental Capacity Act; and it was common ground that the section 136 power could not apply inside the Claimant's flat. On that basis, the analysis set out in the Claimant's solicitor's 1 April 2022 letter, and accepted by the Master, to the effect that officers had wrongly used their section 136 powers to detain the Claimant inside the flat, was not unrealistic.

83. Although the wording of section 136 has changed since *Seal*, and it no longer refers to a person being "found" in a public place (simply that they are "at" a place other than the place where they are living), Mr Simblet submitted that this case had some similarities with a scenario described by Baroness Hale in *Seal*. The police case was that Mr Seal was first arrested inside his mother's home for a breach of the peace, and that, having been taken outside he was then detained under section 136. At [60], she observed as follows:

> "The police may well have an answer to Mr Seal's claim. But their case is not without difficulty. If he was "removed" under section 136 of the *Mental Health Act 1983* from his mother's home, he cannot have been "found in a place to which the public have access". If he was arrested in her home for a breach of the peace, and then "removed" under section 136 after they had taken him outside, can it be said that they "found" him there? (To say otherwise would deprive section 136 of much of its usefulness when an arrested person is later discovered to have a mental disorder.) These are questions which deserve to be addressed at the trial of the claim. By no stretch of the imagination is this vexatious. It may not be worth a great deal of money but that is not the point".

84. In my judgment, it is central to the application for summary judgment here that there remain a series of factual disputes relevant to the Claimant's claims, none of which can properly be determined on such an application: see, for example: *Partco Group Ltd & Anor v Wragg & Anor* [2002] EWCA Civ 594;

[2004] BCC 782 at [28](6). There, the Court of Appeal reiterated that it is inappropriate to deal with cases at an interim stage where there are issues of fact involved "unless the court is satisfied that all the relevant facts can be identified and clearly established". That does not apply here, for the following reasons.

85. There is a dispute about what the officers intended to do when they went to the Claimant's premises. The Defendant has filed no Defence setting out the officers' case on this issue and there is no direct evidence from the officers before the court. In my judgment Mr Simblet was right to contend that it is at least arguable that the officers intended to remove the Claimant from his flat.

86. There is a dispute as to the significance, if any, of the ambulance being called before mention was made by the officers of the section 136 power. Mr Fortt argued that it was clear that the ambulance was called because of the concern about fumes from the flat. However, Mr Simblet may be right to suggest that calling the ambulance was part of the section 136 procedure and illustrated the officers' mindset, not least because (i) the IDR records that an ambulance was requested "to assess" the Claimant; and (ii) section 136 (1C) envisages an officer consulting a medical professional before the exercise of the section 136 power.

87. More fundamentally, there is a dispute as to when and where the detention of the Claimant began. It is well-recognised that detention is "a matter of fact… not a legal concept": *Lewis v Chief Constable of South Wales* [1991] 1 All ER 206 at 209c, per Balcombe LJ, citing with approval (i) Viscount Dilhorne's observation in *Spicer v Holt* [1976] AC 987 at 1000 that "[a]rrest is an ordinary English word…Whether or not the person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases; and (ii) Lord Diplock's formulation in *Holgate-Mohamed v Duke* [1984] AC 437 at 441 to the effect that "arrest….starts with the arrester taking a person into his custody (ie. by action or words restraining him from moving anywhere beyond the arrestee's control)…".

88. Applying those tests, it is arguable that the Claimant was detained inside the flat. The BWV shows the Claimant being surrounded by a number of police officers in the flat and the officers directing the Claimant to go with them. The BWV appears to show an officer's hand on the Claimant's arm, as if to guide him from the flat. The words used were to the effect that the Claimant "cannot go back in" and "must go with the sergeant". The officers are restricting his movement both back into and away from the flat. They refused to let him back in to the flat to get his shoes.

89. If the Claimant proves at trial that he was detained inside the flat, the burden of proof will shift to the Defendant to justify that detention. The Defendant has served no Defence setting out the legal basis for that detention (or indeed the

trespass and assault alleged). However it is agreed that section 136 does not provide that power. It is, in my judgment, at least arguable that the officers wrongly exercised their section 136 powers of detention inside the flat.

90. In his oral submissions, developed further in his reply submissions, Mr Fortt suggested that common law powers to protect life and limb might have been the legal basis for the officers removing the Claimant from the flat. He may well be right that PACE, section 17(1)(e) would be deprived of its force if, on legally entering premises, the officers had no power to remove someone from the premises to protect their life or limb. However, I agree with Mr Simblet that this is an unsatisfactory basis on which to grant summary judgment against the Claimant, not least given the central nature of this issue to the claim.

91. Further, I consider that the comparison with Baroness Hale's scenario in *Seal* is a valid one: there is at least a question to be asked about whether having encouraged or actually removed the Claimant from the flat under powers of detention, the officers can properly rely on their section 136 powers. It is pertinent in this regard that the Code of Practice to the MHA provides at paragraph 16.18 that "It is not appropriate to encourage a person outside in order to use section 136 powers". The Code does not have the binding force of legislation but it is not "mere advice" and "should not be departed from without cogent reasons": *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] AC 148. Mr Fortt's response to this point – namely reliance on the gap in time between the Claimant leaving the flat and the officers saying that they relied on their section 136 powers – is not a complete answer to it. This is because it is at least arguable that the officers had intended to, and did, use their powers earlier.

92. Finally, there is a substantive and central dispute as to whether the Claimant was in "immediate need of care or control" for the purposes of the use of the section 136 power, not least as the IDR records that he was "safe and well".

93. For these reasons I do not accept Mr Fortt's argument, again developed in oral submissions for the first time, based on the principle set out in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 2 AC 245. This submission was to the effect that the Claimant would, at best, be entitled to nominal damages, because it is beyond argument that even if the incorrect power was, in fact, used to remove the Claimant from the flat, there was another power to so remove him; and (potentially also) that the Claimant would have been lawfully detained under section 136 in any event.

94. In my judgment these are difficult legal issues that also render summary judgment inappropriate: as the Court of Appeal held in *Wragg* at [28](5), "[s]ummary disposal will frequently be inappropriate in complex cases".

95. For these reasons I dismiss the Defendant's application for summary judgment under CPR 24.

Issue (5): Should the Master's order be set aside under CPR 23.10 because he was wrong to grant section 139 leave on the merits?

96. The House of Lords in *Seal* endorsed the approach that had been taken to the granting of section 139 leave by the Court of Appeal in *Winch v Jones* [1986] QB 296. In *Seal* at [20] Lord Bingham observed that the threshold has been set at a "very unexacting level" and that "[a]n applicant with an arguable case will be granted leave"; at [70] Lord Brown held that the Court of Appeal in *Winch* decided that the test now is simply "whether the case deserves further investigation by the court".

97. In *Winch* the Court concluded that requiring proof of a prima facie case was too stringent a test for section 139 leave. At 305B-C, Sir John Donaldson MR held that section 139 is intended to strike a balance between the legitimate interests of the applicant to be allowed to seek the adjudication of the courts upon any claim which is not frivolous, vexatious or an abuse of process, and the equally legitimate interests of the respondent to such an application not to be subjected to the undoubted exceptional risk of being harassed by baseless claims by those who have been treated under the mental health legislation. At 305H , Parker LJ similarly held that leave ought to be granted it the claim was neither frivolous nor vexatious.

98. In my judgment, all the issues I have identified under Issue (4) are, to adopt Baroness Hale's words in *Seal*, ones "which deserve to be addressed at the trial of the claim" and "[b]y no stretch of the imagination" are they "vexatious".

99. The Master was therefore correct to grant section 139 leave on the merits.

100. Further, in my judgment the fact that the preamble to the Master's order referred solely to the "without reasonable care" element of section 139(1) does not preclude the Claimant from arguing that the "in bad faith" element is also made out if so advised: those elements are set out in section 139(1), whereas the leave requirement is separately provided for in section 139(2). The Claimant's case as to the different limbs of section 139(1) will, however, need to be set out in a Reply to the Defence.

101. I therefore decline to set aside the Master's order under CPR 23.10 on the basis that he was wrong to grant section 139 leave.

102. It follows from my conclusions on the preceding issues that no order is required on the Claimant's application.

Conclusion

103. Accordingly for all these reasons:

(i) The Master's order is not to be declared invalid under CPR 3.10(a) in light of the prohibition on Masters making such orders or by reason of other procedural failings and/or instances of impropriety by the Claimant;

(ii) The Defendant's applications for strike out and summary judgment are dismissed; and

(iii) The Master's order is not set aside under CPR 23.10 because he was wrong to grant section 139 leave on the merits.