Neutral Citation Number: [2023] EWHC 566 (KB)

Case No: KA-2022-000236

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM HHJ RICHARD ROBERTS
IN THE CENTRAL LONDON COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

MORTGAGE EXPRESS

Claimant/Respondent

- and –

CHRISTOPHER RAMSAY

Defendant/Applicant

- -
- -

Mr Christopher Ramsay appeared in person
Mr William Birch (instructed by **Walker Morris LLP**) for the **Claimant/Respondent**

Hearing date: 14 December 2022
Transcript provided of hearing before HH Judge Richard Roberts: 17 January 2023
Draft judgment handed down: 10 March 2023

Approved Judgment

This judgment was handed down remotely at 12noon on Wednesday 15 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE FREEDMAN:

1. This is an application for an extension of time to file an appeal notice and for permission to appeal out of time against an order of HH Judge Roberts ("the Judge") made on 8 December 2021. By an order of 2 December 2022, Mr Justice Goose directed that the application and, if appropriate, the appeal itself, be heard orally on 14 December 2022.

2. On 17 July 2018, the Claimant obtained a possession order in respect to the Claimant's property at 5 Ruben Place Enfield EN36 XG ("the Property"). The matter arises out of a hearing which took place on 8 December 2021, where the hearing was by Microsoft Teams in the absence of the Defendant.

II Background

3. The chronology is long and complicated. The possession order was obtained on 9th July 2018. At a hearing dated 22nd February 2019, arrears were determined of £70,000.38. Between May 2019 and July 2021, there was a history of stays and adjournments. In large part due to illness and COVID. no payments were made, and the arrears increased.

4. At the hearing of 8 December 2021, two applications were heard in the absence of the Defendant but upon attendance of the Claimant by Counsel Mr Christopher Greenwood, namely:

   (1) the Defendant's application of 6 June 2019 for a stay pending an eviction or for the eviction to be aborted ("the Stay Application");

   (2) the Claimant's application dated 9 August 2019 for permission to transfer enforcement of possession order to the High Court pursuant to the County Courts Act 1984 s.42(2) ("the Transfer Application").

5. The first application was dismissed. The second application was granted. It was also ordered that there be a declaration that the Defendant's application was totally without merit. It was further ordered that the Defendant must copy the Claimant into correspondence with the court.

6. In addition to the two applications, the Court also heard an application on the part of the Claimant that the Defendant to do attend or be represented at any future hearings. The Court refused to make an order about this on the basis that it was not satisfied that it had the power to make it: see paras. 1-10 of the judgment.

7. The reasons for the absence of the Defendant at the hearing of 8 December 2021 is an important aspect of the application for permission to appeal. The Defendant says that he did not know about the Microsoft Teams hearing. On the contrary, the Defendant attended court where he says that he was told by a court employee that the hearing was not taking place. The first that he knew about it was on a return from a period of 11 days away on 26 November 2022. He promptly issued a notice of application for permission to appeal.

8. The Defendant submits that the order made on 8 December 2021 should be set aside. In the course of a hearing on 14 December 2022, he said more than this, namely that the order that was made was a forgery in the sense that there was no hearing on that date. I was told that the Defendant had ordered a transcript to prove that there was no hearing. At the time that the matter was before me, there was no transcript. The question was whether I should await the transcript which would involve the judgement being deferred into the New Year. I agreed to await the transcript before giving judgment. I received the transcript on 17 January 2023.

9. It is apparent from the transcript that there was a hearing on 8 December 2021. I reject the suggestion that there was no hearing or that the order was a forgery. The evidence of the transcript shows that there was a hearing. There is an explanation, albeit not an excuse, as to how the order came to be prepared and entered so late. This is unsatisfactory, but the allegation of forgery is based on speculation falling short of any substantial evidence of a forgery.

10. There were a number of unusual features which had led the Defendant to make his assertions, namely:

    (1) There was a procedural mishap surrounding the hearing of 8 December 2021. The Defendant sought an adjournment of the hearing because of illness. That led to a requirement that the Defendant provide an unredacted isolation notice and also provided for the Claimant to respond. In the meantime, on 7 December 2021, the Court ruled that the hearing for 8 December 2021 would occur by Microsoft Teams. This ruling did not come to his attention.

    (2) In the event, the Defendant felt compelled to attend Court on 8 December 2021 in the belief that the hearing was to be in person. He was told at court that there was to be no hearing. That was true in the sense that there was to be no court hearing in person, but he was not told about the hearing by Microsoft Teams.

    (3) There was then a delay about the processing of the order of many months. The sealed order did not come to the Claimant from the Court until 9 September 2022, and this contained no provision for service on the Defendant. As noted above, the Defendant says that the order only came to his notice on 26 November 2022. In his Grounds of Appeal (Ground 1), the Defendant challenges the validity of the order because it does not state the date and time of the hearing. This does not affect the validity of the order: if it did, it could be corrected without the need for an appeal.

11. The Defendant has put together each of these features and has arrived at a conclusion that he must have been misled to such an extent that the hearing of 8 December 2021 must not have occurred. He has now been provided with the transcript and had the opportunity to make submissions about this. He now relies upon a witness statement of 20 January 2023. In that witness statement, he no longer contends that the hearing did not take place, but alleges that there were grave improprieties which occurred, namely:

(1) The application of the Claimant for a transfer to the High Court dated 9 August 2019 was not heard or dealt with, contrary to the order made by the Judge. The Defendant draws attention to the transcript of the hearing of 8 December 2021 where the Judge asked whether the application dated 9 August 2019 was listed, and Mr Greenwood answered by saying that it was unclear: see p. 13-14. The Defendant says that contrary to evidence of the Claimant, he did not receive the application. He says that this was a tactical measure of the Claimant: see paras. 36-39. In connection with his application for an adjournment, he said that the application had not been listed and has not been served on him: see the Defendant's witness statement dated 20 January 2023 at paras. 4-9.

(2) The Claimant failed to process the order despite the Judge saying that if the order had been emailed to him, he would approve it today. The Defendant's case is that the Claimant has given an impression by its communications to the Court chasing the order that the matter was urgent. He says that the Claimant's actions in not following the instruction of the Judge to have the order sent to the Judge on the day when the order was made was deliberate to exclude and prevent him from appealing the order *and "to keep me in the dark regarding the content of the proceedings and to prevent me from obtaining the Order for several months, so as to scupper and prevent an appeal"*: see the Defendant's witness statement dated 20 January 2023 at paras. 10-14.

(3) The documents of the Claimant and in particular submissions made to the Court on 7 December 2021 were not passed on to the Judge by the Judge's clerk in breach of his article 6 rights. He accuses the Court of having suppressed these documents and the Claimant of failing to inform the Court of these documents despite knowing about the same: see the Defendant's witness statement dated 20 January 2023 at paras. 16-22.

12. As regards the first of the above points about whether the application for a transfer to the High Court was served on him, it is apparent from the transcript that the Judge did hear that: see p. 6 of the transcript at lines 15-19 and para. 13 of his judgment. The application was mentioned in the Claimant's skeleton argument dated 6 December 2021 at paras. 1(d) and 47-49. The point made by the Defendant is that he was not served with this application and that it was not listed to be heard. The Claimant's evidence is that the application was initially made without notice, but it was included in a bundle of documents sent by the Claimant to the Defendant by email on 28 April 2020 in anticipation of a telephone hearing of 29 April 2020: see the witness statement of Calum Ross Davies dated 12 December 2022 at para. 26 and exhibit CRD2 at pages 94-96. However, the Defendant's position is that he did not know about this, and insofar as it was served as part of a bundle, it was buried in it.

13. The Claimant's Counsel submitted that the N54A procedure was used correctly when it was inapplicable to the case because there had been no obstruction. On the contrary, he suffered from illness: see the Defendant's witness statement at paras. 23-28.

14. This judgment will first consider the relevant law and then apply it first to the Transfer Application and second to the Stay Application.

III The law - Appeals

15. Permission to appeal test – first appeals:

> "52.6
>
> *(1) Except where rule 52.7 applies, permission to appeal may be given only where—*
>
> *(a) the court considers that the appeal would have a real prospect of success; or*
>
> *(b) there is some other compelling reason for the appeal to be heard."*

16. Hearing of appeals:

> "52.21
>
> *(1) Every appeal will be limited to a review of the decision of the lower court unless—*
>
> *(a) a practice direction makes different provision for a particular category of appeal; or*
>
> *(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*
>
> *…*
>
> *(3) The appeal court will allow an appeal where the decision of the lower court was—*
>
> *(a) wrong; or*
>
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.*
>
> *…"*

17. In *Tanfern Ltd v Cameron-Macdonald* [2000] 1 WLR 1311, Brooke LJ at para. 33 said the following about what is now CPR 52.21(3)(b):

> *"So far as the second ground for interference is concerned, it must be noted that the appeal court only has power to interfere if the procedural or other irregularity which it has detected in the procedure in the lower court was a serious one, and that this irregularity caused the decision of the lower court to be an unjust decision."*

18. The question which arises is when a decision based on a procedural irregularity will be "unjust".

19. In *Hayes v Transco* [2003] EWCA Civ 1261, Clarke LJ stated at para. 14

> *"It follows that the question in this part of the case is whether the decision of the judge was unjust because of a serious procedural or other irregularity in the proceedings. It is not, however, sufficient that a serious irregularity should be shown or even that some collateral injustice should be established. The decision must be unjust. As I see it, whether the decision is unjust or not will depend upon all the circumstances of the case."*

20. There is assistance in the context of second appeals as to the meaning of the words *"unjust because of a serious procedural or other irregularity in the proceedings in the lower court".* The Court has held that where there has been a serious procedural irregularity so as to render the first appeal unfair, the Court will be prepared to allow the appeal to proceed even where the prospects of success are not very high. This was said by the Court of Appeal per Dyson LJ in *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60; [2005] 3 All ER 264, [24], and cited by the Court of Appeal in *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 988, [8]. It said the following:

> *"(3) There may be circumstances where there is a compelling reason to grant permission to appeal even where the prospects of success are not very high. The court may be satisfied that there are good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair. Suppose, for example, that the judge did not allow the appellant to present his or her case. In such a situation, the court might conclude that there was a compelling reason to give permission for a second appeal,* ***even though the appellant had no more than a real, as opposed to fanciful, prospect of success****. It would be plainly unjust to deny an appellant a second appeal in such a case, since to do so might, in effect, deny him a right of appeal altogether."* (emphasis added)

21. It is to be noted that there is a route other than by way of an appeal for a person who is absent at a trial. Where it is absence at a trial, the relevant provision is CPR 39.3 which reads as follows:

> *"…*
>
> *(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.*
>
> *(4) An application under paragraph (2) or paragraph (3) must be supported by evidence.*
>
> *(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –*
>
> *(a) acted promptly when he found out that the court had exercised its power to strike out(GL) or to enter judgment or make an order against him;*
>
> *(b) had a good reason for not attending the trial; and*
>
> *(c) has a reasonable prospect of success at the trial."*

22. This has no direct application to an application which is not a trial, but it provides a useful analogy. There is also a jurisdiction to set aside a hearing where a party does not attend. This is provided under CPR 23.11 which provides as follows:

> *"23.11*
>
> *(1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence.*
>
> *(2) Where –*
>
> *(a) the applicant or any respondent fails to attend the hearing of an application; and*
>
> *(b) the court makes an order at the hearing,*
>
> *the court may, on application or of its own initiative, re-list the application."*

23. It is because of the possibility of this causing injustice that the Court has the power to rehear the application. The order can be set aside even after it has been perfected: see *Riverpath Properties Ltd v Brammall* The Times 16 February 2000 (Mr Justice

Neuberger). The power to re-list will be sparingly exercised because of the need to allot to a case only an appropriate share of the court's resources: see *Yeganeh v Reese* [2015] EWHC 2032 (Ch). In that case, Mr David Halpern QC stated also that the merits will be an important factor where either party can satisfy the test for summary judgment.

24. In his Grounds of Appeal (Ground 2), the Defendant states that by conducting the case in his absence, his Article 6 rights under the European Convention on Human Rights ("ECHR") have been infringed (denial of his right to a fair trial). The right to a fair trial in such circumstances is preserved by the right to apply to set aside an order made in a party's absence by CPR 39.3 and by CPR 23.11, and in this case, by the right to apply for permission to appeal. The above law and the way that it is applied is entirely consistent with and gives effect to the Article 6 rights of the Defendant.

IV Application of the law to the instant case

25. It is necessary to consider the issues of delay in bringing the application and the merits of the application. I have had some concern in the light of CPR 39.3 and CPR 23.11 whether an appeal was the appropriate route for the Defendant to take. This is not a point which has been taken by the Claimant. In the circumstances of this case, this does not arise for necessary consideration. The reason for this is whether by way of appeal or by way of an application to set aside the order before the judge who made the order on 8 December 2021, there are the following important questions, namely:

    (1) whether the application has been brought promptly after the Defendant knew or ought to have known of the hearing of 8 December 2021;

    (2) whether the Defendant had a real prospect of success in obtaining a different order from the one made on 8 December 2021.

26. The fact that the court is overlooking the route about an application to set aside under CPR 23.11 or by way of an analogy with CPR 39.3 does not mean that litigants in other cases should consider that this is not a point which may arise.

27. By parity of reasoning from the above cases, the question arises if the Defendant is unable to show that the decision was wrong, what is the threshold on the second ground under CPR 52.21(3)(b)? Is it no more than showing a serious procedural irregularity or is it necessary for the Defendant to show at least a real prospect of success (however low that threshold might be)? In my judgment, it is the latter. This is supported by the cases referred to above about second appeals. The Defendant must usually still show in the circumstances of this case that they have a real prospect of success. It might be different if there was a case of an irregularity involving bad faith e.g. an actual conflict of interest on the part of the judge or misfeasance on the part of the tribunal such as to say that there had not really been a hearing. I am fortified in this view by the analogy of CPR 39.3 where a reasonable prospect of success at trial has to be shown, albeit that this is no more than an analogy.

V Extension of time

28. Before considering the merits, the time for bringing an appeal expired 21 days after 8 December 2021, and the application was only brought in December 2021. In my judgment, it is unfortunate what happened on 8 December 2021, and I do not attach any blame to the Defendant before, during or after the hearing. It is a matter of particular concern that the Defendant went to court and was told that there was not to be a hearing. The Claimant seeks to infer that the Defendant must at some stage have seen an email about the notification of the MS Teams hearing. It has not been proven on the balance of probabilities that this email did come to his notice after the hearing, Absent from that, I do not find that this inference is proven. Further, I do not criticise the Defendant for not contacting the Court to find out what was happening. Whatever caused the delay at court in processing the order, the problem might have been alleviated in the event that the Claimant had taken more active and diligent steps to ensure that it was processed at a much earlier stage.

29. I am satisfied that the Defendant should have an extension of time for bringing the appeal on the basis that on the balance of probabilities he did not know about the judgment of 8 December 2021 until November 2022, and when he found out about it, he acted with diligence in filing a notice of appeal on 1 December 2022. The Claimant submits that the Defendant must apply for relief from sanctions and apply the principles set out in *Denton v TH White Ltd* [2014] EWCA Civ 906;[2014] 1 WLR 3926 and inn *R (on the application of Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633; [2015] 1 WLR 2472. A delay of 336 days is serious and significant, but in my judgment, there is a good reason for the default because the Defendant did not know about the order until 28 November 2022. The Claimant says that he ought to have found out about the hearing of 8 December 2021 earlier, pointing to emails and voice messages which he ought to have picked up, or by following up the matter with the Court and the Claimant. For the reasons above, although he might have received these emails and messages, on the balance of probabilities I do not find that he did. That is the end of the analysis, and there is no point in then going on to consider the third limb of Denton, namely whether in all the circumstances of the case, the Court ought to give permission having regard to the need to try cases justly. Even if the Court did go on to consider the third limb of *Denton*, the unsatisfactory features of the events of 8 December 2021 make it necessary for justice to be done to give the Defendant relief against sanctions.

VI Are the Defendant's allegations about bad faith well made out?

30. In respect of the Defendant's allegations about bad faith, I reject the case that there was or t is an argument with a real prospect of success that there was a deliberate attempt on the part of the Claimant or the Court to cause the hearing of 8 December 2021 to proceed without the Defendant. The statement to the effect that the hearing was not proceeding must have been by reference to the absence of a physical hearing and overlooking for whatever reason the MS Teams hearing which had by then been fixed. There is no reason to believe that there was any attempt to mislead the Defendant. There was no reason for the Court to have misled the Defendant intentionally. There was no reason for the Claimant to steal a march by seeking to deceive the Defendant. It is a strong thing to allege that this would be the case when it is more likely that all happened due to procedural mishaps. It is particularly true in this case where the merits

are all in favour of the Claimant, and the Claimant had nothing to fear from the process of a properly contested hearing. In fact, what has happened in this case is that the Defendant has created conspiracy theories which culminated in his belief that there was no hearing on 8 December 2021. That has been demonstrated not to be the case by the transcript. Further, contrary to what he says, I am satisfied that there is nothing in the transcript which indicates any wrongdoing on the part of the Court or the Claimant's legal advisers. It was a standard hearing where the relevant matters were examined with care.

31. In these circumstances, there is no reason to treat this as a case where a hearing without a party should without more be treated as an injustice due to a serious procedural irregularity. I accept that in principle a hearing of the case without the Defendant might amount to a serious procedural irregularity. In order to prove the injustice in the circumstances of this case, there must be at least a real prospect of success on the part of the Defendant in the substantive matters which were before the Court. This is because without this, the Defendant was simply deprived of the opportunity to argue points which, on this hypothesis, did not have any real prospect of success. That would not give rise to an injustice.

32. It is also to be borne in mind that the Defendant was given the opportunity to argue the case before the Court which he did orally before the Court on 14 December 2022. Further, he has subsequently obtained the transcript of 8 December 2021 and made further extensive submissions through his witness statement dated 20 January 2023 which was sent to the Court on that date. If there had been any injustice, these hearings would have redressed the injustice. It therefore follows that the Court must consider whether or not the Defendant has raised real prospects of success in respect of the Transfer Application and the Stay Application

VII Transfer Application

33. The transfer application was originally made without notice on 9 August 2019. The claim is that the Defendant learned of it and requested that it be stayed by an application dated 16 September 2019. The transfer application was emailed to the defendant at 16.00 on 28 April 2020. A minute earlier at 15.59 on 28 April 2020, the Defendant had emailed the Court to request an adjournment of the hearing of the transfer application, which had originally been listed for 29 April 2020.

34. The Claimant says that at the very least from that point onward, the Defendant was aware of the transfer application. The Defendant's case is that he was not served with the transfer application as he stated in his application of 3 March 2020 and in an e-mail of 7 December 2021 to the Claimant's solicitors. Taken at face value, the assertions of the Defendant were correct that the technical requirements of service of documents which ought not to have been served by email. The Defendant, nonetheless, was aware of the transfer application. Without this, he would have not been in a position to oppose it or to allege that prior to 7 December 2021 that he had not been properly served. He did this (a) in a request for a stay on 16 September 2019, (b) in a request for an adjournment on 28 April 2020, and (d) in his email to the Claimant's solicitors dated 7 December 2021 saying *"As stated previously, I have not been served with the Claimant's without notice application dated 9th August 2019 (for transfer of enforcement)."*

35. For the purpose of this application, the Court will assume that the claimant was in breach of the technical requirements of service of documents other than the claim form by e-mail and a CPR PD6A, para. 4.1. What, then, are the consequences of the court dealing with the transfer application without technical prior service of the Claimant with the transfer application? If the defendant was unaware of the transfer application, he would not have been in a position to oppose it or to have alleged that it had not been properly served. In the circumstances, the technical failure to serve the transfer application on the applicant does not constitute a serious procedural or other irregularity for the purposes of CPR 52.21(3)(b).

36. As regards the merits of the defence of the Defendant to the Transfer Application, he says that there was no reason to make the transfer to the High Court. In my judgment, he is wrong about that because the evidence was that there had been at least four previous occasions when the Defendant had failed to hand over possession of the Property. The bailiffs in their report to the Claimant took the view that they had been defeated in earlier failed eviction terms and had been unsuccessful in enforcing the warrant. A more robust method of enforcement was therefore required to which end a High Court enforcement was sought. A High Court Enforcement Officer is entitled to use reasonable minimal force to remove any occupier from a property, and the police also have a statutory duty to assist the officer in obtaining possession: see the Courts Act 2003, s. 99, Sch. 7, para. 5. In those circumstances, the Court was entitled to make a transfer to the High Court in order to assist in enhancing the Claimant's ability to enforce the Possession Order.

37. The Defendant is unable to raise an argument with a real prospect of success to the contrary either to an appellate court (or if the matter had been a rehearing before a first instance judge considering the matter afresh). The decision on the Transfer Application was therefore neither wrong nor was there a real prospect that it was wrong. Nor was there a serious procedural irregularity because the Defendant was aware of the application. He was not aware of the hearing of 8 December 2021, but that has not given rise to an injustice due to a serious procedural irregularity because (a) the Defendant has had a full opportunity to make submissions as to why the order should be set aside both on paper and in the hearing of 14 December 2022, and (b) there is no real prospect of the order to transfer to the High Court being wrong. It also follows that even if, contrary to the above, there had been a serious procedural irregularity in the nature of failure to serve the Transfer Application and the Defendant was not aware of the same, there has not been an injustice caused thereby. This is because despite the opportunity to state his case on the appeal, the Defendant has been unable to identify any real prospect of being able to raise a case to the effect that the transfer order was wrong. This is the answer to Ground 3 of the Defendant's Grounds of Appeal.

38. There is a further matter in respect of Ground 3. The Defendant complains that the Judge on 8 December 2021 did not have before him a statement of the Defendant of 5 March 2020, that was almost two years before the hearing, and now three years ago. It refers to an already convoluted history. It is apparent that it was not in the hearing bundle for the 8 December hearing, and the Claimant does not appear to have been served with a copy. There is nothing in the statement of 14 December 2022 which casts a different light in respect of the instant application for permission to appeal or could conceivably have led to a different result if the statement had been before the Court. It is to be noted that despite the points taken about not having been served with the

application for a transfer of 9 August 2019, the Defendant responded to the application of 3 March 2020. That application sought the listing of the transfer application and contained a skeleton argument and evidence in support. This only adds to the finding that the Defendant knew of the transfer application irrespective of whether he was served in the appropriate way with the application. It follows that the fact that this statement was not before the Court and its contents do not affect the analysis of the Judge or the application for permission to appeal in respect of the Transfer Application or any other aspect of this application.

39. For all these reasons, there is no real prospect of success in the application for permission to appeal against the order made on the Transfer Application, nor is there any other compelling reason for giving permission to appeal.

III Stay Application

40. The stay application is for the following order:

> *"1. Stay of pending eviction on grounds of improper, irregular and unlawful procedure.*
>
> *2. For the eviction to be aborted and for [C] to be ordered to engage in the correct process."*

41. The unlawful procedure is a complaint of the Defendant that the Claimant should have not used a form N54A. This was done by the bailiffs in July 2019 when the Defendant had failed to hand over possession of the Property on 4 previous occasions. This does not assist the Defendant because the use of N54A notices is not restricted to organised protests. That is simply cited as an example in government guidance. It is available in a case of repeated obstructions of an eviction. In any event, the use of the form N54A was by the Edmonton County Court bailiffs (to whom any complaint could have been addressed). The complaint is not to the Claimant. It is to be noted that the use of this form did not lead to eviction. For all these reasons, this complaint does not assist the Defendant.

42. Even if the use of a N54A had been unlawful, it does not follow that there would have been grounds for a stay. That was used such a long time ago. It was a long time ago even as of December 2021. There was no intention to use a form N54A again. That was because the intention was to use the High Court procedure, and the form N54A was a part of the County Court procedure. Further, and in any event, there was no reason for a further stay when so much time had already elapsed without enforcement by the time of the 8 December 2021 application, and even further time thereafter. That may have been due at least in part to the effect of Covid-19 and the compulsory stays in the light of that, but the passage of time which had elapsed rendered a yet further stay otiose.

43. The Defendant has also sought to contend that the Claimant has acted unlawfully and contrary to the Equality Act 2010 and the ECHR. These arguments have no real prospect of success. As regards the Equality Act 2010 and particularly section 29(1), even if the Defendant had a protected characteristic which is not apparent (he might have been unwell, but there is no evidence that he was suffering from a "physical or mental impairment") and even if there was such evidence, *discrimination* requires *different* treatment based on that disability, whereas the Claimant is not treating the Defendant differently from anyone else who has failed to pay their mortgage for several years and failed to comply with a possession order for well over 3 years.

44. Likewise, there is no real prospect of the argument that Article 8 of the ECHR will assist. First, the rights under the Human Rights Act 1998 s.6(1) and 6(3) related to actions of a "public authority". The Claimant is not such a person: the Claimant is a private company, providing residential and commercial loans and enforcing security in respect of those loans. Insofar as attention is drawn to the Court's exercise of its powers, the Court has to strike a balance between those rights conferred by Art.8 of the Convention and Art.1 of the First Protocol and the rights of banks and other lending institutions. The statutory and common law regimes for dealing with such balance is not incompatible with the Conventions rights: see *Barclays Bank v Alcorn* [2002] EWCA Civ 817.

45. It follows that there is no real prospect of an appellate court (or indeed another court of first instance considering the matter afresh) coming to a different conclusion from the Judge as regards the Stay Application. There is no other compelling reason for giving permission to appeal. Accordingly, the application for permission to appeal in respect of the Stay Application is dismissed.

IX Order that application for a stay was totally without merit

46. The order made on 8 December 2021 was that that application was made totally without merit. I mentioned to the Claimant that in the event that that was the only matter on which there was a real prospect of success, would the Claimant wish to oppose the setting aside of that order? The answer was that the Claimant was willing to forego this part of the evidence. The Court can understand why the Judge made that order in respect of a litigant who had not turned up and without having spent as long as the Court on appeal has done on this case. Although I am entirely satisfied that the Judge was right to find that the stay application should be dismissed and that there is no real prospect of success in an argument against that order, I am not satisfied that against the complicated background, a totally without merit order was appropriate in the light of all the information before this Court. In those circumstances, that part of the order will be set aside. That can be done by my exercising the discretion afresh under CPR 23.11 and setting aside that part of the order, and for this purpose acting as a Judge of the County Court. Alternatively, I have the power to achieve the same result by way of appeal in that Goose J ordered on 2 December 2022 that this Court should hear both the appeal and the application for permission out of time. On this alternative basis, I should give permission and then allow the appeal to that very limited extent.

X Disposal

47. The Defendant's fourth and fifth Grounds of Appeal are in general terms, namely that the order was wrong, unfair and unjust and that there were serious procedural irregularities. This has been dealt with in detail above. The orders on the Transfer Application and the Stay Application were not wrong, unfair or unjust: the Defendant has been unable to raise any argument with a real prospect of success to contrary effect. There has not been any serious procedural irregularity: if there had been, they have been corrected by the opportunities to the Defendant in the appeal and especially in the oral hearing of 14 December 2022 and other consideration of submissions made by the Defendant to state his case. Despite this, the Defendant has not identified any real prospect of success of being able to show that there should not have been a transfer to the High Court or that there should have been a stay of proceedings.

48. It follows that the orders of the Judge do stand except the order that the application for a stay was totally without merit is set aside. Save to this extent, the application for permission to appeal is dismissed. Returning to the point that there had not been an application made under CPR 23.11, it should be added that for the reasons appearing above, it would have made no difference to the result of this case if the application had been made under CPR 23.11. As noted above in respect of both the Transfer Application and the Stay Application, there is no real prospect of an appellate court (or indeed another court of first instance considering the matter afresh) coming to a different conclusion from the Judge, nor is there any other compelling reason for giving permission to appeal.

49. There may be consequential orders sought following this decision. A draft order should be provided together with typographical corrections.