Neutral Citation Number: [2024] EWHC 351 (KB) Case No: KA-2023-000104

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE
KING'S BENCH DIVISION

On appeal from the County Court at Reading
Order of HHJ Melissa Clarke dated 20th December 2021
County Court case number: D00RG704

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2024

Before :

MR JUSTICE COTTER

- -

Between :

SANTANDER PLC

Respondent/Claimant

- and -

ANTHONY HARRIS

Appellant/Defendant

- -
- -

The Appellant in person

Charles Sinclair (instructed by Ascent Legal) for the Respondent.

Hearing dates: 30th November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Cotter:

Introduction

1. By an application made on the 3 October 2023 the Appellant, Mr Harris, seeks to set aside or vary the order made by Sir Stephen Stewart on 19 September 2023 whereby he refused an extension of time to lodge an application for permission to appeal against the order of Her Honour Judge Clarke made on the 20 December 2021.

2. The matter came before me on the 30 November 2023 for an oral hearing. Mr Harris had been able to provide documentation prior to the hearing, including a skeleton argument.

Application for an adjournment

3. At the outset of the hearing Mr Harris made an application for an adjournment on the basis of his mental health "being poor". He produced no medical evidence in support of this application, but stated that he had been diagnosed with Aspergers and in 2015 with autism.

4. Mr Harris made submissions (and was able to answer questions) about both his application for an adjournment also in respect of the merits of the application (the two being interlinked). Indeed he was initially conspicuously able to address the Court at some length about the merits of the appeal/application to set aside and the injustice which he believed had occurred. After weighing up all material factors, including that the overriding objective which includes a requirement, so far as practicable, to ensure that the parties are on an equal footing and can participate fully in proceedings (and also CPR PD 1A) I was initially not minded to adjourn the hearing. In my view given the fact that full written submissions were before the Court, Mr Harris was able to make oral submissions (he gained confidence as matters progressed) and also the impact of any adjournment in terms of delay and wasted costs an adjournment should not be granted. However as the hearing progressed Mr Harris stated that he was beginning to tire mentally, and also that he was in some physical pain and as a result I decided that the just way forward was to adjourn the hearing, in effect part heard, to enable him to provide any further/additional written submissions he wished the court to take into account in respect of his application.

5. Mr Harris filed further written submissions dated 14th December 2023.

6. Submissions in response were lodged by the Respondent on 20th December 2023 but these did not materially add to what was said by Mr Sinclair at the hearing on 30th November in respect of the central issues.

7. I am fully satisfied the combination of the oral hearing which took place and the ability to file written submissions has ensured that Mr Harris has been able to advance all arguments that he wishes to advance in respect of the application to set aside the order of 19th September 2023.

Facts

8. I turn briefly to the underlying facts. The claim concerns property known as Flat 10, Avon Court, Cressex Close, Binfield, RG42 4DR.

9. On the 11 July 2008 Mr Harris entered into a deed of variation to extend the original lease of this property with D.W.D. Property & Investments Company Limited ("DWD") as the lessor, Mr Harris as the lessee, and also the Management Company as a third party. The new lease was for a term of 147 years and incorporated the terms of the original lease including that Mr Harris would pay to the Management Company sums in respect of services charges and also ground rent to DWD of £150 per annum.

10. At the same time as entering into this Lease, Mr Harris entered into a mortgage with the Respondent under which he was advanced £142,500 for the purposes of a re-mortgage and to provide the funds for the extension of the Lease.

11. In or around April 2014, arrears began to accrue on the mortgage. Mr Harris also entered into an IVA.

12. After the IVA had come into existence the Management Company obtained a series of judgments against Mr Harris (on 24th October 2014, 9th April 2015, 27th November 2015 and 10th January 2017) in respect of service charges and administration charges which he was required to pay pursuant to the terms of the lease.

13. On three occasions in April 2015, January 2016 and February 2017 the Respondent received notices served on behalf of DWD pursuant to section 146 of the Law of Property Act 1925 in respect of the failure by Mr Harris to pay service charges, ground rents, and administration charges pursuant to the terms of the lease. On each occasion the Respondent made payment in respect of the Charges in order to secure its interest in the property. Such payments were stated to be without prejudice to Mr Harris's right to dispute the validity of the Charges. The amounts paid were added to the Mortgage account, which continued to be in arrears.

History of the proceedings

14. On the 30 March 2017, the Respondent commenced these proceedings seeking possession of the Property and a money judgment for the outstanding balance due under the Mortgage on grounds that the mortgage was in arrears.

15. Mr Harris defended the claim on the basis that the outstanding balance and arrears had been miscalculated as a consequence of the Respondent having added fees and charges to his outstanding balance to which it was not entitled to add. He also counterclaimed for:

    a. An order that the term of the mortgage be extended;

    b. An order that the mortgage be converted from repayment to interest only;

    c. An order that the Respondent consent to Mr Harris letting the Property; and

    d. Damages for stress and anxiety.

16. Eventually the matter proceeded to a trial before Her Honour Judge Clarke over 3 days from 24th to 26th February 2020. Mr Harris was represented up to, but not at, the trial (direct professional access).

17. After the trial Covid intervened and all possession claims were made the subject to a stay through a temporary modification of CPR 55.

18. Her Honour Judge Clarke was of the view that the handing down of a written judgment further to the hearing would be caught by the stay. She eventually handed down a written judgment on the 21st December 2021, in which she found in favour of Respondent on every point in issue. The Learned Judge granted the Respondent possession of the property by 4 pm on 17th January 2022, a money judgment for £195,308.64 and ordered that the Respondent was entitled to debit its costs of the proceedings to the Mortgage account.

Judgment

19. I will not rehearse the content of the judgment in great detail given the nature of the application before Court. However I will refer to some particularly significant aspects.

20. The Judge referred, inter alia, to the conditions 24.2(a) and 31.4(a) of the mortgage agreement which provided that

    (a) the Respondent could give Mr Harris notice requiring him to pay outstanding sums owed immediately if he was more than two months late in making any payment under the mortgage.

    and

    (b) that the Respondent could charge a fee to recover any costs or expenses it reasonably incurred in connection with the mortgage, including the costs and expenses incurred in any action to preserve or protect its security.

21. In addition, condition 24.2(K) expressly provided the Respondent with the power to give Mr Harris notice to pay any money owed immediately when a Landlord had given statutory notice specifying a breach of any obligation or condition in the Lease (if the Defendant failed to remedy the default within a reasonable time).

22. The following matters set out within the Judgment are also of noteworthy;

    a. The Respondent had previously brought possession proceedings in respect of arrears under the mortgage but Mr Harris had sent a cheque that cleared the arrears (on 23 February 2015).

    b. From May 2015 the only payments made in respect of the sums due under the mortgage were part payments in respect of the interest by the Department of Work and Pensions. The result was a significant monthly shortfall and by August 2015 arrears stood at over £5,000. The bank again brought possession proceedings which were listed to be heard on 1 October 2015. Mr Harris then contacted the vulnerable team within the Respondent's organisation and stated that he had diagnoses of Aspergers and also of autism (which he stated were on

top of the physical disabilities arising from a road traffic accident which he had previously informed the Respondent about).

c. Mr Harris objected to the payments made by the Respondent following the service of the section 146 Notices. He made a complaint to the Financial Ombudsman Service which was eventually treated by the Ombudsman as having been rejected in February 2017.

d. As at 27th February 2017 the arrears stood at £19,634.90.

e. The Respondent issued the claim form in this action in March 2017. Mr Harris then filed a defence and counterclaim and the bank filed a reply.

f. Mr Harris argued within his defence that there was no risk of the lease being forfeited and he denied that the Respondent was entitled or obliged to pay the management company any money in order to preserve its security.

g. The Judge did not find Mr Harris to be a good witness and she was of the view that his evidence suffered from significant inconsistencies in material respects. Where his evidence amounted to a bare assertion, unsupported by any other credible and reliable evidence or the inherent probabilities, she did not accept it.

h. During closing submissions Mr Harris made an oral application to vary his defence to argue, inter alia, that the section 146 Notices were not served by DWD but by the Management Company. The application was refused.

i. Her Honour Judge Clarke accepted the Respondent's submission that DWD had a right of forfeiture for any breach of performance of any condition within the lease for non payment of any sum due under the Lease and this included sums due to the Management Company being "any other sum" payable under the Lease (see judgment paragraphs 70 and 81).

j. It was the Respondent's case (supported in evidence) that in the face of a section 146 Notice served by a Landlord which was founded upon the determination of a court or tribunal i.e. a judgment, it was not obliged (and did not) further investigate whether it was a valid debt or not, rather it paid the sum demanded without prejudice to the right of the tenant mortgagor to dispute that the sum was properly owed . If Mr Harris' objections to the validity of the Notices and been successful (e.g. judgments set aside) the Respondent would have adjusted the capital account accordingly. However the Respondent would not get involved in any challenge to the Notice itself because it considered this was a matter for the tenant mortgagor.

k. Mr Harris submitted that some of the service charges and administration charges were not due and owing because they were debts that pre-dated (and were therefore included within) the IVA. He submitted that the Respondent had been notified of his intention to enter an IVA. However he put in no documentary evidence showing the date when he entered into an IVA and his oral evidence was found by the Judge to be "somewhat confusing and contradictory".

23. Her Honour Judge Clarke concluded the Respondent was at real risk of the loss of its security through forfeiture of the lease on each of the occasions when a section 146 Notice had been served. She also found that Mr Harris did not raise the issue of the IVA, and specifically, that he had not asserted that any of the sums demanded in those section 146 notices fell within the IVA so were not due and payable at the time the Notices were served or at any stage before the Respondent made the relevant payments. Given her findings that the IVA was entered into in 2014 and not 2015 (and most likely on the 9 July 2014) she did not find that the bank was unreasonable in paying the sums due under the Notices. She also noted that if Mr Harris believed that the relevant claims should have been included within his IVA, he could have disputed the validity of the amount demanded including the First Tier Tribunal.

New evidence

24. In the statement accompanying the application for permission to appeal, Mr Harris stated that "new evidence" had been disclosed within another action (issued on the 4 September 2020) and that this disclosure occurred within 2021. He stated that had this evidence been available to him, his defence would have been substantially different to that advanced before the Judge. He stated that new evidence was in direct contradiction to the case pleaded/evidence produced by the management company when judgment has been obtained against him. He also stated within the application to set aside the order of Sir Stephen Stewart that he did not understand how he could be asked to appeal a judgment in time, when "the basis of the appeal" was fresh evidence which was not in his knowledge or possession during the proceedings in the Court below or during the timeframe to lodge an appeal. Me Harris states that "as soon as was practicable" after the knowledge came into his possession he sought to lodge the appeal and request for permission to appeal out of time. He stated that the fresh evidence clearly showed fraud and breaches of duties under the lease.

25. When Mr Harris was asked about the obvious conflict between the assertion that the relevant information came to his attention in 2021 and the statement that it was not available during the timeframe to appeal, Mr Harris conceded that the information was in fact available to him prior to the handing down of the judgment.

The appeal

26. Mr Harris explained how he submitted his appellant's notice on 23rd March 2023. However he filed it with the Court of Appeal and not the High Court. The papers were then forwarded by the Court of Appeal to the High Court at which point deficiencies in the documentation were noted. He submitted that the period of delay between the 23rd March 2023 and 26th May 2023 should not be held against him. This would reduce the time by which the Notice was out of time to 14 months. For the purposes of the analysis of the application for an extension of time, I will proceed on the basis that the delay was indeed 14 months. I also proceed on the basis that, in any event, Sir Stephen Stewart fell into error in noting that the Defendant's notice of appeal should have been filed over two years before it was filed.

27. Apart from the submission that the fresh evidence was not available during the timeframe for appeal, which fell away, Mr Harris referred to the following factors as causing the delay in filing his notice of appeal;

a) Disability and poor mental and physical health (including as a result of injuries sustained in a car crash in 2006 and surgery, with complications, in 2016);

b) The pressure of other claims running contiguously; "the non-stop barrage of litigation";

c) Familial safeguarding issues (meaning that he had to support a relative in Dorset);

d) Pandemic issues ("all my support normal support structures (were) taken away due to lockdowns and travel restrictions ..");

e) The fact that his files and records (and possessions) have been in storage since January 2022;

f) the need for a warrant to be obtained;

g) the threat of eviction "knocked him for six".

28. However Mr Harris conceded that it was "not till push came to shove" and he faced an application for a warrant that he took action. He stated that in the interim he had prioritised other sets of proceedings (with the Management Company/Lessor) as he considered them to be "more pressing".

How the application is to be determined

29. The correct approach to the application for an extension of time was set out by the Court of Appeal in **R(Hysaj) v The Secretary of State** [2014] EWCA Civ 1633. In short an application for an extension of time for filing the appeal notice should be equated with an application for relief from sanctions (under CPR 3.9) and should be determined in accordance with the structured "three stage test" for the extension of time periods set out in **Denton** [2014] EWCA Civ 906. Taken shortly that approach first requires identification and assessment of the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable the court to deal justly with the application including the factors set out at CPR 3.9(1) (a) and (b).

30. In **Lakatamia** [2019] EWCA Civ 1626 the Court of Appeal confirmed that the approach set out in **R (Hysaj)** [2014] EWCA Civ 1633 applied to applications to extend time made by Litigants in Person. The absence of legal representation is not a good reason for a delay and litigants in person, are required to comply with the rules just as a legally represented party is.

31. I turn to the three stage test.

32. An appellant must file the appellant's notice within the appeal court within 21 days after the date of the decision of the lower court that the appellant wishes to appeal. Taking the 23rd March 2023 (which is a generous approach to the filing of the

application) then it was 14 months beyond the time limit for appeal. This is undoubtedly a serious and significant breach.

33. Turning to the reasons for the delay, what at first blush may have been the most powerful one, that the fresh evidence (such as it was) was not available until after time for appeal had expired, fell away. Mr Harris was in possession of this documentation at the time the judgment was handed down and the order was made.

34. Mr Harris submitted that:

> "as the fresh evidence was of fraud and deceit and misrepresentation and criminal conduct that the doctrine of res Judicata does not apply and thus the time limits (if any) in which to bring an appeal do not apply. The Supreme Court has confirmed the doctrine that fraud unravels all."

He also stated within his written submission of 14th December 2023 (some very nearly two years after the order in issue in this appeal was made) that;

> "I will file an appeal against each of the judgments obtained by the management company on the basis of fraud. Naturally should any of these judgments be set aside on the basis of fraud (as they must be in law) then any section 146 based on them would also automatically be set aside."

35. To the extent that he held a belief to the contrary during the material time Mr Harris was wrong in that the 21 day time limit for appeal against the order of Her Honour Judge Clarke did apply. That an appeal is based on an allegation of fraud does not alter the requirement under CPR 52.12. A Court may take the principles in relation to allegations of fraud into account when considering whether to extend time to appeal, and may do so. I say no more, in respect of any applications to appeal out of time against the judgments obtained by the Management company. However, here the fraud is not alleged against the other party to the action; the Respondent, rather against third parties who still have valid judgments in their favour. Mr Harris took no steps either before the order in this case was made, and has taken no steps in the two years subsequent to it, to appeal against those judgments.

36. Turning to the balance of the explanation for the delay, I do not, for a moment, underestimate the impact of Mr Harris's health conditions or the impact of lockdown on his life. However the vast majority of Covid restrictions had ended by December 2021 (and all restrictions lifted by 24th February 2022) hence the delivery of the judgment as the stay had been lifted. The plain fact of the matter is that Mr Harris was able to conduct other litigation during the relevant 14 month period and simply did not pursue, let alone prioritise, this appeal (or applications to appeal the other judgments). Indeed, he candidly conceded that it was only when push came to shove, and he faced an application for a warrant, that he lodged the appeal notice. Mr Harris considered the ongoing battle against DWD/ the Management Company more important and pressing than the progression of any appeal against the order of Her Honour Judge Clarke.

37. The reality is that the default was not caused by Mr Harris's health, mental or physical and/or the impact of Covid and/or having to look after a family member and/or the

storage of documentation (he only removed his belongings from the Property following the order so had access to the case papers in the 21 days following the handing down of judgment) preventing him from progressing the appeal. Rather he chose to prioritise other matters.

38. In his written submissions Mr Harris has referred to having borrowed money and instructing a firm of solicitors (Fosters LLP) to

> "appeal this judgment based on fresh evidence and to defend a claim by the lessor (since discontinued and the unlawful ground rent demand in the second section 146 notice refunded with intertest) and to advise on a joint application to the FFT".

He stated that:

> "I did engage professional help and did seek to challenge far earlier, but this was scuppered by the conduct of the Lessor." (underlining added).

He explained elsewhere he stated that the Lessor "sought to negotiate to reinstate proceedings, this extinguished the funds borrowed".

39. Mr Harris has provided no dates in relation to the instruction of solicitors (or details of any advice given in relation to the time limit) but the Court is entitled to proceed on the basis that any solicitor "specifically instructed" to appeal an order would be aware that there was a time limit for appeal' yet no appeal was lodged for well over a year. Taking matters in the most favourable light for Mr Harris the submission that he instructed a solicitor at some earlier stage to appeal the judgment does not assist him..

"All the circumstances of the case"

40. I now turn to the third stage of the test which requires evaluation of all the circumstances of the case, so as to enable the court to deal justly with the application including the factors set out at CPR 3.9(1) (a) and (b) which are the need for litigation to be conducted efficiently and at proportionate cost; and to enforce compliance with rules, practice directions and orders. These factors have particular importance.

41. Given the focus of Mr Harris' arguments, including as to fraud, I have given some consideration to the merits of the grounds of appeal whilst bearing in mind that I am not determining whether permission to appeal should be granted rather whether I should grant an extension of time to appeal. Given the circumstances of this case I have proceeded on the basis that if the appeal grounds have clear and obvious merit it may be a factor that weighs in the balance in favour of the granting of an extension as a refusal would mean an end to any challenge to the possession (and money judgment) order. Alternatively if the grounds are clearly hopeless that may weigh against the applicant.

42. Within Mr Harris's oral and written submissions as to the merits of his appeal he struggled not to conflate such limited grievances as he had against the Respondent with his allegations of fraud, illegality and misrepresentation against DWD and the Management Company. Much of what he said was directed at the validity of the section

146 Notices (including an argument in respect of waiver which does not appear to have been raised at the trial) and he failed to focus on the terms of the mortgage and the fact that the Respondent was faced with a position where judgments had been obtained in respect of sums owed to the Management Company and under the lease. It is Mr Harris' case that not one of the judgments obtained against him has been correct in law and no evidence has been produced on any occasion to prove the case against him yet on every occasion the Court has given judgment "on the fraudulent and unlawful basis". He believes that he has suffered prejudice at the hands of the Court. However, those judgments where valid at the time the notices were served and remain so as there have been no successful appeals in relation to them and given the principle of finality they must be respected until set aside.

43. Mr Sinclair submitted that it was unarguable that on three occasions (April 2015, January 2016 and February 2017) the Claimant received section 146 notices which followed on from the Management Company obtaining judgment against Mr Harris (on 24th October 2014, 9th April 2015, 27th November 2015 and the 10th January 2017) in respect of service charges and administration charges. The careful analysis of the Judge was clearly correct and Mr Harris's grounds of appeal contained no real prospect of successfully appealing against the order. As for the "new evidence" upon which Mr Harris now sought to rely this related to arguments about the validity of the section 146 Notices served by DWD on the Respondent and the judgments upon which those notices relied. However any arguments that arose should have been advanced against DWD and/or the Management Company and not against the Respondent which solely provided mortgage finance. There was not, and could not be, any sustainable allegation with merit of misconduct on the part of the Respondent in respect of the section 146 Notices. There was simply no basis for Mr Harris to challenge the judgment on grounds that it was not reasonable for the Respondent to make (without prejudice) payments in respect of the section 146 Notices to preserve its security. The submission that the Respondent should have taken any other action save from steps to protect its security when faced with the notices from the Landlord based on judgments was indeed hopeless, as recorded by Her Honour Judge Clarke in her judgment (paragraph 91).

44. In the relation to the IVA this was entered into on 11th April 2014. Mr Harris had initially given evidence when cross-examined that the IVA was entered into in July 2014 (it having been suggested on behalf of the Respondent that it was likely to have been April 2014). However, the following day he produced a new document not previously disclosed, namely the certificate of completion dated 29 April 2015, and submitted that the IVA had been entered and completed on 29 April 2015 (see judgment paragraph 84). Her Honour Judge Clarke found on the available evidence on the balance of probability the IVA was entered into in July 2014. The fact that the IVA was in fact entered into earlier in April 2014 would have no impact on the HHJ Clarke's judgment. As the relevant notices were issued and judgments were obtained after this date. If Mr Harris wished to challenge the notices and/or judgments he had a right to do so but this was not something that could be laid at the door of the Respondent. The payments made by the Respondent were expressly without prejudice to his ability to challenge the claims and in the event he did so successfully the Respondent would adjust his account accordingly. Mr Sinclair submitted that the reality was that Mr Harris had delayed the filing of an appeal as he was engaged in battle with DWD and the Management Company and this was unsurprising as it was against those entities that his complaints lay.

45. In my judgment there is obvious force in Mr Sinclair's submissions. However I need go no further, given that I am not determining permission, than concluding that it cannot be said that the grounds of appeal have clear and obvious merit. The allegations of fraud relate to a third party and not the Respondent and Mr Harris has taken no steps to appeal the relevant judgments in the two years that he has been in possession of the "new evidence".

46. After consideration of all the circumstances the conclusion that I have reached is that the lengthy extension of time sought should not be granted and the order of Sir Stephen Stewart should not be set aside. There was breach of a rule in large part designed to ensure finality is achieved in a relatively short time after an order is made. Compliance with rules is of particular importance. The delay was substantial (14 months) and caused by Mr Harris' choice to focus on other litigation with third parties. He only took action when prompted by the Respondent pursuing enforcement.

Application for a stay

47. Within his written submission on 14th December 2023 Mr Harris makes an informal application for a stay of enforcement pending his appeals against the orders (judgments) obtained by the Management Company. I have no details of any appeals (which given the matters set out above must be pursued as a matter of urgency) or indeed the relevant actions and judgments and it would clearly not be appropriate to grant stay without a full and proper application. Such an application must be made to the County Court which is dealing with enforcement.

48. Mr Harris should discuss the content of an order following this judgment with the Respondent and either party may file submissions in the event that agreement is not reached within 21 days of the handing down of this judgment (any such submissions to be filed within 35 days after the handing down). I adjourn the hearing to further date to be listed but hope that an agreement as to the form of the order will be reached (I note that the Respondent's request is that the order remain silent as to costs). If no agreement can be reached a further short hearing may be necessary if I cannot properly determine the matter on the basis of the written submissions. In the interim time for lodging an appeal will not start to run i.e. the time for appeal will start to run from the making of a final order; either by consent or otherwise.