Neutral Citation Number: [2022] EWHC 622 (Ch)

Case No: E00YE350

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 18 March 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

AXNOLLER EVENTS LIMITED	**Claimant**
- and -	
(1) NIHAL MOHAMMED KAMAL BRAKE **(2) ANDREW YOUNG BRAKE**	**Defendants**

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Niraj Modha (instructed by **Stewarts Law LLP**) for the **Claimant**
The Defendants in person

Application dealt with on paper

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. On 25 February 2022 I handed down judgment in this claim for, amongst other things, possession of West Axnoller Farm ("the Farm"), near Beaminster in Dorset (this includes the main house, "the House", and associated equestrian facilities. I held that the claimant was entitled to possession. There was disagreement about the form of the order. After considering written submissions, I made an order on 4 March 2022 that the defendants give up possession of the Farm forthwith.

2. I also directed (by paragraph 5) that there be a hearing of consequential matters before me, which had been fixed by agreement between the parties for 31 March 2022. In addition, by paragraph 6 of my order,

> "Time for the purposes of CPR 52.12(2) shall not begin to run until the hearing directed in paragraph 5 above".

3. It appears that on 14 March 2022 the claimant applied for and on 15 March obtained a writ of possession based on my order of 3 March. Fourteen days' notice of eviction was given at the property on 15 March, to take place on 29 March 2022.

Application for stay

4. By application notice dated 16 March 2022, the defendants now seek a stay of my order of 3 March until a date after the consequentials hearing on 31 March. I have read the evidence given in the application notice and that filed by the claimants in answer, as well as the written submissions of counsel for the claimant.

5. CPR rule 3.1(2)(f) provides that:

> "Except where these rules provide otherwise, the court may – … Stay the whole or part of any proceedings or judgment either generally or until a specified date or event…"

Impact of appeal

6. In the application notice, the defendants say that both the order in this case and that in another case decided on the same day between substantially the same parties "are being appealed". (The other case was a claim by these defendants for possession of a cottage nearby, currently occupied on behalf of the parent company of the claimant in this claim. That claim failed.) The defendants have not, however, made an application to this court (the lower court) for permission to appeal in either case.

7. Instead, they have informed me that they intend to apply directly to the Court of Appeal for permission to appeal against my order. But, so far as I am aware, they have not yet done that either. This appears to be because they are not sure whether they may do so before the consequentials hearing on 31 March 2022.

8. However, even if they had already made that application, CPR rule 52.16 provides that:

> "Unless –
>
> (a) the appeal court or the lower court orders otherwise; …
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> an appeal shall not operate as a stay of any order or decision of the lower court".

9. In order to secure a stay, therefore, it is not enough that there should be an appeal. More is required. In *DEFRA v Downs* [2009] EWCA Civ 257, Sullivan LJ said:

> "8. … A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.
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> 9. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

Submissions

10. In the light of the rules, and the default position that they create, the burden is on the defendants to show that a stay should be granted. In the present case, the defendants make what I see to be two main points in support of their application.

11. The first is that, if they wait until after the hearing fixed for 31 March 2022 before applying directly to the Court of Appeal for permission to appeal, it will be too late, because notice of eviction has been given for 29 March 2022. If on the other hand they apply to the Court of Appeal now, they will not know the full extent of what will be ordered at the consequential hearing of 31 March 2022.

12. They say that, as litigants in person, they "cannot work out what the position is in respect of this 'gap' that has been created between when we can appeal to the Court of Appeal and the unknown specifics of the order that will be made on 31 March 2022". They also say that if the defendants were given permission to appeal then there would be "irreparable harm" caused to them by not staying the possession order, because if they were successful in either of the two appeals they "would not be rendered homeless".

13. Secondly, the defendants rely on article 2 of the European Convention on Human Rights, made justiciable in English domestic law by the Human Rights Act 1998. They say that this means that "public authorities should consider a person's right to life when making decisions which might put you in danger or affect your life expectancy". The defendants have told the court that Mrs Brake (who is their advocate) has tested positive for Covid 19. She is also a clinically extremely vulnerable individual. It is submitted

that rendering her homeless when she has Covid 19 would be a breach of article 2. There should therefore be a stay to allow for her to recover from Covid 19.

Discussion

14. As to the first point, I note first of all that the consequentials hearing was fixed for 31 March 2022 because that was the date agreed by the parties. It was not imposed by the court. If that date creates a problem because it is possible for the claimant to obtain a writ of possession and give notice of eviction to take place before that date, it is something which results from the parties' agreement.

15. Secondly, despite the advice of Jackson LJ in *P v P* [2015] EWCA Civ 447, [68], that it was "good practice for any party contemplating an appeal in the first instance to seek permission from the lower court", it is also clear (at [69]) that there is no rule requiring an application for permission to appeal to be made first to the lower court. So, the defendants can apply directly to the Court of Appeal if they wish.

16. I do not interpret paragraph 6 of my order of 4 March 2022 as meaning that the time for applying for permission to appeal only begins on 31 March 2022 and ends 21 days thereafter. CPR rule 52.12(2) identifies the period *within which* the notice must be filed. My order extended the *end date* of that period, as being 21 days after the hearing of 31 March, not the *beginning.* In my judgment, therefore, what paragraph 6 means is that the defendants may apply for permission to appeal at any time from the date of the order until 21 days after the hearing on 31 March 2022.

17. Thirdly, I note that the defendants do *not* say in their evidence that they have nowhere else to stay than the House and the cottage. The evidence before me in a witness statement from Oliver Ingham (of the claimant's solicitors), which is unchallenged and which I accept, is that the defendants' horses have already gone from the property, and that the defendants have recently been moving some of their possessions out of the House. They have also arranged for a removal company to attend the property on 16 March 2022 in order "to remove the remaining items from Axnoller House … [including] clothes, food and a double bed".

18. In addition, the evidence before me at earlier stages in these proceedings satisfied me then that the defendants were being supported by Mrs Brake's family in relation to living expenses, and that they had friends in the locality, including Susan Maslin, who lived at a nearby farm, and had accommodation for horses. There is no suggestion that this has changed. So I am far from satisfied that they would be homeless if they left the House and could not use the cottage.

19. As to the second point, I accept that the court is a "public authority" for the purposes of the Human Rights Act 1998, and that it is unlawful for a public authority to act in a way which is incompatible with a Convention right: see section 6(1), (3)(a). But I also remind myself of what I said in my decision on the form of the order on 3 March 2022 ([2022] EWHC 459 (Ch)):

> "14. The question of the relevance of Art 8 to a private law dispute between landowner and occupier was raised once more, and this time definitively, in *McDonald v McDonald* [2017] AC 273, SC. In that case, as between private landlords and their tenant, the Supreme Court unanimously held that the tenant's

> Art 8 rights could not be relied on to justify a different order from that which the ordinary private law would require, at least where there were (as there were there) legislative provisions balancing the competing interests of landlords and tenants.
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> 15. As Lord Neuberger and Lady Hale (with whom the rest of the court agreed) put it,
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> > '41. To hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is, as we have mentioned, to protect citizens from having their rights infringed by the state. To hold otherwise would also mean that the Convention could be invoked to interfere with the A1P1 rights of the landlord, and in a way which was unpredictable. Indeed, if article 8 permitted the court to postpone the execution of an order for possession for a significant period, it could well result in financial loss without compensation - for instance if the landlord wished, or even needed, to sell the property with vacant possession (which notoriously commands a higher price than if the property is occupied)'."

20. Of course, that was a case about whether a possession order should be made at all, or in a particular form. This is a case about staying such an order. But the general private law gives some private citizens certain rights and others certain obligations in relation to property. It is also the case that (as *McDonald* says) the Convention is not directly enforceable as between such citizens and so does not alter their rights and obligations. The consequence is that the court (which is a public authority) must still make an order giving effect to those rights and obligations. For myself, I find it hard to see why it should be different if the order has duly been made and the question is whether a stay should be ordered on the enforcement of that order. The Convention is still not directly enforceable as between such citizens.

Conclusions

21. My conclusions overall are these:

> 1. Any problems for the defendants resulting from the fact that they agreed not to hold the consequential hearing until 31 March 2022 are the consequence of that agreement. The parties did not agree that no enforcement action could be taken on the existing order in the meantime, and I did not so order.
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> 2. There is nothing to stop the defendants from applying immediately to the Court of Appeal for permission to appeal from my order of 4 March 2022.
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> 3. I am not satisfied that there will be any irremediable harm caused to the defendants if they have to leave the House before the question of permission to appeal is determined. The evidence satisfies me that the House is being (indeed, may already have been) emptied of furniture and personal belongings, so that, if their appeal were allowed, the defendants would have to move everything back in again anyway. Moreover, I am not satisfied that the defendants have nowhere else to stay.

4. The fact that the court is a public authority for the purposes of the Human Rights Act 1998 does not mean that the court must grant a stay on human rights grounds in litigation between private citizens.

5. Assuming that Mrs Brake does not develop any complications, by 29 March she will have long got over Covid. If, very unfortunately, she did develop any complications, I cannot think that she would still be in the House: she would be in hospital.

22. In the light of these conclusions, and in particular nos 3 and 4, there is no proper basis upon which I could grant a stay of my order, and I must dismiss this application.