Case No: G00WT956

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand, London
WC2A 2LL

25 August 2021

BEFORE:

HIS HONOUR JUDGE LUBA QC

BETWEEN:

GLOBAL 100 LTD

Claimant

- and -

(1) ANDREA KYSELAKOVA
(2) JASON WALKER
(3) CHARMAINE GRIFFITHS
(4) GENTIAN LUMANI
(5) HENRY BLIDGEON
(6) MARIA LALEVA (*Appellant*)
and others

Defendants

Hearing date: *9 August 2021*

Mr Nicholas Grundy QC appeared on behalf of the Claimant

Mr Nick Bano appeared on behalf of the Sixth Defendant

JUDGMENT

I direct that no recording shall be taken of this Judgment and that copies of this version as sealed and handed down may be treated as authentic.

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Introduction

1. This is my judgment on an appeal from a possession order made on 29 March 2021 by District Judge Parker, sitting at the County Court at Wandsworth. The appeal is brought by the sixth defendant, Ms Laleva. Permission to appeal was granted by HHJ Monty QC on a consideration of the papers and the appeal was listed for an expedited hearing before me on 9 August 2021. I reserved judgment, having received substantial skeleton arguments, extensive oral submissions, an Appeal Bundle of over 200 pages and an Agreed Bundle of Authorities and Statutory Materials containing some 23 items.

Factual Background

2. The present claim concerns premises at The Stamford Brook Centre, 14-16 Stamford Brook Avenue, Hammersmith, London W6. The owner is NHS Property Services Limited ("NHSPSL"). I am told that the premises have in the past been used as accommodation for NHS nursing staff and thereafter were used as office space until they became empty.

3. In March 2016, NHSPSL entered into a written property guardianship arrangement with Global Guardians Management Ltd ("GGM"). That is not the Claimant company but an associated company. The document sets out terms proposed by GGM which NHSPSL accepted on 31 March 2016. In short, GGM agreed to bring the premises into habitable condition, keep them habitable, and install individuals as 'guardians'. The arrangements were expressed to run initially for four months, thereafter determinable by four weeks written notice given by NHSPSL to GGM. Under the heading "Managing the Property" the written agreement explains that "This means GGM will be managing the property 24/7".

4. However, a little under two years later, on 19 January 2018 a director of GGM, Mr Kyprianou, signed a document described as an "INTER COMPANY ARRANGEMENT FOR APPOINTMENT AND TERMINATION OF GUARDIAN LICENSES". The other company involved in the arrangement was the present claimant, Global 100 Ltd ("G100"). In his capacity as a director of G100, the same Mr Kyprianou signed on behalf of that company also.

5. The inter-company arrangement document reads:

> "…[GGM] provides services to property owners to, among other benefits, secure premises against trespassers and protect such premises from damage. To assist GGM in providing those services GGM grants permission to [G100] to grant temporary non-exclusive licences, to persons selected by G100, to share occupation of such part or parts of the property as G100 may from time to time designate, on terms which do not confer any right to exclusive occupation of the property or any part of it. These temporary licences are the Guardians' licences to occupy the property.
> The grant of the licence from GGM to G100 confers on G100 such rights to manage, protect and occupy the premises as are required for the property protection of the properties through their residential guardians.
> Guardians sign agreements directly with G100 Ltd whose authority to grant such licences emanates from its permission or license from GGM. In as much as GGM authorize G100 to grant such Guardian licences, it also confers on G100 sufficient interest in the properties for G100 to bring claims for possession if required against the Guardians to whom it has granted licences.
> This situation has existed since the two companies were set up in around June 2011."

6. In 2019, a Ms Maria Laleva became one of the occupants of the premises. In April 2020, she signed a document provided in common form to each occupant. It is entitled "TEMPORARY LICENCE AGREEMENT" and is made between G100 and the individual occupier. That she had been living in the property for some time before that is acknowledged, because the April 2020 agreement records it as already being her address. The agreement was signed by Mr Kyprianou on behalf of G100.

7. The interpretation clause of the April 2020 document (clause 14) fully identifies both G100 and GGM and clause 1 explains that:

> "G100 places Guardians in properties for [GGM] …, who in turn provide guardian management services to property owners to, among other benefits, secure premises against trespassers, squatting and anti-social behaviour and protect such premises from damage."

8. Ms Laleva continued in occupation of the property on the terms of the April 2020 agreement.

9. In mid-2020, NHSPSL gave informal notice that possession of the premises was required. It seems that the NHS intends to use the premises to accommodate temporarily decanted staff as part of a project to refurbish a different health facility.

10. G100 gave notice to the occupiers. By Email, Ms Laleva was sent a "NOTICE TO QUIT (BY LICENSOR OF PREMISES LET AS A DWELLING)" dated 30 August 2021. It identified the Licensor as G100, Ms Laleva as the Licensee and was signed by Mr Kyprianou. It required delivery of possession on 17 September 2020. It was accompanied by the statutory particulars required to be given to determine a tenancy or licence of a dwelling.

11. Formal notice was given by NHSPSL's solicitors by letter dated 3 September 2020 that possession was required from GGM no later than 5 October 2020. It appears common ground that this ended GGM's rights under the 2016 agreement on the latter date.

12. However, Ms Laleva and some of the other occupiers did not leave in mid-September 2020 when their own notices expired. So GGM was going to be unable to deliver-up vacant possession to NHSPSL when its own agreement ended.

13. In those circumstances, a further agreement was entered into between NHSPSL and GGM on 1 October 2020 by which they agreed that:

> "To the extent that such a right does not already exist on an ongoing basis… [NHSPSL] hereby grant [GGM] a right of possession of the Property for the sole purpose of enabling eviction of GGM's former licensees and any other persons occupying the Property".

14. On 7 October 2020, G100 issued a claim for possession of the Stamford Brook Centre naming Ms Laleva and a number of other individuals (as well as Persons Unknown) as defendants. The claim was brought on Form N5 as a claim pursuant to CPR Part 55 on the footing that the defendants were trespassers. Particulars of claim were given in Form N121 indicating that this was a 'possession claim against trespassers' within the meaning of CPR 55.1(b)

15. After a paper review, the Court listed the claim for a 15-minute substantive hearing by telephone on 29 March 2021.

16. Ms Laleva engaged solicitors to act for her and was granted legal aid to defend the claim. A few days before the hearing, a fully pleaded but unsigned defence dated 22 March 2021 was filed on her behalf. A number of other occupiers put in similar draft defences and several indicated that they wished to attend in person. In those circumstances, the matter was rescheduled as an 'in person' hearing.

17. The claimant instructed Mr Grundy QC, who put in a substantial skeleton argument.

18. The hearing then conducted before DJ Parker was intended by her, and by those appearing before her, to determine whether a possession order should be made summarily or whether case management directions should be given towards a trial of the defended claim.

19. That way of putting the matter arises from the terms of CPR 55.8. It provides that:

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

20. On 29 March 2021, after the conclusion of considerable oral argument, extending well over an hour, and having pre-read the pleadings and the skeleton argument, the Judge gave an *ex tempore* judgment.

21. She concluded that she was "not satisfied that there are substantial grounds for defending the claim" [12]. She made an outright order for possession to be given on 26 April 2021. It is a reflection of the pressures on the Court at Wandsworth that it took until 21 April 2021 for her order to be sealed and issued by the Court.

22. The Judge was asked for, but refused, permission to appeal. Her reasons are recorded in Form N460 in terms which read in part:

> "The court made a case management decision that the draft defences filed did not raise substantial issues. The court's decision was within the bounds of a reasonable exercise of case management discretion on the submissions made."

23. From the possession order, Ms Laleva brings this appeal with permission granted in this Court. The other remaining occupiers of the property have played no part in the appeal but may be assumed to have a considerable interest in the outcome.

24. The enforcement of the order for possession has been stayed pending determination of the appeal.

The Grounds of Appeal

25. HHJ Monty QC granted unlimited permission to appeal on all grounds. They were presented by Mr Bano, counsel for Ms Laleva. They were resisted by Mr Grundy QC, counsel for G100. I am grateful to both for their written and oral submissions.

Ground One: The claimant's standing to bring the claim

26. This Ground contends that the Judge was wrong to make a possession order because:

> "on the basis of the material before the Court, it was a remedy that exceeded the [claimant's] rights in respect of the land."

27. Put very shortly, Mr Bano contended that G100 was the wrong claimant. NHSPSL had made its agreement for guardianship of the property with GGM. If possession was sought to be recovered by anyone other than NHSPSL itself (as title owner) it had to be by GGM. Only GGM had been the beneficiary of the guardianship agreement and only GGM had the benefit of the 'extended licence' granted by NHSPSL on 1 October 2020.

28. This was put more fully in the draft Defence in these terms:

> "The Sixth Defendant can neither admit nor deny, but requires the Claimant to prove, the nature and extent of any agreement between the Claimant and Global Guardians Management Limited; The Sixth Defendant avers that, on the Claimant's pleaded case, any such agreement can only have been in the nature of an agency arrangement in that the Claimant has not pleaded that it was granted any interest in the land sufficient to entitle it to an order for possession, but has instead only pleaded that the Claimant was contracted to act as an agent for Global Guardians Management Limited; and
> Accordingly, the claim cannot succeed and stands to be dismissed because the remedy sought exceeds the Claimant's legal rights as pleaded (the Sixth Defendant will rely on *Manchester Airport PLC v Dutton* [2000] QB 133, CA per Laws LJ at p.149H)."

29. Mr Grundy contends that the Judge was right to hold that G100 could bring the claim by virtue of the cascading (my term) of the rights of GGM to G100, the claimant, pursuant to the inter-company agreement.

30. Anticipating that response, the draft Defence had further pleaded that:

> "The Sixth Defendant notes the contents of the document titled "*INTER COMPANY ARRANGEMENTS FOR APPOINTMENT AND TERMINATION OF GUARDIAN LICENCES*" dated 10th January 2018, and avers that (to the extent to which it relates to any interest(s) in land) it is a generic document that fails to identify, refer to, or grant any interest in, any particular land. The Sixth Defendant also notes that it has not been executed as a company document in compliance with section 44 of the Companies Act 2006. Accordingly, there is nothing before the Court establishing any specific or effective grant to the Claimant of any interest in the land at all, nor is there anything before the Court establishing that the Claimant has an interest in the land that is greater than the Sixth Defendant's interest."

31. Mr Grundy contended before the Judge that the point as to the Claimant's standing was in any event not open to Ms Laleva at all because: (a) it was her case that her agreement with G100 constituted a tenancy but it was at least a licence; (b) accordingly, G100 was either her landlord or licensor; (c) a possession claim is (inter alia) a claim brought by 'a landlord' or 'a licensor'; (d) on well settled principles a tenant could not be heard to deny (or 'was estopped from denying') their landlord's title to bring such claim; and (e) these principles apply equally to a licensee.

32. The Judge accepted Mr Grundy's submissions on both points. She stated:

> "6. I was satisfied that the [the inter-company agreement] did confer sufficient interest to this claimant to bring these possession claims. I was also persuaded, on the basis of the caselaw that has been referred to, that the claimant does not have to have a legal interest in land to be entitled to a possession order. I also note that it is accepted that the defendant is estopped from denying the landlord's tenure.
>
> 7. I was satisfied that was sufficient evidence to prove that this claimant has been granted the right to pursue the claim on the basis of the [agreement between NHSPSL and GGM and the inter-company agreement between GGM and G100] and that in any event the defendant is estopped from denying the landlord's right. In my judgment, that issue raised is not a substantial dispute to warrant case management directions."

33. In her reasons for refusing permission to appeal, the Judge put it this way:

> "the Court found that the documents … gave the claimant a licence to bring proceedings and that the defendant was estopped from denying the landlord's interest in land."

34. Mr Bano invites me to hold that she was wrong on both points – the claimant did *not* have standing to bring the possession claim and *no* estoppel prevented his client from taking that point.

35. I was taken to considerable modern authority on the question of the standing necessary to bring a claim for possession under what had been the old RSC Ord 113 (which had survived the introduction of the Civil Procedure Rules in 1998) and is now the procedure for recovery of possession against trespassers incorporated into CPR Part 55.

36. I take the relevant law to be succinctly stated by the Editors of the Housing Law Reports as follows:

> "Proceedings for possession of land may only be brought by a person who has a sufficient interest in the land to entitle him to possession as against the occupier." [1]

37. It was once thought that a necessary pre-requisite was that the person claiming possession had a title to - or a right or an interest in - the land itself. For example, in *Chesters Accommodation Agency v Abebrese*[2], decided as recently as 1997, LJ Millet (as he then was) said in the context of a claim for possession of residential premises "the proper plaintiff in an action for possession is the person in whom the immediate reversion is vested, not his agent".

38. But the majority in *Manchester Airport PLC v Dutton*[3] later decided that in certain circumstances the holder of a mere licence could recover possession of land against a trespasser, even if not in occupation or control of the land when the trespassers entered.

39. However, as demonstrated by *Countryside Residential (North Thames) Ltd v T*[4] not every licence to use land in some way will suffice to sustain a possession claim: "something beyond just the right to enter land is required".[5]

40. What then is the 'something', beyond a right of entry, that a mere licensee needs in order to be able to maintain a claim for possession? In *Countryside*, LJ Waller identified it as a "right to occupy or have possession with the effective control" of the land.[6]

41. Such a right can derive from contract (as in *Dutton,* above) or by implication from statutory authority (as in *Mayor of London v Hall*[7]). It is well settled that merely being

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[1] At [2003] HLR 62 H1

[2] Decided 18 July 1997, reported in *The Times*, 28 July 1997.

[3] [2000] 1 QB 133

[4] (2001) 81 P & CR 2

[5] Per LJ Waller at [13]

[6] Ibid

[7] [2011] 1 WLR 504, CA

a letting agent or managing agent for the landlord of the land will not suffice (see *Chesters,* above).

42. This shift, from an emphasis on 'title' to alternative footings for claims for possession against trespassers, is reflected in the wording of CPR PD 55A paragraph 2.6 which (with emphasis added) reads:

> "If the claim is a possession claim against trespassers, the particulars of claim must state the claimant's interest in the land or the basis of his right to claim possession…."

43. Against that background, had this present claim been brought by GGM in its own name, and based on the agreement with NHSPSL and the additional licence of 1 October 2020, it would have been very likely accepted that there was a 'right to claim possession', particularly in light of the decision in *Alamo Housing Co-op Ltd v Meredith*.[8]

44. However, in the instant claim, G100 (and not GGM) is the claimant and the Particulars of Claim (at [4]), in answer to the requirements of PD 55A para 2.6, set out and rely upon the inter-company agreement as giving G100 the right to possession of the property based on the licence(s) that GGM held from NHSPSL.

45. In effect, G100 asserts that it holds, by the inter-company agreement or arrangement, a sub-licence of the rights enjoyed by GGM under the contractual licence(s) it holds from NHSPSL.

46. It might be thought that a claim for possession brought against trespassers by a sub-licensee would break new ground but it seems to me that if the sub-licensee enjoys (by contract or proper implication) sufficient 'control' of the land, such a claim would be properly constituted.

47. On a plain reading of the inter-company agreement in the instant case, GGM is giving G100 licence to "manage, protect and occupy" by the installation (and if necessary, removal) of individual guardians and "sufficient interest … to bring claims for possession".

48. Like the Judge, I am satisfied that this is a sufficient degree of control, if available in respect of the present property, to enable G100 to maintain its present claim.

49. Mr Bano contends that there is no indication that this inter-company agreement applies in respect of the current property at all. It does not mention the Stamford Brook Centre. It does not mention the agreement with NHSPSL that GGM had for the property. It obviously does not mention the special licence later granted by NHSPSL to GGM on 1 October 2020. Even if GGM could sub-licence its rights under agreements for guardianship arrangements, the inter-company agreement could not bite on a mere licence for the purposes of securing possession such as that made on 1 October 2020.

[8] [2003] HLR 62, CA

50. Despite the cogent and sensibly measured contentions of Mr Bano, I am – like the Judge below – satisfied that the inter-company agreement was of sufficient breadth to capture within its reach properties even if not identified by specific address (or otherwise) and not merely properties that GGM held under guardianship arrangements when it was made but also to those it was to hold in future. It is in truth intended to apply, and does apply, across the GGM property portfolio.

51. Further, it is clear from its own terms that the licence granted on 1 October 2020 by NHSPSL was either parasitic upon or a mere extension of the licence earlier granted by NHSPSL to GGM rather than any new freestanding arrangement. I see no reason in principle why, if the 'parent' licence agreement is to be treated as sub-licenced by the inter-company agreement, its 'offspring' licence should not also be so treated as sub-licenced.

52. Those conclusions are sufficient to lead to the rejection of Ground 1 of the Grounds of Appeal.

53. However, Mr Grundy invited me to uphold the alternative basis upon which the Judge rejected Mr Bano's arguments i.e. that he was unable to pursue them by operation of the ancient principle that a tenant is estopped from denying their landlord's title.

54. Although I heard argument on the point, I decline the invitation to determine it.

55. First, it is not necessary for the determination of this ground of appeal. Second, it seems to me that the question arises in a wholly surreal context. The claim is a claim for possession against trespassers i.e. by definition, against those who are <u>not and have not been</u> 'tenants'. It is difficult to see how a claimant in such a claim could contend that it is not open to a defendant to put them to proof of their interest or 'right to claim' possession. Third, and unsurprisingly in this context, there is no pleading by the claimant that the defendant is 'estopped' and the convention is always that estoppels must be pleaded. Fourth, I was not taken to any settled law suggesting that not-admitting the claimant's right to possession (or putting them to proof of it) amounted to 'denying' a landlord's status as landlord. Fifth, although *Megarry* suggests[9] that the estoppel rule applies to licences as it does to tenancies, I was not taken to any of the authorities cited in support of the proposition or to the case which the notes suggests those authorities should be compared with. Sixth, because the Judge was dealing with the matter summarily, she gave no reasons for holding against the defendants on the estoppel point.

56. In my judgment, the better course is for this interesting question to be considered in a situation in which it is determinative and one in which the appeal court has the benefit of the reasoning of the first-instance tribunal.

57. I accept that, if this claim goes further, the point may possibly become determinative on a second appeal on the 'standing to sue' issue (if the Judge and I are wrong on the

[9] Megarry & Wade: *The law of real property (9th edition)* at 16-126 and fn535.

‘standing to sue’ point). It will be for the parties and the Court of Appeal to decide if it could or should be canvassed then.

Ground Two: Was the claim ‘genuinely disputed on grounds which appear to be substantial?

58. This Ground contends that the Judge was wrong to make a possession order:

> “in circumstances where the [defendant] had disputed the claim on grounds that (on a proper analysis) appeared to be substantial.”

59. She ought instead, it is contended, to have treated the hearing as an opportunity to allocate the claim to track and/or make case management directions, sending the claim forward for trial.

60. Ground 2 then goes on to identify four grounds which the Judge ought (it is said) to have found to appear substantial and to have caused the hearing to proceed in that alternative way.

61. I shall come to those four grounds shortly, but it is important to identify the correct starting point for an appeal of this nature.

62. The decision whether to adjourn a hearing or not is pre-eminently a matter of judicial case management. As LJ Lewison has explained in *Birmingham CC v Stephenson*[10], a possession claim hearing may be adjourned for a wide range of reasons, not limited to those in CPR 55.8 (e.g. lack of court time, sudden illness of a party, breakdown of video/audio arrangements, etc, etc) and on any such adjournment case management directions may or may not be given. In respect of that form of judicial case management, the substantial deference which an appeal court will have for the exercise of judgment by the Judge hearing the matter requires no further elaboration.

63. But the specific inclusion of the features identified in CPR 55.8 strongly suggest that <u>if</u> the claim before a Judge has been disputed on grounds *which appear* to the Judge to be substantial then case management directions for the future determination of those matters <u>should</u> ordinarily be given.

64. In my judgment, the ‘threshold’ in CPR 55.8 must be a relatively low one. That emerges not only from the use of the words “which appear” rather than “which are” in CPR 55.8[11] but also from the special rule in Part 55 possession claims that a defendant to such a claim, who has not filed a defence, still has a right to take part in the hearing[12] and, presumably, to simply describe – at the hearing - something that they may later plead. To similar effect is PD 55A paragraph 5.1, indicating that the place for evidence

[10] [2016] HLR 44

[11] See by analogy the contrasting use of “have reason to believe” and “are satisfied that” in Housing Act 1996 Part 7 and the jurisprudence thereon.

[12] CPR 55.7(3)

in a possession claim is in a statement of case. By definition, if a defendant is participating in a hearing not having filed a defence, the assessment of whether the claim is opposed on substantial grounds is potentially one to be made without a written defence and without any evidence i.e. on assertion or submission alone (of course, in the context of the material properly already before the Court from the claimant).

65. That low-threshold approach is well illustrated by *Stephenson* itself. In that case, the claim for possession against a mere introductory tenant was at its second hearing (the first having been adjourned on 2 November 2015, with the defendant having been directed to use his best endeavours to file a defence). The defendant had had significant time to find a solicitor but had only seen one some three working days prior to the resumed hearing on 13 January 2016. No defence had been filed. The best that the solicitor attending, in the absence of the client and absent a written defence, could say was that he considered that his client had a potential defence based on 'proportionality' (said to be brought into play by the Human Rights Act 1998 Schedule 1 Article 8 and Equality Act 2010 section 15). The Court of Appeal allowed a second appeal from the making of a summary possession order because what had been said at the hearing "ought to have alerted the… Judge to the *real possibility* of at least a pleadable defence under the Equality Act 2010."[13]

66. I recognise, of course, the special context of that case as having raised issues under the Equality Act (which may have reversed the burden of proof in certain circumstances in such a claim) and that the appellate courts have encouraged robust disposal at the summary stage of all but the most exceptional 'human rights' defences.

67. But the message from *Stephenson* appears to be that, albeit that whether to adjourn or proceed is a discretionary case management decision, the appeal court will interfere if what has been put before the Judge is indeed an outline defence which raises a genuine dispute with the claim on what appear to be substantial grounds and the Judge was wrong not to identify it as such.

68. It is informed by that approach that I would conduct my review of what was done by the Judge in this case.

69. I reject any suggestion by Mr Bano that all that is needed to surmount the threshold is a point that is pleaded in a defence or could be so pleaded. That is rejected in *Stephenson* itself:

> "I do *not* therefore say that once a defence has been filed, it will inevitably result in a full trial. There is always *the possibility* even once a defence has been filed that a claim may be summarily decided."[14]

70. It seems to me not unimportant to note that in this claim, as it stood before this Judge at the short first hearing before her (initially fixed for 15 minutes): (1) the defendant was represented by specialist solicitors who had a contract with the Legal Aid Agency

[13] At [16]
[14] At [24]

to conduct housing work, primarily in possession claims; (2) the defendant had legal aid funding to defend the claim; (3) a fully pleaded defence had been filed; (4) that defence had been settled by specialist counsel from long-established chambers; (5) the points taken had been considered sufficient on the claimant's part to cause them to engage the services of Leading Counsel from whom a 14-page skeleton argument had been received; (6) the defendant had been in residential occupation of the property for many months (if not a year or more) rather than just a few days or weeks; (7) the argument took over an hour – with no waste of time; and (8) the claim arose in the relatively novel area of emerging jurisprudence concerned with property guardianship.

71. One might have thought, having regard to the relatively low threshold, that unless the points pleaded by the defence were unarguable, this was the sort of case very unlikely to have been suitable for determination on a summary basis.

72. Mr Bano referred me to two relatively recent judgments[15] of other judges of this Court, sitting on appeal, in which summary determinations in possession claims had been overturned because the material advanced at first instance plainly appeared to be sufficient to be described as *appearing* to raise 'substantial' grounds for defending the claim. He might, for good measure also have referred to two further such instances where the appellate tribunal was the High Court.[16]

73. If it might have been hoped that, post-*Stephenson*, fewer such successful appeals would be brought because fewer unsuitable cases would be determined on a summary basis, I regret to record that I have myself very recently allowed an appeal in just such a case.[17]

74. Should this matter go further, I believe it would be helpful, to both first instance judges and to those who sit on first appeals, to have a clear steer on the correct application of CPR 55.8 in the generality of cases. For my own part, I meanwhile take that steer from the judgment of LJ Lewison in *Stephenson* and from the wording of CPR 55.8 itself.

75. I can now turn to consider each of the four grounds in the instant case that was advanced as *appearing* to provide a substantial answer to the claim.

(a) The Claimant did not have standing to bring the claim

76. Having determined the substantive issue on this point under Ground 1, nothing will be gained by my reviewing it through the prism of CPR 55.8.

[15] *France v Drury* (HHJ Monty QC, 28 September 2018) and *Lakhany v Pempeh* (HHJ Lethem, 16 December 2019).

[16] *Benesco Charity Ltd v Kanj* [2011] EWHC 3415 Ch (16 December 2011) and *Evans v Brent LBC* (unreported, QBD, 18 December 2012)

[17] *Southwark LBC v Giger-Blenkinsop* (10 August 2021)

77. I would add, however, that I would have found it difficult to criticise any first instance judge had they, when faced with this point (and its accompanying 'you are estopped from arguing that' contention), decided that it did *appear* to dispute the claim on substantial grounds and could not be dealt with at a short hearing initially listed for 15-minutes.

(b) The Licence/Tenancy point

78. The Grounds of Appeal contend that "there was a substantial dispute as to whether [the defendant] had been granted exclusive possession."

79. The context is one in which the claimant for possession against trespassers accepts that it allowed the defendant into residential occupation, for payment, and has given notice to quit "a dwelling" which has expired following the entry of the parties into a 'licence agreement'.

80. The Defence of Ms Laleva pleaded that she held a tenancy, and not a licence, in the following way:

> "The Sixth Defendant has the benefit of an assured shorthold tenancy within the meaning of the Housing Act 1988. She entered into occupation of the Premises on 29th September 2019. On 17th April 2020 she moved to the room that she now occupies, and entered into a written agreement with the Claimant. She occupies her room on a weekly or monthly periodic basis in consideration of a rent of £92.31 per week, and in all other respects the matters set out at sub-section 1(1) of the Housing Act 1988 are satisfied. The Sixth Defendant was granted exclusive occupation.
>
> PARTICULARS OF EXCLUSIVE OCCUPATION
>
> The factual reality of the arrangement between the parties is such that the Sixth Defendant was granted exclusive occupation in that:
>
> a. The Premises was a purpose-built residential building (a former nurses' home, later used as office space), which was designed and constructed to be let as a number of individual units of residential accommodation (rather than a shared space occupied in common);
> b. The Sixth Defendant has exclusive possession of a numbered, lockable room (initially room 4 on the ground floor, later room 2 on the first floor);
> c. Rather than occupying the whole space in common with other residents, the Sixth Defendant was required to seek the Claimant's permission to move room;
> d. While the Sixth Defendant shares communal spaces with the other Defendants, she has exclusive possession of her particular room;
> e. The Sixth Defendant selected her own room, rather than being allocated a room by the Claimant;
> f. The Sixth Defendant was entitled to decide whether to admit the Claimant's agents when they visited the Premises;
> g. The purported contractual clauses at paragraphs 1.3-1.5, 4.1-4.3, 4.13, 5.7-5.8, 5.27 and 6.6-7.10 of the written agreement between the parties are not incompatible with exclusive occupation in that the Claimant does not exercise such a degree of control over the Defendants' use and occupation of the premises as would be incompatible with exclusive occupation; and/or
> h. In consequence of the matters set out at sub-paragraphs a-g (above), at all material times the Sixth Defendant had a right to occupy her particular room individually, and did not occupy the whole of the premises in common with the other occupiers.

81. Insofar as the claimant would contend that the issue was foreclosed by the licence agreement itself, the Defence pleaded that:

> "….the written agreement between the parties (insofar as it purports to be in the nature of a personal licence, rather than a tenancy) is a sham arrangement in that, in consequence of the factual realities of the arrangement as set out … above, the purpose of terms of the agreement on which the Claimant seeks to rely (insofar as they may be incompatible with exclusive occupation) was to create the appearance of a personal licence."

82. The task for the judge was to determine whether this *appeared* to raise a substantial defence to the claim.

83. She said:

> "8. The second issue is the tenure of these defendants, whether they have a licence or a tenancy, and whether the agreement is essentially a sham. The agreement and the clauses in the agreement, which were in the bundle, I was satisfied supported the proposition that this is a licence. They were incompatible with the argument that these defendants were granted exclusive possession of their rooms. That was supported by the contextual information as to the background of the case, that it was formerly a nursing home, then offices owned by the NHS and required to develop as a health centre.
>
> 9. The defendants made the point that the caselaw, especially *Camelot Guardian Management Limited v Khoo* [2018] EWHC 2296 (QB) will never be full square with every situation. I obviously accept that, but I was satisfied that in all essential points the facts of this case are in line with the *Camelot Guardian Management Limited v Khoo* judgment. I am not satisfied from the defendants' pleading that there is an arguable substantial defence that this was a sham arrangement. It was not adequately pleaded as a sham or a fraud. There was no total unreality aspect here. In fact, the opposite was true, it was readily understandable that this was a licence and the reasons for that."

84. It is important to recall that the Judge had no *evidence* in the case beyond the usual short witness statement filed in support of a claim against trespassers and the exhibit to that.

85. She was, as she recognised, concluding on a summary basis the factual *determination* of whether an occupation agreement was a lease or licence. Although contextual information was, as the Judge recognised, important for such a determination, she had none before her from the defendant because there was no evidence put in yet for the defendant. That would come as part of preparations for any trial. Of course, she did have the full terms of the written agreement made in April 2020.

86. In my judgment, Mr Grundy's submission, that the matter was in effect foreclosed by the terms of the written licence agreement and decision in the *Camelot* case, ought not to have been accepted by the Judge and I reject it on this appeal.

87. It is strikingly similar to a submission that Mr Grundy unsuccessfully recently advanced on the appeal in *Ibrahim v London Borough of Haringey*[18]. In that case (which concerned the summary disposal of an injunction claim at an interim hearing), as here, Mr Grundy contended that the judge at first instance had been right to summarily determine that an individual could not, in the circumstances of that case, be a tenant (or even a licensee) given binding precedent on similar facts. That was an *a fortiori* case because the precedent emanated from the UK Supreme Court. Lane J, allowing an appeal, held at [68] that the judge was wrong to find that there was no properly arguable case to go to trial. Mr Ibrahim "ought to have been afforded the opportunity of arguing, at trial, that the circumstances of his agreement with the first defendant materially differed" from the precedent case.

88. In the present case, the terms of the licence agreement entered into by Ms Laleva may have been similar, or perhaps even identical, to those of the *Camelot* case. But that did not foreclose her from contending that, in the circumstances of her particular occupancy, she actually enjoyed a tenancy and that the licence agreement either innocently mislabelled the relationship or was a 'sham'. Like the Judge, I have read the licence agreement, and the *Camelot* case, and heard submissions about them. With respect to the Judge, I do not consider them to inevitably dictate the result of the lease/licence point in this claim.

89. In particular, I note that the occupancy of the premises by Ms Laleva began *before* the parties each signed the Licence Agreement now relied upon and that the premises she occupies were not a former warehouse of some other empty commercial building but a property with a history of use for *residential* occupation. The licence being entered-into by an incumbent resident in such accommodation may have very much coloured the contextual background.

90. I have no hesitation in holding that the Judge was wrong to find that the defence advanced did not even *appear* to raise substantial grounds for defending the claim. I note that in her summary reasons for refusing permission to appeal, while discretely dealing with all the other matters she determined, she does not deal with this one.

91. Both counsel were right to draw my attention to the fact that other claims brought on a similar basis by the same claimant are awaiting *trial* on, inter alia, the self-same lease/licence/sham points in this court and another county court in London. Likewise, that 'property guardianship' is a relatively novel concept in our law of property and its implications are still being worked-through by the Courts. These matters seem to me to demonstrate that here a defence was being advanced which clearly *appeared* to dispute the claimant's case on substantial grounds.

92. It is somewhat ironic, that – had the Judge given truncated case management directions for an early trial rather than having summarily disposed of the substantive factual dispute – the trial would be coming on for hearing about now. As it is, as a result of the outcome of this appeal, it remains at first base.

[18] [2021] EWHC 731 (QB) (30 March 2021)

(c) Notice to Quit by Email

93. The Defence advanced before the Judge contended that the claimant was relying on a notice to quit (or, more properly, what should have been described as a 'notice to determine a licence') which had been despatched to her by Email.

94. This appeared to give rise to an interesting question, canvassed briefly in *Hill & Redman*[19], as to whether service by Email could amount to good service.

95. The Judge was referred to a provision in the Licence Agreement signed by Ms Laleva which provided that notice to her might be served by "sending it by Email to the email address set out in the Particulars".

96. She stated that:

> "10. … The defendants' position is that there was not good service via email. The claimant said that this is an arguable point because there is no caselaw on the matter. I was satisfied that the licence could be revoked under the terms of the contractual arrangement and that the Protection from Eviction Act 1977 provides for notice in writing and that email was defined as in writing in the Interpretation Act 1987. I am satisfied that the parties agreed this format and that the landlord's service of notice via email was effective. There is no arguable or substantial dispute sufficient to give case management directions."

97. Mr Bano took my attention to the respects in which the provisions as to notice in the agreement were (like much of the rest of it) poorly laid out, muddled and difficult to follow. But the provision referred-to by me, and relied upon by the Judge, was actually there. The proposition that the clause (or the agreement as a whole) was void for uncertainty was and is unarguable.

98. The Defence had pleaded that the claimant could not "displace the common law requirement that a physical notice to quit must be delivered to the dwelling house and/or to the recipient."

99. The common law does not embrace a concept of 'physical' notice. Notice is either oral or in writing. If in writing, the common law requires that it has been served upon, i.e. received by, the recipient. If it comes into their hands at the correct date, how precisely it has done so is irrelevant.

100. In the instant case, there was no pleaded denial of receipt. That should have been an end of the matter.

101. There may be future cases in which the point actually matters e.g. where a notice is sent by Email but is rejected by the server for the Email address to which it was sent or where delivery of the Email fails for some other technical reason. Nothing of that sort arises here.

[19] At [4458]

102. In any event, the Judge decided - as a matter of construction of the agreement - that service by Email had been agreed. That displaced any general rules of common law as to means of service. She was right to hold that the point gave no appearance of any substantial basis for disputing the claim.

(d) Unfair bargain

103. The Defence contended that a 'deemed service' provision in the Licence Agreement, stipulating a greater margin of deemed service dates for notices *to* the claimant than notices *from* the claimant, created a more significant imbalance in the contractual arrangements between the parties than was fair, Accordingly, this was an unfair term and should be struck down as contrary to the Consumer Rights Act 2015.

104. The Judge said this:

> "11. Finally, in relation to the Consumer Rights Act 2015, the defendants' argument is that there is an imbalance created by the requirement for the defendant to serve notice via post effective next day and that that imbalance is unfair. The Consumer Rights Act 2015 provides examples of unfair clauses and where that might lead to significant imbalance. I was not persuaded that the contractual methods agreed here did give rise to a substantial dispute on the basis of a breach of the Consumer Rights Act 2015."

105. Mr Bano submitted that the Judge was plainly wrong. His oral and written submissions were commendably clear but, to my mind, impossible to accept.

106. There was no dispute that his client *had received* the Notice sent to her. In those circumstances, even if the terms of the licence agreement as to *deemed* service fell, by operation of the 2015 Act, to be struck down by some means, that would have made no difference whatever to the substance of the possession claim.

107. In any event, I can discern no error in the Judge's summary treatment of this point. Even if the terms of the agreement do contain provisions as between grantor and grantee as to deemed service of notices which are slightly less generous to the latter than the former, I consider that there did not even *appear* to be any grounds on which it could be found that the imbalance was 'significant'.

Outcome

108. For the reasons given above, the appeal fails on Ground 1, Ground 2(a), Ground 2(c) and Ground 2(d).

109. The appeal is allowed on Ground 2(b). The claim ought now to be allocated to track and made subject of case management directions.

110. I will determine any applications or ancillary matters, in so far as they cannot be agreed, at the handing-down of this Judgment.

111. As usual, a draft of this judgment was circulated to counsel in advance of the handing-down so that any typographical errors might be detected and so that any factual inaccuracies might be identified. Regrettably, a little less than 24 hours was made available for that exercise. I am most grateful for the helpful responses received from counsel within that limited time.

112. In his response, Mr Grundy took the opportunity to make somewhat broader observations on the draft. Where I considered it appropriate, I took account of them. I should particularly indicate that Mr Grundy drew attention to the fact that neither party had referred in argument to the *Ibrahim* case considered by me. Had time allowed, I might have earlier invited oral or written representations on it. But Mr Grundy had pressed upon me, on 9 August 2021, the urgent need for a decision on the appeal. That imperative, and my ability to consider Mr Grundy's comments on the case in his response to the draft judgment, have caused me to leave my reference to it undisturbed.

HHJ Luba QC

25 August 2021