



Neutral Citation Number: [2023] EWCA Civ 1319

Case No: CA-2022-002229-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL APPEALS CHAMBER
Upper Tribunal Judge Perez
UA/2018/002856-CH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2023

Before:

LORD JUSTICE COULSON

Between:

Tendring District Council	<u>Applicant</u>
- and -	
Christopher Alfred Ling	<u>1st Respondent</u>
- and -	
Secretary of State for Work & Pensions	<u>2nd Respondent</u>
- and -	
Janet Ling	<u>Proposed 3rd Respondent</u>

Kelvin Rutledge KC (instructed by Tendring District Council) for the Applicant and 2nd Respondent

The Respondents did not appear and were not represented.

Hearing date: 8 November 2023

Approved Judgment
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LORD JUSTICE COULSON:

1. This is a case concerned with the repayment of housing benefit. Between 2000 and 2012, some £67,000 odd was overpaid by Tendring District Council to the first respondent, Mr Ling. There was a statutory demand for the return of the money on 18 July 2012. Thereafter, much of the debate has focussed on whether the statutory demand, and subsequent events, also made Mrs Ling jointly liable for the repayment. The process has been complicated by Mr Ling's apparently progressive ill health, and the absence of any legal representation on his behalf. Mrs Ling has appeared at all the hearings below as Mr Ling's litigation friend.
2. This straightforward dispute has suffered a series of unwarranted delays, and unexpected events, which almost beggar belief. Sadly, those appear to be primarily due to the tribunal service. This has led to a labyrinth of documents, decisions, appeals and further decisions. The case has been round the full course of First Tier Tribunals ("FTT") and Upper Tribunals ("UT") not once but twice. I stress that none of that is the parties' fault, although it has made the need for a proper chronology in this case almost overwhelming.
3. Picking up the history at the time of the second go-round in the FTT, the judge found that both Mr and Mrs Ling were liable to repay the housing benefit. Although Mr Ling appealed that decision to the UT, I note that the bulk of the arguments concerned Mrs Ling's case that she was not jointly liable. The UT dismissed the appeal in respect of Mr Ling but allowed the appeal insofar as it related to Mrs Ling's joint liability. Tendring sought to appeal against that decision, and I granted them permission to appeal earlier this year.
4. At the same time as the application for permission to appeal, there was an application to join Mrs Ling as a respondent. I adjourned that to an oral hearing, in order for Mrs Ling to be represented, if she chose to be. The hearing was fixed for 8 November 2023. Mrs Ling indicated that she would appear in person. It had been arranged through the Court of Appeal Office for her to attend that hearing by way of the Cloud Video Platform ("CVP"). The day before the hearing, she sought an adjournment on health grounds but, in the absence of any independent medical evidence whatsoever, I refused that application. The CVP arrangements were kept in place for the hearing on 8 November, but Mrs Ling did not attend. The hearing therefore went ahead in her absence.
5. Mrs Ling's objections to being joined to these proceedings had already been set out in some detail in writing. Many of the points she made went to the substantive merits of the appeal itself, and those will be dealt with at the appeal hearing itself, fixed for January 2024. They are not relevant to the application to join her as a party. Her other principal objection was the delay in the making of the application, an issue which I had myself raised when adjourning the application to join Mrs Ling to an oral hearing.
6. Tendring want to join Mrs Ling as a party because they want her to be formally bound by the result of the appeal. That is primarily so they can enforce any order against Mr and Mrs Ling without further difficulty. A possession order had been sought in Colchester County Court, but the proceedings were stayed as far back as 2017. It appears that this was because of Mr Ling's health difficulties and the fact that he jointly owned the relevant property with his wife.

7. In making the application to join Mrs Ling as a party, Mr Rutledge KC, who appeared on behalf of Tendring, primarily relied on CPR 19.2(2). That provides:

“19.2

- (2) The court may order a person to be added as a new party if –
(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.”

Mr Rutledge relied on *Dunlop Haywards (DHL) Ltd v Erinaceous Insurance Services Ltd* [2009] EWCA Civ 354, in which this court considered it desirable for excess insurers to be joined into the proceedings so that the issues of rectification and construction of the policy which arose could be fully litigated.

8. Whilst I have no doubt that it is “desirable” for Mrs Ling to be a party to the appeal, I have formed the firm view that this is not the applicable test in this case. That is because of r.19.2(1), which disapplies r.19.2(2) in specific circumstances:

“(1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).”

I should add that the cross-reference there to r.19.5 is an error; following an addition to the rules, it should be a reference to r.19.6.

9. On the basis of the material available to the court, I consider that any cause of action against Mrs Ling accrued not later than 17 July 2018, namely 6 years after the statutory demand. The 6 years comes from s.9 of the Limitation Act 1980, concerned with the limitation period for claims for sums recoverable by statute. On that analysis, any claim against Mrs Ling is now statute-barred. So it is necessary to apply r.19.6.
10. Rule 19.6 provides as follows:

“19.6

- (1) This rule applies to a change of parties after the end of a period of limitation under –
(a) the Limitation Act 1980;
(b) the Foreign Limitation Periods Act 1984; or
(c) any other enactment which allows such a change, or under which such a change is allowed.
(2) The court may add or substitute a party only if –
(a) the relevant limitation period was current when the proceedings were started; and
(b) the addition or substitution is necessary.
(3) The addition or substitution of a party is necessary only if the court is satisfied that –
(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

(b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
(c) the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party.

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that –

(a)

(i) section 11 (special time limit for claims for personal injuries); or

(ii) section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or

(b) the issue of whether those sections apply shall be determined at trial.”

11. Applying r.19.6(2)(a), it is plain that the relevant limitation period was current when the proceedings were started against Mr Ling. The issue therefore concerns r.19.6(2) (b), namely whether the addition of Mrs Ling is “necessary”. Rule 19.6(3)(b) makes plain that the addition of Mrs Ling would be necessary only if I was satisfied that the appeal cannot properly be carried on against Mr Ling unless Mrs Ling was added as a respondent.
12. The rule is usually deployed when there has been a change of circumstances during the course of litigation and it is necessary to substitute one party for another, such as the liquidation of a company or the death of a party: see, for example, *Parkinson Engineering Services PLC v Swan* [2009] EWCA Civ 1366; [2010] P.N.L.R. 17 where the liquidator of a company was added in substitution of the company itself. In the present case, nothing of that sort has occurred: the only change of circumstances that might be said to have occurred was the UT’s decision to allow Mr Ling’s appeal in respect of Mrs Ling’s liability.
13. However, it is important to stand back and have regard to the reality of what has been going on during these lengthy proceedings. In both the FTT and the UT, the principal arguments in respect of housing benefit concerned Mrs Ling’s potential joint liability to repay. That was the issue with which, certainly by the second go-round, the UT was primarily concerned. On that issue, Mrs Ling, in her role as her husband’s litigation friend, made detailed and forthright submissions, which were upheld by the UT judge.
14. In other words, at all material times, the parties were proceeding on the basis that what mattered was the decision for or against Mrs Ling. That remains the case now: that is what the appeal is all about. The purpose of the appeal, if Tendring is successful on the substantive merits, is to permit enforcement against both Mr and Mrs Ling. It is therefore necessary for Mrs Ling to be made a respondent in order that she can argue her case to the full, and that, if she is unsuccessful in so doing, Tendring can put in place proper enforcement proceedings. The position in respect of Mr Ling is almost an irrelevance because he has already been found liable and there is no appeal in respect of his position; indeed, I suggested that, if Mrs Ling was added as a respondent, Tendring should give some thought to abandoning the appeal insofar as it relates to Mr Ling.
15. It is of course right that Mrs Ling could have formally been made a party at an earlier stage of these proceedings. But that did not happen, because no one turned their mind to the formal position, and everybody focused on the substantive issue as to whether

or not Mrs Ling was in fact jointly liable with her husband. Since she made detailed (and successful) submissions on that point, and has been closely involved throughout the process, Mrs Ling has not suffered any prejudice by not having formally been made a party before. On the other hand, if she was not made a party, she might be able to run all the arguments she has run before at the appeal hearing, lose them, and still avoid any liability to repay the money. She would be arguing on appeal that she was not liable, but with no adverse consequences to her if she lost. That would be having her cake and eating it, and would be contrary to the overriding objective.

16. It is also right to note that the way in which the statutory scheme works may also help to explain why this application has been made late. The statutory demand of July 2012 fixed liability, subject to questions of appeal. Mr Ling appealed and not Mrs Ling, but thereafter all the arguments focussed on their joint liability. In one sense, therefore, if Tendring are right about the effect of the notice - and that is a matter for the substantive appeal - then they could argue that, under the statute, joint liability was established in July 2012. Again, Mrs Ling needs to be a party to the substantive appeal in order to address that argument.
17. For those various reasons, therefore, I have concluded that, on the unusual facts of this case, it is necessary for Mrs Ling to be joined as a party to these proceedings. The costs of the application will be costs in the appeal. Since she is now a separate party, it may be inappropriate for her to continue as her husband's litigation friend, because of what may be a potential conflict of interest. In any event, I would urge Mrs Ling to co-operate with the Official Solicitor in view of Mr Ling's potential status as a protected party.