



Neutral Citation Number: [2022] EWHC 459 (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: 3 March 2022

Before :

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

Between :

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

Claimant

Defendants

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

Reasons for form of order, 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 (i) possession of West Axnoller Farm (“the Farm”), near Beaminster in Dorset (this includes the main house, “the House”, and associated equestrian facilities, as well as the remaining land of the original dairy farm), (ii) mesne profits and/or damages, and (iii) damages for wrongful interference with the claimant’s goods. I held that the claimant was entitled to possession and to an inquiry for mesne profits/damages and damages for wrongful interference with goods.
2. I invited the parties to agree an order to give effect to my judgment. Unfortunately, the parties were unable to agree. Each side submitted its own version. The principal difference between the parties is whether any time should be given to the defendants to give up possession (and, if so, how much), or whether they should be ordered to give up possession “forthwith”.
3. The defendants submit that I should order possession of the Farm estate other than the House itself to be given up by 21 March 2022, and the House itself by 1 August 2022. They rely on a number of matters in support of this submission, which I will refer to very shortly. The claimant says that I have no discretion in the matter, but must make a “forthwith” order. However, they say that, if I have a discretion, it should not be exercised as extensively as the defendants seek.
4. In seeking to be given time to leave the Farm, the defendants rely on a number of matters. They say first of all that there has been a significant drop in rental properties available on the market. They say also that they have lived at the farm for just under 18 years. They refer to medical evidence that Mr Brake has a serious mental condition which (according to the consultant) means that “enacting an eviction without a notice period, so leading to an inability to plan an appropriate exit strategy from their current accommodation, would be of severe detriment to Mr Brakes mental health”. Finally, they also refer to evidence that Mrs Brake herself is physically very unwell.
5. In a case where the court has power to give time to defendants to organise their departure from land which they are being ordered to give up, some at least of these matters could be relevant. The main question here is whether the court has any such power in the present case. Only if the court has such a power is it necessary to go on to consider whether and how far it should be exercised.
6. As I have said, this was a claim for the possession of land. The defendants did not challenge the claimants’ title to the legal estate in fee simple in the Farm, but put forward a number of defences based on assurances said to have been given to them. I rejected all these defences, and held that, as from February 2017 (when the claimant company was acquired by The Chedington Court Estate Ltd), the defendants had merely a bare licence to stay in the House as a second home, and to use the equine arena. I further held that that bare licence had been validly determined, and that the defendants had no further right to remain at the Farm.

A historical perspective

7. Historically, in considering what order to make on a successful claim for the possession of land, the law distinguished between two different situations. The first was where the defendant did not have or obtain possession in law. The archetypal example is what we might nowadays call a “squatter”. The second was where the defendant originally had, and had entered by virtue of, a right to legal possession which had now come to an end, for example because he or she had been granted a tenancy for a term which had now expired (whether by effluxion of time or by notice), and yet the former tenant was holding over.
8. In the first case the claimant landowner was (historically) entitled to enter the land and evict the defendant by reasonable force: see *eg Hemmings v The Stoke Poges Golf Club Ltd* [1920] 1 KB 720, CA, where the evicted occupier had been a service occupier and not a tenant. In the second case, the landowner was not so entitled, because of the operation of the so-called statutes of forcible entry (the Forcible Entry Acts 1381, 1391, 1429 and 1623).
9. But if, in the first case, the landowner, instead of resorting to self-help, brought a claim for possession *in the courts*, and succeeded, the court would not give extra time to the defendant. The reason for this was so as not to encourage claimants in future to resort to self-help. Instead the court would order possession to be given up “forthwith”. In the second case, however, where the landowner could not simply retake possession personally, the court could and did fix a date for the giving up and retaking of possession. Typically this was four to six weeks after the order: see the historical analysis in *McPhail v Persons Unknown* [1973] Ch 447, CA.

Statutory intervention

10. There are nowadays a number of statutory regimes which provide, among other things, for the court’s power to give time in making a possession order. These include service occupiers (Protection from Eviction Act 1977, s 8(2)), occupiers under rental purchase agreements (Housing Act 1980, s 88(1)), mortgagee possession proceedings (Administration of Justice Act 1970, s 36), forfeiture of leases (County Courts Act 1984, s 138), and various residential tenants (Housing Act 1988, s 9(6)). None of these applies in the present case.
11. A more general provision was enacted by the Housing Act 1980, section 89, as follows:

“Restriction on discretion of court in making orders for possession of land

(1) Where a court makes an order for the possession of any land in a case not falling within the exceptions mentioned in subsection (2) below, the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order.

(2) The restrictions in subsection (1) above do not apply if—

(a) the order is made in an action by a mortgagee for possession; or

- (b) the order is made in an action for forfeiture of a lease; or
- (c) the court had power to make the order only if it considered it reasonable to make it; or
- (d) the order relates to a dwelling-house which is the subject of a restricted contract (within the meaning of section 19 of the 1977 Act); or
- (e) the order is made in proceedings brought as mentioned in section 88(1) above.”

None of the exceptions referred to in sub-s (2) applies in this case.

The impact of human rights

12. In *Boyland & Son Ltd v Rand* [2007] HLR 369, the Court of Appeal confirmed the correctness of the distinction drawn in *McPhail v Persons Unknown*, and held that section 89 of the Housing Act 1989 was concerned only with cases where the court already had power to postpone the giving up of possession, and had no application to cases where the court had no power to postpone such giving up. It also held that, in a case between private persons, the decision in *McPhail v Persons Unknown* was unaffected by Art 8 of the European Convention on Human Rights (“ECHR”).
13. In *Malik v Fassenfelt* [2013] EWCA Civ 798, the Court of Appeal revisited these questions, in a case concerning squatters on certain (non-residential) land near Heathrow Airport. Sir Alan Ward expressed his own view that, in the context of a claim by a private landowner against a squatter, *McPhail* had been overtaken by Art 8 of the ECHR. But the majority of the court (Lloyd and Toulson LJ) declined to take that view.
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.
15. As Lord Neuberger and Lady Hale (with whom the rest of the court agreed) put it,

“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).”

Other authorities

16. The defendants however refer to a number of authorities, which they say demonstrate that the court has power to give time to the defendants to leave the property. These are *Canadian Pacific Railway Co v The King* [1931] AC 414, *Minister of Health v Bellotti* [1944] 1 KB 298, *Parker v Parker* [2003] EWHC 1846 (Ch), and *Mehta v Royal Bank of Scotland* [1999] HLR 45. But all of these are in fact cases about the appropriate length of notice to be given in order to determine a licence in a particular case. In the present case, however, the bare licence given to the defendants has already long been determined (as indeed the defendants accept in their written submissions (at [6])). This has been decided by the court, and is therefore *res judicata* between the parties. It cannot be raised again in considering what order to make.

Conclusion on power to postpone

17. In my judgment, therefore, the legal position today is that, as between the claimant private landowner and defendant occupier in a successful claim for possession by the former against the latter, if the occupier has never had legal possession of the land, and no statutory regime applies to give the court power to postpone the giving up of possession, the court has no power at all to give time to the defendant to leave. It must order possession to be given “forthwith”.
18. That does not mean that the court will immediately enforce the order. The enforcement procedures are set out in CPR part 83. In practice, if the defendants do not give possession consensually, the claimant will have to apply for a writ of possession, and then at least 14 days’ notice of eviction would have to be given.
19. Accordingly, I will order possession of the Farm to be given forthwith.

“Exceptional hardship?”

20. In case I am wrong, however, and I do have power to take account of the points made by the defendants in favour of giving them time to leave the Farm, I go on to say this. Under section 89 of the Housing Act 1980, I could not stay the possession order for longer than 14 days, unless it appeared that “exceptional hardship would be caused by requiring possession to be given up” by that date. Even then, the *maximum* time that can be given is limited to six weeks. There is therefore no question of my being able to postpone possession being given up until August 2022.
21. Is there “exceptional hardship” shown in the present case? First, the fact, if it be so, that there is a shortage of rental properties on the market, cannot create exceptional hardship, over and above the ordinary hardship of having to leave a property. The same shortage and the same hardship simply take effect earlier. Second, the length of time that the defendants have lived at the Farm cannot do so either. I am afraid that legal rights trump emotional attachment, and, anyway, if you have to leave sometime then there will be an emotional cost, whenever it is paid.

22. Thirdly, accepting that Mr Brake has a mental condition, I note that the medical evidence in support baldly states that evicting him without a notice period would be “of severe detriment” to his mental health, but that six months “may” give him sufficient time to access “help and support” (no reasoning supplied). This is, I am afraid, of very little assistance to me. It tells me nothing of the potential “detriment”, and it does not explain why six months, rather than one, or twelve, will make all the difference. In any event, as already explained, I cannot give six months.
23. Fourthly, I have accepted throughout this litigation that Mrs Brake suffers from a number of medical conditions. Indeed, I have made numerous adjustments to the procedure, both in this trial and in the accompanying one, in order to accommodate her. But it does not mean that, in addition to all the accommodations referred to, she should then have an extended period in which to leave the property. If an ill person is adjudged not to have rights in certain land, and should leave, there is no *a priori* reason why a possession order should not be made effective. If however the nature of the illness impacts on removal from the property (*eg* a person who is bed-ridden with special equipment that needs to be specially installed elsewhere), then this should be made clear. But there is nothing of that kind here.
24. In any event, I have noted in earlier judgments that the defendants have removed much of the furniture from the House already. I cannot see that it will be a very difficult task to remove the remainder, and there is no evidence before me to persuade me otherwise. Accordingly, even if I had had the power to order possession to be given other than forthwith, there would in my judgment be no “exceptional hardship” within section 89 of the 1980 Act, and I could not have postponed the order for more than 14 days. I also note in passing that tomorrow will be the fourteenth day after I circulated my draft judgment. The defendants have known since 18 February 2022 what was going to happen.