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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 2297 (QB)



No. QA-2021-000131

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 9 July 2021

Before:

MRS JUSTICE STEYN DBE

B E T W E E N :

RAJEVE MAHANDRU

Claimant/Appellant

- and -

DR EJIRO NIELSON

Defendant/Respondent

MR PHILIP McLEISH (instructed by Javed Nazir Solicitors) appeared on behalf of the
Claimant/Appellant.

MR MANSOOR FAZLI (instructed by Victory Solicitors) appeared on behalf of the
Defendant/Respondent.

J U D G M E N T

(Via Microsoft TEAMS)

MRS JUSTICE STEYN:

- 1 This is an appeal brought by the claimant in the underlying action, Mr Rajeve Mahandru, against an order of Ms Recorder Frost dated 8 June 2021 by which she refused his application for an interim injunction requiring the defendant, Dr Ejiro Nielson, to readmit the claimant to the property where he had been living before he was admitted to hospital.
- 2 Permission to appeal was granted by Jacobs J by an order dated 23 June 2021.

Background

- 3 The underlying claim is for unlawful eviction. The claimant had been living in a property owned by the defendant since about 23 December 2020. He was admitted to hospital with mental health issues on 4 April 2021. When he tried to return to the property on 11 May 2021 he found that the locks had changed and that the defendant herself was living in the property.
- 4 The claimant filed a claim for unlawful eviction on 26 May 2021 and an application for an interim injunction was made at the same time. That was heard by Ms Recorder Frost on 8 June. She dismissed the application for an interim injunction and she made directions listing the claim for trial. It is listed to be heard on Tuesday, 13 July 2021. That is in two working days from today.

The Recorder's decision

- 5 I do not have a copy of the Recorder's approved judgment. In view of the short timescale in which the appeal has been listed, approval of the transcript has not yet been provided but as I considered it would be better to have the formal transcription of the Recorder's judgment than counsel's notes of it, I granted permission yesterday evening for the unapproved transcript to be provided to the court. So my references to the judgment are to the transcript of her judgment, albeit unapproved.
- 6 The Recorder said at paragraph 2 of her judgment:

“This is an unlawful eviction injunction. I have to be satisfied in accordance with well-established case law that there is a serious issue to be tried, effectively a properly arguable case that if an injunction is wrongly granted, that compensation in damages would be adequate and/or that if an injunction was not granted, damages would be adequate. The adequacy of the remedy of damages is the second aspect of the test and, finally, the balance of convenience.”
- 7 In respect of the first of those issues, the Recorder found that there was a reasonable argument that this was an assured shorthold tenancy and so a reasonable argument that the eviction was unlawful. But on the evidence which she described as being in its infancy, this was by no means certain in circumstances where the defendant's case is that the exception in paragraph 10 of Schedule 1 to the Housing Act 1998 applies.
- 8 In respect of the second issue, the Recorder said that damages would not be an adequate remedy for either party and so the case essentially turned on the balance of convenience. That is a term that reflects section 37(1) of the Senior Courts Act 1981 where it is stated that an injunction may be granted if it appears to the court “just and convenient to do so”. In some cases, it has been said that the balance to be struck is more fundamental and more weighty than mere convenience and is better described as the “balance of the risk of doing

injustice” raising the question: which course carries the lower risk of injustice? (see volume 2 of the **White Book** at paragraph 15.12).

- 9 The Recorder considered that there were significant points going both ways. She clearly bore in mind that unless an injunction was granted, the claimant was prevented from residing in the property in respect of which his case is that he has an assured shorthold tenancy. Having been locked out, he was residing in a hotel and, clearly, the position was made more difficult for him in view of his mental health difficulties evidenced by the medical evidence before her.
- 10 Nevertheless, the Recorder considered that the balance of convenience fell in favour of the defendant. She said:

“10. The defendant has told me and told the court today, and sets out as much in her particulars of defence document, that it is her only residence and she had come back to reside in her only residence having attended to family matters abroad which whilst Mr Mahandru was in the early stages of the occupation of the property. ...”

- 11 She further said: at paragraph 12:

“12. ... I am satisfied on the evidence that is before me that it is her home, it is her principal residence, and that she needs to reside there and has a right to reside there.

13. If I granted the injunction today, it would effectively put Dr Nielson out of her home that is, I am told, her only residence.”

Discussion and decision

- 12 There are four grounds of appeal. First, it is alleged:

“It amounted to a serious procedural irregularity for the judge to decide the case on the basis of evidence contained in a twenty-page statement which claimant’s counsel had not been afforded any opportunity to read, let alone to take instructions on.”

- 13 As Mr McLeish acknowledges on behalf of the claimant, the defence is, in fact, fourteen pages rather than twenty. Nevertheless, I accept that he received it late and it is a reasonably lengthy, closely typed document and the opportunity to consider it was limited.
- 14 In giving her order, the Recorder noted that the claimant was given an opportunity to consider the defendant’s evidence. No adjournment was requested and the claimant himself had also served evidence late. In my judgment, the decision of the Recorder was not unjust because of a serious procedural irregularity. It is often the case in the context of an interim injunction application, which by definition will usually be urgently sought, that materials may be filed at a relatively late stage. The claimant could have sought an adjournment, or asked for more time to read the defence, if he considered that he was prejudiced. He did not do so because he considered that most of what was said in the particulars of defence was not relevant to the interim injunction application. That was clearly right and so the real question is whether the Recorder took into account irrelevant matters when making her determination, a point that is raised in Ground 4. I reject the appeal insofar as it is based on Ground 1.

15 The second ground of appeal is in these terms:

“The Recorder failed to have regard to paragraphs 5 and 6 of Lord Diplock’s guidance in *American Cyanamid v Ethicon* [1975] AC 396. The Recorder had identified this as a case that was finely balanced and in which neither party would be adequately compensated in damages should an injunction turn out to have been wrongly granted. She did not identify any respect in which defendant might be more at risk of suffering uncompensatable disadvantage than the claimant. Notwithstanding this, and in breach of Lord Diplock’s guidance, she failed to consider the relative strength of each party’s case. This was unfair to the claimant since the WhatsApp messages, to which there could be no credible dispute, pointed towards the strength of the claimant’s case being disproportionate to that of the defendant.”

16 I consider it appropriate to consider this ground together with Ground 3 which states:

“The Recorder failed to have regard to paragraph 4 of Lord Diplock’s guidance in *American Cyanamid*, since although the Recorder stated in her judgment that the case was a finely balanced one, she failed to mention or consider restoring the status quo ante.”

17 Guidelines (4), (5), and (6) are stated in these terms in volume 2 of the White Book 2021 at paragraph 15.10:

- “(4) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.
- (5) The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.
- (6) If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party’s case as revealed by the written evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of the one party’s case is disproportionate to that of the other party.”

18 At paragraph 15.14 of volume 2 of the White Book, guideline (4) is addressed in more detail:

“Guideline (4) states that where other factors appear to be evenly balanced it is ‘a counsel of prudence’ to take such measures as are calculated to preserve the status quo. Sometimes, it is said that the principal function of the interlocutory injunction is to preserve the status quo (*Siskina v Distos Compania Naviera SA* [1979] AC 210, HL at p.256 per Lord Diplock; see also *Daniel v Ferguson* [1891] 2 Ch 27, CA). However, in a given case, the preservation of the status quo may on balance clearly incur the greater risk

of injustice. Further, parties should not be encouraged to believe that the courts will be unwilling to undo by interlocutory injunction what would otherwise be a *fait accompli* (*Thompson v Park* [1944] 1 KB 408, CA), especially where one party, by conduct that reflects little credit on them, has ‘stolen a march’ on the other (*Zockoll Group Ltd v Mercury Communications Ltd*, *op. cit.*, at p. 371 per Simon Brown LJ). The relevant point of time for the purpose of ‘status quo’ may be difficult to determine and may vary.”

- 19 On appeal, the question is whether the lower court was wrong. In my judgment, in respect of Grounds 2 and 3, the Recorder was not wrong to reach the view that she did. First, although she did not refer in express terms to the term “status quo”, it is clear that she applied guideline 4. The other factors being evenly balanced on the materials before the Recorder, what she did in refusing the application was to *preserve* the status quo. As a matter of fact, at the time of the hearing before the Recorder, the status quo was clearly that the defendant was living in the property and the claimant was not.
- 20 Mr McLeish contended that the Recorder should have restored the *status quo ante*, that is, restored the position as it had stood before the defendant excluded the claimant from the property. The argument that it would be unjust in this case to preserve the status quo rather than restore the status quo ante was one that the Recorder addressed in considering whether the defendant had manipulated the situation to oust the claimant from the property. The Recorder said:
- “It seems to me that whilst one can foresee a situation where the claimant can argue that there has been some manipulation on the part of the defendant, I do not consider that there is sufficient evidence for me to make that determination at this juncture. I am asked to infer from the way in which the defendant has gone about the text messaging that she somehow has manipulated the situation or changed her mind at a later juncture. I am afraid that whilst that argument is not without merit in that I can see it being arguable, I do not consider that I can reach a conclusion that the defendant has somehow manipulated the situation with regards to this property to suit her own ends.”
- 21 In other words, the Recorder did not consider that this was a case in which it could be determined, at least at the interim injunction stage, that what the defendant had done was to steal a march on the claimant such that the position should be restored to how it had been prior to the claimant’s exclusion from the property on 11 May.
- 22 Secondly, the Recorder addressed the merits and the extent of disadvantage, and it was reasonably open to her to find on the facts that these did not clearly tip the balance one way or the other. Whilst there is much to be said on both sides in relation to the merits, and no doubt will be said at the hearing on 13 July, in my judgment, the Recorder’s conclusion that the merits were reasonably arguable but there was no certainty at that stage while the evidence was in its infancy that the claimant would succeed in his claim was not wrong and the merits were not something she ought to have found outweighed the prudent position of preserving the status quo.
- 23 As regards the extent of disadvantage, the claimant had defaulted on his rent, so the real possibility that damages would not be an adequate remedy for the defendant was clear. More importantly, as the Recorder found, the defendant did not have another address where she could live. So, for that reason too damages were not an adequate remedy for her. The

claimant was not street homeless. The medical evidence showed that he had been offered temporary accommodation on discharge (although he had not taken up that offer) and at the time of the hearing, he was living in a hotel. The Recorder was not wrong in her assessment of the balance of convenience.

24 The final ground is in these terms:

“In deciding to exercise her discretion in favour of the defendant, the only factor cited by the judge as a reason for finding that the balance of convenience swung in her favour were ‘extraneous circumstances’. It is understood that this referenced various allegations levelled at the claimant by the defendant relating to his recently failed marriage. The judge erred in having regard to these allegations, since they were extraneous and irrelevant to the issues in dispute between the parties.”

25 In my judgment, this ground demonstrates a misreading of the judgment and a misunderstanding of the way in which the point was referred to by the Recorder. The essential point was that on the defendant’s case, the intention had been that both the defendant and the claimant would together occupy the property. The extraneous circumstances and, indeed, the litigation itself were only relevant insofar as they demonstrated - as was not disputed - that if the claimant were to be readmitted to the property, the effect of that would be that the defendant could no longer live there. Realistically, there was no question of both parties living together in the property and so the Recorder had to approach the application on the understanding that refusing the injunction prevented the claimant living in the property, while granting the injunction would have had the effect of evicting the defendant from the property. It was in that way that the Recorder referred to the extraneous issues and for no other purpose. In my judgment, she was not wrong in that and she did not take into account any irrelevant matters.

26 For the reasons that I have given, I would dismiss the appeal. I would only add that I would not, in any event, have considered it appropriate to grant an interim injunction at this stage in circumstances where it would have altered the status quo as it has existed for several months now just two working days before the claim is due to be determined by the County Court. However, in any event and for the reasons I have given, I dismiss the appeal.

L A T E R

27 This is an application for costs by the defendant who has been successful in defending this appeal. The defendant seeks costs in the sum of £3,960. However, no schedule of costs has been served as it should have been.

28 The claimant submits that the appropriate order in these circumstances is to make no order for costs. In my judgment, that would be unjust given the ordinary rule that the successful party is entitled to their costs. Nevertheless, the fault for not providing a schedule of costs clearly lies with the defendant and it seems to me, in the circumstances, the only sums that I can properly summarily assess are the costs which I am told have been incurred in respect of counsel’s appearance at the hearing today and drafting of the skeleton argument.

29 So I make an order that the claimant shall pay the defendant’s costs summarily assessed in the sum of £1,250.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.