



Neutral Citation Number: [2021] EWHC 731 (QB)

Case No: QA/2020/000138

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2021

Before :

THE HONOURABLE MR JUSTICE LANE

Between :

Abudah Ali Ibrahim
- and -
(1) London Borough of Haringey
(2) Capital Home Services Ltd

Claimant

First
Defendant

Second
Defendant

Justin Bates and Matthew Lee (instructed by Duncan Lewis Solicitors) for the claimant
Nicholas Grundy QC and Stephen Evans (instructed by B Ryan, Assistant Director of
Corporate Governance, Haringey Council Legal Services) for the first defendant
The second defendant did not appear and was not represented

Hearing date: 8 March 2021

Approved Judgment

Lane J:

1. The central question in this appeal is whether HHJ Saunders was right, in deciding a claim for interim relief, to make a finding that disposed of the claimant's entire substantive case. In reaching my decision, I wish to record at the outset that I have been much assisted by the written and oral submissions of counsel for the claimant and the first defendant.

The background

2. In early May 2020, the claimant was a rough sleeper in London. The claimant describes himself as a stateless Palestinian. Before he began rough sleeping, the claimant had been supported by the Secretary of State for the Home Department as an asylum seeker or failed asylum seeker (it is unclear which). Following a violent incident at his accommodation, when the claimant was said to have assaulted another resident, he was brought before the Magistrates' Court and bailed, subject to conditions which included keeping away from the area in which he had been residing.
3. The claimant approached the first defendant in order to seek accommodation. On 12 May 2020, the claimant signed what purported, on its face, to be an agreement for the provision of "Temporary Accommodation provided under Licence to an Occupier for Homelessness Assistance under s. 188(1) or s. 190(2) Housing Act 1996 Part VII Homelessness". The accommodation in question was a self-contained flat in London N8. The agreement was also signed by an individual on behalf of the second defendant. The document included a reference to £45 "charged by night", this sum being written in manuscript. The occupier acknowledged that by the agreement the accommodation would not become a grant of a tenancy "as it is a licence to occupy the accommodation for as long as the Local Authority states I am allowed to remain in it on a temporary B&B type basis". The Agreement said that once the Local Authority sent a notification to terminate the Licence, the Occupier shall take the date specified in that letter as "being my last at the accommodation and that I must arrange to vacate the property by 12PM the following day and take all my belongings". The Occupier further agreed that the Local Authority and the supplier were "not required to get a court order to evict me ... as section 3 and 5 of the Protection from Eviction Act 1977 do not apply ...".
4. It is common ground that the accommodation provided under the agreement document of 12 May 2020 was not temporary accommodation provided pursuant to section 188 or 190 of the Housing Act 1996. This is because the claimant did not have status in the United Kingdom and might well have remained eligible for asylum support accommodation. The first defendant made a mistake in having recourse to the document I have described. The first defendant ought merely to have arranged for the claimant to be given a room in a Travelodge. Instead, the first defendant referred the claimant to the second defendant, which provided the claimant with the self-contained flat rather than the temporary hotel accommodation intended. Having appreciated its mistake, the first defendant caused the claimant to be told, on 14 May, that he should move to the Travelodge.

The proceedings

5. On 15 May 2020, the claimant initiated proceedings against the defendants in the County Court, contending that he had been granted either a tenancy or a licence of the

flat. In either case, the premises were a dwelling house and the first defendant was a prescribed social landlord. The claimant occupied the premises as his only or principal home, which was let as a separate dwelling. Accordingly, sections 79 to 81 of the Housing Act 1985 meant that the agreement of 12 May 2020 created a secure tenancy or secure licence. Further or alternatively, the claimant asserted that an express term had been agreed orally between the claimant and a person the claimant “describes as a black male employed by the council when signing the agreement” that the claimant could reside in the premises until the end of the Covid 19 crisis. Further or alternatively, the claimant said that there was an implied term in the agreement that the claimant would not be evicted without being given reasonable notice; that the claimant would be allowed quiet enjoyment of the premises; and that he could not be evicted without due process, pursuant to sections 3 and 5 of the Protection from Eviction Act 1977.

6. The claimant contended that at 5pm on 14 May 2020 a representative of the second defendant had, on the first defendant’s instructions, permission or authority, attempted to evict the claimant without prior notice from the flat. The claimant alleged harassment, alarm and distress, for which he sought damages, together with declarations confirming his security as a tenant or licensee; that he could not be evicted without a court order; and that he could not be evicted by a party who was not his landlord or landlord’s agent.
7. The claimant also applied for an injunction, compelling the defendants to re-admit him to the flat and forbidding them from interfering with his quiet enjoyment of it. Following a telephone hearing on 18 May 2020, which did not involve any representative of the defendants, HHJ Hellman, sitting at Central London County Court, granted an interim injunction, forbidding the defendants from excluding the claimant from the property or in any way interfering with his quiet enjoyment of it. The injunction was expressed to last until “the outcome of the hearing scheduled to take place on Thursday 21 May at 10.30am, or until further order”. The parties were ordered to exchange and file skeleton arguments by 4.30pm on 20 May.
8. On 19 May 2020, the first defendant filed and served a defence to the claim. It was accepted that the agreement “purports to, and did, create a licence between the claimant and the first defendant”. It was, however, denied that the agreement created a tenancy. The primary reason advanced in this regard was that the claimant and the first defendant did not intend to create legal relations. The claimant came to occupy the premises as a consequence of the provision of emergency accommodation during the coronavirus pandemic, following the application by the first defendant of its powers pursuant to section 1 of the Localism Act 2011. The first defendant had not demanded any payment in return for the accommodation, nor had it accepted any such payment from the claimant.
9. If, which was denied, the claimant and the first defendant had intended to enter into any legal relations, the defence submitted that the factual context and the terms of the agreement created a licence and not a tenancy. It was denied that the parties agreed any term, whether certain or otherwise, and, in particular, that the provision of accommodation from night to night was the hallmark of a tenancy. The first defendant’s actions were, rather, “akin to an act of generosity or friendship or for charitable purposes inconsistent with the imposition of the relationship of landlord and tenant”.

10. It was denied that the property was a dwelling house. The first defendant relied upon R (N) v Lewisham London Borough Council [2014] UKSC 62, where it was held that as a general rule “dwelling” suggests settled accommodation, which was not the accommodation provided to the claimant by the first defendant.
11. The defence denied there was any oral term agreed between the claimant and the first defendant, that the claimant could reside in the property until the end of the Covid-19 crisis and that he would be given at least 48 hours’ notice. Instead, the “parties’ relationship was governed by the terms of the written Agreement and no more”. The alleged or implied term relied on by the claimant was denied, since it was unnecessary for the purposes of business efficacy to imply such a term, given the express wording of the agreement, which referred to the notification letter to terminate the licence on a date specified by the first defendant, which the claimant acknowledged, in the agreement, was “my last at the accommodation”.
12. It was denied that the Protection from the Eviction Act applied in the circumstances of the claimant’s case. Again, the first defendant relied on R (N) v Lewisham London Borough Council for this proposition.
13. The defence ended by denying that there had been any actual or threatened breach of the express or implied terms of the agreement of 12 May 2020, or any harassment of the claimant. Issue was taken with the witness statement of Adrian Smith of Duncan Lewis Solicitors, in which he made reference to what the claimant had told him about the circumstances surrounding the agreement. Given that the claimant was able to read, the defence contended that the claimant should have been able to sign a witness statement in his own right; but, in any event, Mr Smith’s statement did not contain the certification required by paragraph 3A.3 and Annex 1 of Practice Direction 22. At the foot of the defence, Mr K S Matthews, a lawyer with the first defendant, made a Statement of Truth, that the facts stated in the defence were believed to be true.
14. Both the claimant and the first defendant filed and served skeleton arguments, in compliance with HHJ Hellman’s order. The claimant’s skeleton argument contained the following:-

“Injunction Principles

2. A final injunction is awarded at the end of a trial when the factual disputes between the parties have been resolved. The trial may not take place for some months after the commencement of proceedings and the prospect of a final injunction is of little assistance to someone locked out of their home. In such circumstances, it is open to an applicant to apply for an interim injunction at the commencement of proceedings or exceptionally before the proceedings have been issued: CPR 25.2(1)(a).
3. In deciding whether to grant an interim injunction, the court should not attempt to resolve the dispute between the parties. Rather, the applicant should demonstrate:
 - There is serious dispute between the parties;
 - Damages would not be an adequate remedy for the applicant; and

- The balance of justice (also referred to as balance of convenience) between the parties is in favour of granting the injunction and restoring or maintaining the status quo for the time being: *American Cyanamid*.”

15. The skeleton then went onto aver that the relationship of landlord and tenant does not depend on title but on possession. Street v Mountford [1985] AC 809 was cited for the proposition that it is the legal consequences of the agreement which are determinative, rather than the label which the parties choose to attach to the agreement. Although the payment of rent is the hallmark of a tenancy, it is possible to create a tenancy at no rent, the most important feature of a tenancy being exclusive possession: Ashburn Anstalt v Arnold [1988] 2 All ER 147. The property was a one-bedroomed flat and not Bed and Breakfast type accommodation. The claimant occupied the property alone and could exclude all other parties by way of lock and key. It was, thus, a periodic tenancy. It was submitted that section 81 of the Housing Act 1985, which requires the premises to be a “dwelling house” in order for the tenancy to be a secure tenancy within the meaning of section 79, did not fall to be interpreted in the same way as the Supreme Court had interpreted the expression “dwelling” in the Protection from Eviction Act 1977. The case of R (N) v Lewisham London Borough Council concerned a licence under section 3 of the Protection from Eviction Act 1977, as it applied to interim accommodation provided to an apparently homeless person while it was investigated whether that person was owed a duty under Part 7 of the Housing Act 1996. The claimant said that this was “a completely different case from the present as conceded by” the first defendant. There was a serious issue to be tried as to whether the claimant had a secure tenancy. In any event, the skeleton contended that the first defendant had still failed to serve a valid notice to quit or, alternatively, give the requisite notice pursuant to the agreement. The balance of convenience favoured allowing the claimant to maintain the status quo and remain in the accommodation until his rights were fully determined.
16. The first defendant’s skeleton argument noted, at paragraph 1, that “the matter is listed for a return hearing in relation to the claimant’s application for an injunction against the defendants”. The skeleton stated that the first defendant was “unsure whether the claimant’s solicitor gave full and frank disclosure to the court of all relevant matters, including the first defendant’s email correspondence with the claimant’s solicitors, and of the claimant’s non-payment of any charge for the accommodation. It reserves its position in this regard”. It was then submitted that the claimant and the first defendant had not entered into legal relations and that it was “a gross misrepresentation” for the claimant’s solicitor to inform the second defendant’s solicitor that the first defendant accepted that it was the claimant’s landlord or licensor. In Booker v Palmer [1942] All ER 674, the appellant, whose house had been destroyed by enemy action during World War II, was offered accommodation by a landowner, in a cottage, rent free, for the duration of the war. The Master of the Rolls said:-

“To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is a very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me this is a clear example of the application of that rule.”

17. The first defendant's case was that the "instant factual matrix falls within the class of cases envisaged" in Booker v Palmer and Street v Mountford. Even if that were wrong, the first defendant's skeleton argument submitted that the claimant did not obtain a tenancy. The first defendant never intended to house the claimant in the property. It intended to accommodate him in a Travelodge, pursuant to the first defendant's "umbrella power under s.1 of the Localism Act 2011". There was nothing in the agreement of 12 May 2020 that led to the conclusion a tenancy had been created. All the substantive terms pointed to a licence. Accordingly, if the parties entered into legal relations, the surrounding circumstances of the Covid-19 emergency, the exceptional provision of the premises to the claimant and the terms of the agreement were, at the highest, only referable to a licence to occupy. If the claimant had been told that he could reside in the premises until the end of the Covid-19 crisis, Lace v Chantler [1944] KB 368 (and the subsequent cases approving it) was authority for the proposition that residence for a term which is uncertain was not compatible with the creation of a tenancy.
18. Having reiterated the first defendant's stance in respect of the term "dwelling", the first defendant's skeleton argument concluded as follows:-
- "46. The Injunction made at paragraph 2 of the order made dated 19th May 2020 should be discharged, with costs."

The judgment

19. After hearing oral submissions on 21 May 2020, HHJ Saunders gave judgment the next day. At paragraph 7, the judge said:-
- "7. It is important to note that, as a factual point, the claimant still remains in the property and the first defendant has been given notice to quit which expired at noon yesterday, 21st May 2020. I remind myself in dealing with this application that I am not trying the case as a whole; I am looking at whether I should grant an interim injunction relief. In this regard I must have consideration to well-established principles in American Cyanamid Co v Ethicon Ltd which sets out three requirements:
- (1) Whether there is a serious question to be tried.
 - (2) The balance of convenience.
 - (3) Whether there are any special factors."
20. The judge then turned to the first question, namely, whether there was a serious issue to be tried. Having referred to Mr Lee's submissions, the judge said:-
- "15. I can understand these points being made, but for the purposes of this application there is an important factor which does not feature in these arguments. In whatever way he puts his case, he has to rely on the signed agreement and contractual principles. The facts of this case are novel and the surrounding circumstances are important and fact-sensitive. In my provision these arose out of a highly unusual situation caused by the pandemic. The D1 was using its umbrella power under s.1 of the Localism Act 2011. It was never intended that the Claimant would be housed in these premises which were designed for Part 7 housing. In my view, this was something akin to an act of friendship, or charity or

generosity, something not referable to a landlord and tenant relationship. The Claimant was not required to pay rent. What happens in this process is the First Defendant refers the occupier to the Second Defendant. The First Defendant makes the payments of £45 to the Second Defendant for that accommodation. In my view, the Claimant is not contractually involved in that process. The claim does run into significant problems. I have been taken to a passage in Woodfall at paragraph 1.021 which deals with intention to create legal relations:

“Acts of generosity may also negative an intention to create legal relations. So where the owner of a cottage allowed it to be occupied rent free by the friend of a friend whose house had been destroyed by a bomb, the occupation was held to be referable to a licence.”

16. The case described in the hearing as the bomb case is *Booker v Palmer* [1942] All ER 674, a Court of Appeal decision is highly relevant. In that case, a house was destroyed by enemy action in World War II and someone offered to allow the bombed out individual to go into occupation rent free during the war:

“To suggest there is an intention there to create a relationship of landlord and tenant seems to me to be quite impossible. There is one golden rule which is of very general application, namely that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me this is a clear example of the application of that rule.”

17. In the Court’s Judgement, this did not impute intention to enter legal relationship. This is a clear example of an application of the rule.
18. It is perhaps rather overstating the current pandemic to be a war situation (despite it having often been described as such), which may be insulting to our parents and grandparents who took part in that conflict, but, on any interpretation, we are all living in a time where there is a national emergency where government is under pressure to assist those who become its unfortunate victims – such as the homeless (and rightly so too).
19. In this case, the Claimant accepts that the First Defendant’s actions were a clear mistake or accident or must have known it was an accident. The facts demonstrate that this arose out of an out of hours referral dealt with in some haste and without much thought of the legal niceties, with the intention of providing someone who is homeless with a roof over their head in an emergency situation, that being what was intended as accommodation for the duration of the pandemic. I cannot see that the scenario was intended to create a landlord and tenant relationship, of that licensor/licensee. The Claimant did not pay anyone. There is no suggestion of any licence fee or rent properly so called. There is no evidence that his s.4 (or s.95) accommodation has been terminated. He had been asked to move to other accommodation, which was consistent with the requirements under the directive. It seems to me there was no intention to create legal relations. It was temporary and was to be provided until the pandemic had passed. He did not make a homeless person’s application.
20. There is no serious issue to be tried, simply because there was no intention to create legal relations.”

21. Beginning at paragraph 21 of his judgment, HHJ Saunders held that, even if he was wrong about the lack of intention to create legal relations, the claimant was,

nevertheless, neither “a secure tenant or licensee”. Citing Street v Mountford, the judge held that “exclusive possession is not the be all and end all. One should look at the agreement”. He held that the agreement between the parties in the present case was “wholly silent on exclusive possession”. The substantive terms pointed at the highest more to a licence than a tenancy. Having regard to the case law that a tenancy for the duration of the war was not a term which was certain, HHJ Saunders held that the present situation:-

“is entirely analogous. It is suggested that this may be overcome by saying this was a periodic tenancy from night to night. There is no authority before me as to whether a tenancy can be nightly. The answer for that may be a simple one. It is not part of the pleaded case.”

22. At paragraph 24, the judge found that R (N) v Lewisham was relevant to the proper interpretation of “dwelling house” in connection with the security of tenure provisions in section 79 *et seq* of the Housing Act 1985. The flat which was the subject of the 12 May agreement was “clearly not the claimant’s home. The Supreme Court found that s188 accommodation was not provided as a dwelling; here it was of a significantly lower standard of accommodation than s188 accommodation, particularly in the context of the facts of this case”.
23. At paragraph 25, the judge held that the claimant in his view had sufficient notice. He was “tying up the local authorities’ precious resources”. Given that the claimant was not faced with sleeping on the streets, it could not be said that damages would not provide an adequate remedy: “It was agreed by the parties that if I am wrong, he would receive substantial damages ... His accommodation is guaranteed until the end of the coronavirus pandemic” (paragraph 26).
24. At paragraph 27, HHJ Saunders turned to the balance of convenience. He found that the claimant would be “moved into a room in what is a low-cost hotel” whereas, for the local housing authority, “there is much greater prejudice. The accommodation is intended as temporary accommodation for homeless applicants. It deprives someone of the ability to secure this accommodation to which they would be fully entitled” and “reduces D1’s ability to provide homeless person accommodation to someone who is eligible and in need” (paragraphs 27 and 28).
25. In conclusion, HHJ Saunders said:-

“30. My view therefore is that the injunction should be discharged.”

The events following the judgment

26. Following receipt of the judgment, counsel attempted to draft an agreed order. On behalf of the claimant, Mr Lee emailed the judge on 23 May 2020, as follows:-

“Dear Judge,

Please find attached herewith draft order on behalf of the claimant. The parties have been able to agree the minute of the order but have differing views on the recital. The dispute, in brief, is that the claimant understands the finding was made on the limited evidence and in the context of the interim application only. So suggest wording in the following terms are appropriate:

AND UPON the court considering the application for an interim injunction, the evidence limited to the support of that application and for the purposes of the issue of whether or not there is a serious question to be tried finding that the parties did not enter into any legal relationship.”

27. On behalf of the first defendant, Mr Evans emailed as follows:-

“ ...

Mr Lee is correct that the First Defendant disputes the final part of the preamble to the draft order he has sent you in the last 10 minutes.

The First Defendant submits that the following wording is properly reflective of the court’s findings:

Upon the court finding that the parties did not enter into any legal relationship [my italics]

The client’s remedy against the Court’s finding is by way of appeal. Not by seeking to argue at another hearing that the court’s finding was other than a final decision /determination on the parties’ relationship, which binds them.”

28. On 23 May 2020, HHJ Saunders replied to both counsel as follows:-

“Thank you for your respective emails over the weekend – which I have now considered.

My view is that Mr Evans’ draft preamble reflects my determination. I also agree with him that if this is disagreed with then the claimant’s only recourse is to appeal – which is, of course, his entitlement.”

29. As a result, the judge’s order, sealed on 1 June 2020, read as follows:-

“Before His Honour Judge Saunders sitting at the County Court at Central London, Central London, R. C. J., Thomas More Building, Royal Courts Of Justice, Strand, London WC2A 2LL.

UPON hearing counsel for the Claimant and Counsel for the First Defendant by way of Skype for Business call, and the Second Defendant neither appearing nor being represented.

AND UPON the court considering a bundle which included the application for an interim injunction, the pleadings, the witness statement of Mr Adrian Smith dated 15 May 2020, the parties’ skeleton arguments, and a letter to the Court from the Second Defendant’s solicitors dated 20 May 2020.

AND UPON the court finding that the parties did not enter into any legal relationship

IT IS ORDERED THAT

1. The application for an interim injunction is dismissed and the injunction made at paragraph 2 of the order of His Honour Judge Hellman dated 19 May 2020 is discharged.

2. The Claimant do pay the First Defendant's costs summarily assessed in the sum of £3496.50 including VAT, not to be enforced without the court's permission pursuant to section 26 of the Legal Aid Sentencing and Punishment of Offenders Act 2012.
3. There be no order as to costs between the Claimant and Second Defendant.
4. Detailed assessment of the Claimant's publicly-funded costs."

The appeal

30. The claimant sought permission to appeal against HHJ Saunders' order on three grounds: (1) It was not part of the court's function at the interim injunction stage to try and resolve conflicts of evidence as to facts and/or the difficult question of law which ultimately called for detailed argument, supporting evidence and mature consideration. Those matters ought to have been dealt with at trial; (2) There was no evidence or insufficient evidence to support such a finding; (3) The decision was perverse because, on the basis of the evidence in the interim application, no reasonable Tribunal could have reached such a decision. Permission to appeal was granted on 24 November 2020 by Ellenbogen J. She noted that "the judge purported to bind the trial judge to his finding that the parties did not (intend to) enter into a legal relationship, thereby removing that issue from his or her consideration. In that respect, all grounds of appeal have a real prospect of success". Ellenbogen J specifically noted that the claimant did not challenge the part of HHJ Saunders' order in which he refused to continue the interim injunction previously imposed by HHJ Hellman. Before me, Mr Bates was at pains to confirm that matter. Given that the claimant was being offered accommodation at the Travelodge (to which he subsequently went), the claimant conceded that the balance of convenience did not weigh in his favour, and so the interim injunction properly fell to be discharged.

Discussion

31. The claimant accepts that the second and third grounds of appeal are indissolubly linked with the first ground. As I have foreshadowed at paragraph 1 above, the central question is whether the judge was entitled to frame the recitals to the order in such a way that he had, in fact, disposed of the substantive claim. The parties are agreed that, in view of the recitals and the judge's email, HHJ Saunders had disposed of the substantive proceedings. In recognition of that fact, the first respondent sought permission to vary the judge's order, adding at paragraph 1 thereof that the substantive claim be dismissed. The application was not opposed by the claimant. It is clearly in the interests of the overriding objective that the issue is expressly articulated in that way.
32. Mention of the overriding objective brings me to the starting point of Mr Grundy QC's and Mr Evans's defence of the judge's order. Mr Grundy submits that what the judge did was wholly in accordance with the overriding objective in CPR1.1:-
 - "1.1 – (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
 - (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issue; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and
- (f) enforcing compliance with rules, practice directions and orders.”

33. Mr Grundy also relies on CPR 1.4(2):-

“(2) Active case management includes –

- (a) encouraging the parties to co-operate with each other in the conduct of proceedings;
- (b) identifying issues at an early stage;
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- ...
- (i) dealing with as many aspects of the case as it can on the same occasion.
- ...”

34. Mr Grundy submits that the advent of the above-mentioned provisions of the CPR means that courts should be readier than they may have been during the era of the Rules of the Supreme Court to make substantive decisions, otherwise than at a full trial. This, he says, informs the way in which we should approach such hallowed judicial pronouncements as the opinion of Lord Diplock in American Cyanamid Co v Ethicon. At P406G, Lord Diplock said:-

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff’s ultimate success in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.”

35. Dealing with Hubbard v Vosper [1972] 2 QB84, Lord Diplock held that:-

“... This authority was treated by Graham J and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if a case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought.

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as “a probability”, “a prima facie case”, or “a strong prima facie case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial ... So unless the material available to the court at the hearing of the application for an interlocutory function fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go onto consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.”

36. CPR 25.1(1) provides that:-

“The court may grant the following interim remedies –

- (a) an interim injunction;
- (b) an interim declaration;

...”

37. At paragraph 25.1.3 of the commentary in the 2020 White Book, reference is made to the need to seek to give effect to the overriding objective when the court “exercises any power given to it by the rules”. The same paragraph of the commentary records the concern voiced about the making of unnecessary applications for interim remedies, and appeals from decisions on those applications, stating that the case management scheme under the CPR “seeks to ensure that control is exercised ... in a manner that reduces the impact of these mischiefs and ensures that ‘interlocutory warfare’ between the parties does not overwhelm the proceedings”.

38. The first defendant also draws attention to the commentary at 25.1.15, where it is stated that “the court has jurisdiction to grant a declaration as a final remedy at trial, including at the trial of a preliminary issue. It is also clear that in interlocutory proceedings the court may grant a declaration as a final remedy”. In Abaidildinov and Another v Amin [2020] EWHC 2192 (Ch), Mr Robin Vos, sitting as a Judge of the High Court, heard an application for summary judgment in respect of parts of the claimants’ claims for certain declarations and injunctions. The claimant said the purpose of making the application for summary judgment was “to finally dispose of the proceedings given the

defendant's acceptance of various matters" (paragraph 2). The Deputy Judge, at paragraph 25, followed the principles summarised by Lewison J in Easyair Limited v Opal Telecom Limited [2209] EWHC 339 (Ch) for deciding whether summary judgment should be given. Those principles are as follows:-

- (a) The court must consider whether the defendant has a realistic as opposed to a fanciful prospect of successfully defending a claim or issue;
- (b) A realistic prospect of success is one which carries some degree of conviction. The defence must be more than merely arguable;
- (c) The court should not conduct a mini trial;
- (d) This does not mean that the court must take at face value and without analysis the defendant's evidence;
- (e) The court should take into account not only the evidence actually placed before it but also any evidence that could reasonably be expected to be available at trial;
- (f) The court should hesitate about making a final decision without trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of this case;
- (g) Disputed facts must generally be assumed in the respondent's favour;
- (h) Where an application gives rise to a short point of law or construction and the court is satisfied that it has before it all the evidence necessary to decide that question, it should do so.

39. At paragraph 48, the Deputy Judge in Abaidildinov held that:-

"... once it is established that the defendant has no real prospect of mounting a successful defence in respect of those facts or matters, it is unlikely to be in accordance with the overriding objective to require a full trial in order to decide whether the court should exercise its discretion to make the declarations which have been sought."

40. Having regard to all the circumstances, the Deputy Judge decided, as a matter of discretion, that the declaration sought by the claimants in that case should be made.

41. Attractive though they are, I find that there are formidable problems with the submissions of the first defendant. Mr Grundy's invocation of the overriding objective to justify the effect of the judge's order immediately runs up against the fact that the essence of the overriding objective is that cases should be dealt with justly. It is quite evident that neither Mr Lee nor Mr Evans (who appeared before the judge in May 2020) embarked upon the hearing in the expectation that the ensuing judgment would not only deal with interim relief but also entirely dispose of the substantive claim. So much is plain from their respective skeleton arguments. So much is also plain from paragraph 7 of the judgment, where the judge said, in terms, that he was concerned only with the application for an interim injunction, which was to be determined in accordance with the American Cyanamid principles.

42. Although both sides accepted before me that there may be circumstances in which, on an application for interim relief, findings may be made that are effectively of a “final” nature, the court must be assiduous to ensure that – if it considers such an outcome is possible in the proceedings before it – that possibility is squarely grasped by the parties and their representatives and that they are given the opportunity of addressing it.
43. The first defendant relies upon the judgments in Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523. In that case, an interim injunction had been made, preventing the BBC from broadcasting a programme about the plaintiff’s very low calorie diet, prior to publication of the report of a government committee into the medical aspects of such diets. The judge who granted the injunction held that the plaintiffs had established a plausible case that there was a contract between them and the BBC, preventing transmission until after publication of the report; that the balance of justice required an injunction to be granted; and that the BBC could be adequately compensated in damages.
44. The Court of Appeal allowed the BBC’s appeal against the grant of the injunction. The court held that where neither side was interested in monetary compensation and the decision on the application for an interlocutory injunction would be the equivalent of giving final judgment, particularly where the subject matter was the transmission of a broadcast that depended on the timing of the transmission (the nature of the programme being that it was only appropriate for transmission before publication of the report), then the court should not grant an interlocutory injunction restraining transmission merely because the plaintiff was able to show a good arguable case and that the balance of convenience lay in favour of granting the injunction. Instead, the court should assess the relative strength of the parties’ cases before deciding whether the injunction should be granted.
45. Although the first defendant is correct to say that the Cambridge Nutrition case shows the American Cyanamid principles are not to be rigidly applied in all circumstances, I find Cambridge Nutrition offers the first defendant no material assistance. As the Court of Appeal observed, the particular circumstances of that case were such that the grant or withholding of the interim injunction effectively amounted to the giving of final judgment. That is not true of the present case. Whether an interim injunction was granted to the claimant or not did not dispose of his underlying claim. Indeed, HHJ Saunders expressly held that damages would be a satisfactory remedy for the claimant. The suggestion that Cambridge Nutrition supports what the judge did in the present case therefore amounts to no more than the “boot strap” argument that, merely by doing what he did, the judge was entitled to equate the application for interim relief with the claimant’s substantive case.
46. The contention that the CPR has materially diluted the opinion of Lord Diplock in American Cyanamid is refuted by the judgment of Sir Terrance Etherton, Chancellor of the High Court, in Sukhoruchkin and Ors v Van Bekestein and Ors [2014] EWCA Civ 399. In that case, Morgan J had refused to continue an interim freezing injunction because he found that the “no reflective loss” principle meant the appellants did not have a seriously arguable case for the recovery of the loss they alleged they had suffered in consequence of the breach of fiduciary duties owed by certain of the defendants. The Chancellor said:-

- “31. At the heart of the appeal is the contention that the Judge was wrong in principle to decide at this interlocutory stage that the appellants do not have a good arguable case in relation to the Distribution Agreement and the Rio Agreement because of the no reflective loss principle. Despite the Judge's careful analysis, I agree with this ground of appeal.
32. The general principle is now well established that, on an application for an interim injunction, the court should not attempt to resolve critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend, particularly where the point of law turns on fine questions of fact which are in dispute or are presently obscure: *Derby v Weldon* [1990] Ch 48, 58F-G, 63G-H.
33. The Judge in the present case cited relevant passages in *Derby v Weldon* which state and illustrate the operation of that principle but he nevertheless felt able to reach the firm conclusion in paragraph [72] of his judgment that the appellants' claims in relation to the Distribution Agreement and the Rio Agreement are "clearly barred by the no reflective loss principle". Indeed, as I read that paragraph in his judgment, he considered that, had there been an application to strike out those claims, he would have granted that application. It was only because there had not been an application to strike out the claims and so it might be said that there is no reason why they should not be investigated at trial that he went on to say that the appellants' case that the claims give rise to a serious issue to be tried "is no more than borderline".”
47. The Chancellor held that Morgan J was not entitled to take that view at the interlocutory stage. Whilst noting the appellants’ submission that there was uncertainty in the law as to whether the no reflective loss principle would bar a claim, even where a company was precluded from claiming it because it had affirmed a contract induced by misrepresentation, the Chancellor, at paragraph 58, said he preferred to base his decision on the appeal:
- “not on the ground that the no reflective loss principle is a complex or developing order of the law in a respect relevant to the present case, but rather on the point that its application is highly fact dependent and, because of the current state of the disputed evidence, the appellants have a good arguable case that their claims for relief ... will not be barred at trial by the no reflective loss principle”.
- Thus, notwithstanding that Morgan J had heard the application over four days and handed down “a careful and comprehensive written judgment” (paragraph 16), the appeal against his order was allowed.
48. It is plain from paragraph 32 of the Chancellor’s judgment that the principle originally articulated by Lord Diplock in *American Cyanamid* remains effective. On an application for an interim injunction, the court should not attempt to resolve critical disputed questions of fact or difficult points of law, particularly where the point of law turns on fine questions of fact which are in dispute or are presently obscure.
49. As can be seen from paragraph 33, Morgan J had not, in fact, issued any judgment which had the effect of deciding the substantive issue. Importantly, he noted that there had not been an application to strike out the claims. As the Chancellor remarked, if such an application had been before Morgan J, it is plain what his reaction to it would have been. The point for our purposes, however, is that Morgan J did not treat the

application for interim relief as amounting to an application to strike out the claims. On the contrary, he appreciated the important distinction between the two.

50. Mr Grundy sought to make much of the court's power under CPR 24.2(a)(i). This enables the court to give summary judgment against a claimant on the whole or part of a claim, where the court considers that "the claimant has no real prospect of succeeding on the claim or issue". Mr Grundy drew attention to paragraph 56 of the skeleton argument lodged by the claimant in connection with the application for permission to appeal against the judge's decision. There, it is accepted by the claimant that the test of "no serious question to be tried" for the purposes of an application for an interim injunction is very similar, if not identical, to the test of "no real prospect of succeeding on the claim or issue" in CPR 24.2(a).
51. I have set out at paragraph 38 above the approach, articulated by Lewison J in Easyair, that should be adopted in summary judgment applications. Given the common nature of the two tests, Mr Grundy invites me to find that what HHJ Saunders did in the present case involved no legal error. In applying the test he employed to answer the question whether there was a serious question to be tried, the judge was entitled to make a finding on the application before him that disposed of the claimant's substantive case.
52. I have serious problems with this submission. Despite the similarity of the tests, the summary judgment process has a number of important features that are not to be found in the procedure governing interim relief. First, for there to be summary judgment there has to be an application, which puts the other side on notice of precisely what the applicant is seeking; namely, the substantive determination, in the applicant's favour, of the whole or part of the proceedings. CPR 24.5(1) makes specific provision for the filing of written evidence by the respondent to an application for summary judgment. This touches upon one of the principles articulated in Easyair; namely, that in reaching a conclusion on summary judgment, the court may have regard to evidence that can reasonably be expected to be available at trial. That finds no counterpart in the caselaw concerning interim relief. On the contrary, in an interim relief application, the court is enjoined against assuming too much about what the facts and/or the legal answers to the case might eventually be. Finally, ED & F Man Liquid Products Limited v Patel & Anor [2003] EWCA Civ 472 held that, in an application for summary judgment, the overall burden of proof rests on the applicant. There is no indication in HHJ Saunders' judgment that the first defendant was recognised as being subject to any such burden.
53. For these reasons, I find that there was real procedural unfairness to the claimant. Having embarked on what those acting for him rightly considered to be an application for the continuation of HHJ Hellman's order for interim relief (and only that); and having argued on that basis (as did counsel for the first defendant), the claimant's position after the finalisation of the order was that he had not only lost his application for the continuation of interim relief but also his substantive claim, so that his only remedy was to appeal to the High Court.
54. As a general matter, appellate courts will be disinclined to refuse relief, where procedural unfairness has occurred, even if a cogent case is made that any decision which followed a fair process is bound to be the same (see eg. R (Pathan) v Secretary of State for the Home Department [2020] UKSC 41). In the present case, I consider the breach of procedural fairness is itself such as to require HHJ Saunders's dismissal of the substantive claim to be set aside. I shall, however, go on to consider whether –

putting aside the issue of procedural unfairness – the judge was entitled in law to reach the conclusions he did.

55. This means I must consider whether there was a serious issue to be tried on the matter of the parties' intention to enter into legal relations. Having had full regard to the submissions of Mr Grundy and Mr Evans, I am firmly of the view that the judge erred. There is no indication in the judgment that he took account of the fact that, since there was an express signed agreement between the parties, the burden was on the first defendant to show that there was, nevertheless, no intention of creating legal relations. Despite the fact that the first defendant attached a statement of truth to the defence, there was a dearth of evidence of the kind one would expect to see if the matter had proceeded to trial. In particular, one would expect to see evidence from the first defendant's officer, with whom the claimant dealt and who allegedly told the claimant that he could reside in the flat for the duration of the pandemic crisis. One would also, of course, expect to see evidence from the claimant. The first defendant doubts whether, in fact, the claimant would (at least now) produce such a statement. Nevertheless, as matters stood at the time of the hearing, this was an issue that should have been considered by the judge. As we see from the case law, these sorts of factors should be taken into account before a judge concludes there is no arguable case, in the context of an application for interim relief. They are, *a fortiori*, factors that need to be firmly borne in mind if the judge is considering making any findings that go to the applicant's substantive case.
56. At paragraph 15 of his judgment, the judge acknowledged that the "facts of this case are novel and the surrounding circumstances are important and fact-sensitive". Both are true. The judge ought, however, in my view to have returned to those observations, before deciding that there was no good arguable case.
57. The judge relied heavily upon Booker v Palmer but, importantly, acknowledged the limitations of that case as a guide to determining the legal position of the accommodation which had been provided to the claimant in the context of the Covid-19 pandemic.
58. Also at paragraph 15, the judge considered that, in providing the claimant with the flat, the first defendant was using its "umbrella power" under section 1 of the Localism Act 2011. This enables a local authority to do anything that an individual may do, subject to certain exceptions. One such exception in the housing context was explored by Upper Tribunal Judge Marcus QC, sitting as a High Court Judge, in R (AR) v London Borough of Hammersmith and Fulham [2018] EWHC 3453 (Admin). She held that the prohibition in the Housing Act 1996 on granting assistance to a person from abroad who is ineligible for housing assistance, was a pre-commencement limitation on section 1 of the 2011 Act, by reason of section 2(2)(a) of that Act. The first defendant contends that this case is not apposite. There is, however, in my view an arguable issue surrounding the first defendant's ability to invoke section 1 of the Localism Act in the circumstances of the present case. This is relevant to the judge's decision, since it is clear from paragraph 15 that he placed weight on the fact that section 1 was the power used by the first defendant, in coming to his conclusion that there was no legal relationship between the parties and that what the first defendant did was "something akin to an act of friendship, or charity or generosity". I can understand the judge's emphasis upon section 1, since it vests a local authority with a power to act in a benevolent or charitable manner, which an individual can do, but which might

otherwise be harder to infer from the enactments conferring specific functions on a local authority in the housing sphere. The judge's conclusion on the issue of no intention to enter into legal relations was therefore founded in part at least on his identification of the power under which the first defendant acted.

59. Following the hearing, on 16 March 2021 the parties drew my attention to the handing down on 11 March by Freedman J of judgment in R (Ncube) v Brighton and Hove City Council [2021] EWHC 578 (Admin). Freedman J agreed with the decision of the deputy judge in R (AR) that local authorities cannot use section 1 of the Localism Act 2011 to house those who are ineligible for housing assistance. Both sides were agreed it is unnecessary for me to identify the power under which the first defendant acted in the present case. Suffice it to say that the lengthy and detailed judgment in Ncube underscores the fact that the judge in the present case went too far, in attempting to resolve matters of law at the interim application stage, which he then used to conclude there was no arguable merit in the claimant's substantive case.
60. At paragraph 19, the judge, having found the first defendant's actions to be "a clear mistake or accident", held that what transpired was not "intended to create a landlord and tenant relationship, or that of a licensor/licensee". Before me, it was common ground that the claimant must, at least, have become a licensee of the property. Otherwise, he would have been a trespasser. Accordingly, the judge should have paused to examine the implications of the claimant's status as a licensee.
61. For these reasons, I conclude that the judge was wrong to find, on the evidence before him, that the claim fell to be substantively dismissed because it was not properly arguable that the claimant and the first defendant had an intention to create a legal relationship, when they signed the agreement in May 2020.
62. Beginning at paragraph 21, however, the judge went on to consider whether, if he was wrong about the intention to create legal relations, the claimant was a secure tenant or licensee. But once one assumes an intention to create legal relations, the case law demonstrates that it is relatively easy for a local authority to find it has granted a tenancy to an individual, notwithstanding any mistake on its part. Thus, in Akinbolu v Hackney Borough Council (1997) 29 HLR 259, the Court of Appeal rejected the council's argument that it had not, in law, granted a tenancy to an individual who, unknown to it, was an illegal overstayer in the United Kingdom, with the result that it had no power under the Housing Act 1985 to grant such tenancy. The court held that:-

"... if a local housing authority finds out that a prospective tenant is an unlawful overstayer, they will no doubt usually decline to grant him a tenancy and it is scarcely conceivable that they would upon judicial review be compelled to do so. But if without that knowledge they in fact grant him a tenancy, the tenancy does not fail for want of a party granted."
63. Similarly, in Birmingham City Council v Qasim & Ors [2009] EWCA Civ 1080, the Court of Appeal held that tenancies which had been improperly granted by one of its housing officers in disregard of the council's allocation policy were, nevertheless, valid. Mr Grundy submits that these cases are, in effect, nothing to the point, since the judge in our case went on to find that the tenancy or licence (if such it be) was not in any event a secure tenancy and was not subject to the provisions of the Protection from

Eviction Act 1977. The cases are, nevertheless, in my view relevant, in that they illustrate the limitations of the first defendant's argument based on mistake.

64. This leads me to the issue of whether, if there were an intention to create legal relations, the transaction with the claimant generated a state of affairs in which the claimant held a secure tenancy or, at least, one that was subject to the terms of the Prevention from Eviction Act 1977. In R (N) v Lewisham London Borough Council (paragraph 11 above), the majority of the Supreme Court held that the word "dwelling" in section 3 of the Protection from Eviction Act 1977 (prohibition of eviction without due process of law) bore the same meaning as in the Rent Act legislation. As a general rule, "dwelling" suggests a more settled occupation than "residence" and can be equated with one's home. It was therefore necessary to look at the purpose of the licence in each case.
65. Whilst, at first sight, it might be said that the Supreme Court's majority judgment in R (N) supports the first defendant, both as regards the meaning of "dwelling" in the Protection from Eviction Act 1977 and, for the purposes of determining whether any tenancy was a secure one, within the meaning of sections 79 *et seq* of the 1985 Act, the position before HHJ Saunders was not so clear as to have permitted him to dismiss the substantive claim on this basis. There was in particular the following issue. At paragraph 45 of his judgment, Lord Hodge said:-
- "45. Pulling together the threads of the case law, in my view the following can be stated: (i) the words "live at", "reside" and "dwell" are ordinary words of the English language and do not have technical meanings, (ii) those words must be interpreted in the statutes in which they appear having regard to the purpose of those enactments, (iii) as a matter of nuance, "dwelling" as a general rule suggests a more settled occupation than "residence" and can be equated with one's home, although "residence" itself can in certain contexts (such as the two-home cases) require such an equation, and (iv) under the 1996 Act a person remains homeless while he or she occupies temporary accommodation provided under sections 188(3), 190(2), 200(1) or 204(4) of the 1996 Act so long as the occupation is properly referable to the authority's performance or exercise of those statutory duties or powers. In my view it is consistent with this approach to conclude in the context of PEA 1977 that an overnight or day-to-day licence of accommodation pending the making of a decision under section 184 or on review or appeal does not show any intention to allow the homeless applicant to make his or her home in that accommodation."
66. I find the claimant 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 accepted purpose in R (N) of providing "overnight or day to day licence of accommodation pending the making of a decision under section 184 or on review or appeal". On one view, any reliance on R (N) could be said to be redundant since in our case the power under which the accommodation was provided is itself at issue; and, if the claimant is right, then, notwithstanding what the first defendant might have intended, the claimant (a) took possession of premises that are plainly capable of being a "dwelling"; and (b) albeit fortuitously, did so in a way that made his tenancy secure and subject to the protection of the 1977 Act. But, even if one adopts the more limited position that the claimant was merely permitted to live in the premises during the currency of the pandemic, that still arguably put him in a different position from the appellants in R (N), whose terms of occupation would necessarily be short ones.

67. For these reasons, I find that the judge was wrong to find, in the alternative, that there was no properly arguable case to go to trial.
68. The appeal is accordingly allowed. So much of the judge's order as amounts to the dismissal of the claimant's substantive claim is to be set aside (see paragraph 31 above). I shall invite counsel to draw up the necessary order.