Case No: 4PA09093

IN THE COUNTY COURT AT BIRMINGHAM

33 Bull Street,
Birmingham B4 6DS

Friday, 3 May 2019

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Before:

HIS HONOUR JUDGE MURDOCH

MIDLAND HEART LIMITED

Claimant

- and –

(1) MARGARET BURNS
(2) MR C ANDERSON **Defendants**

- -

MISS MICHELLE CANEY for the **Claimant**
MR GARY WILLOCK for the **First Defendant**
MR ZIA NABI for the **Applicant/Proposed Second Defendant**

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Approved Judgment

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE MURDOCH:

1. Let me deal first with the application to set the judgment aside. I am going to refer to the notes in the White Book at page 1981, which is setting aside where there has been a failure to attend the hearing.

2. I will deal with the background to where we are at the moment, and that is that the claimant has a possession order against the first defendant based upon the grounds of rent arrears. The claimant has sought a warrant of possession against the first defendant, and the first defendant seeks that that warrant be suspended. That was all proceeding (if I can put it this way) under the heading of rent, but the claimant then wished to present to the court hearing the warrant case matters dealing with antisocial behaviour and the state and condition of the property. I am told that they also wished to put before the court matters relating to drug usage, or the use of the premises for drug purposes. That was considered by the deputy district judge, who considered that the case of *Sheffield v Hopkins* was appropriate, and said that those matters could be raised and made the appropriate directions.

3. Since then, the court has joined in the first defendant's son, the second defendant, to this action. The second defendant seeks to raise a defence as to eviction. I put it that way, because that is how the Equality Act puts it, by saying that because of his disability he is facing unfavourable treatment, and that is an issue that the court will have to grapple with in due course.

4. I return to the application to have the possession order set aside. As I say, at page 1981 of the White Book it refers to the case of *London Borough of Hackney v Findlay*, where Arden LJ says the following:

> "…in the normal case where a party fails to attend a hearing at which a possession order is made, the discretion vested in the court is wide and unstructured. First of all, there is a clear indication in [the Housing Act] that Parliament contemplated that save in unusual circumstances the execution of a possession order should bring to an end the tenant's rights, including his right to apply for an order under that subsection… Secondly, the finality of litigation has long been a principle of public policy… As a corollary of that principle, challenges to orders should be by way of appeals. In the interests of the proper administration of justice and the system of appeals, judges should not sit in judgment on their own orders… Thirdly, CPR 39.3 makes it clear that, where a final order is made the defendant should have to produce a good explanation for not attending the hearing, that he acted promptly on learning of the order which he seeks to set aside, and that he should show that he has a real prospect of success in his defence…
>
> 24. …in the absence of some unusual and highly compelling factor as in *Forcelux*, a court that is asked to set aside a possession order under CPR 3.1 should in general apply the requirements of CPR 39.3(5) by analogy. This is in addition to, and not in derogation of, applying CPR 3.9 by analogy…in the

> absence of the unusual and compelling circumstances…this court should give precedence to the provisions of CPR 39.3(5) above those enumerated in CPR 3.9. …in deciding whether the tenant has a good reason for non-attendance the court can in my judgment have regard to the provisions of the Rent Arrears Pre-Action Protocol and to best practice among social landlords."

5. I say that, because of course when the possession order was made, the only defendant was the first defendant. The possession order was made on the grounds of rent arrears. The second defendant has been joined into this action because he can raise a defence in relation to the eviction. That defence can, of course, be raised at the warrant stage, and that is where we are. I think that is the wording of the Equality Act, that it provides for the word "eviction" to cover any stage within the possession proceedings.

6. The second defendant, in my judgment, has no prospect of successfully defending the possession order, which was based upon rent arrears, which order was made in 2014, over 4 years ago now. In my judgment, the requirement of litigation to be final, the delay and the lack of prospect of success of defending that possession order based upon rent arrears means that it is not appropriate to set aside the possession order, and I am not going to do so.

7. This matter cries out for resolution. From the claimant's perspective, they seek to execute a warrant and to have from their perspective – I am not saying this is correct or not – tenants who have been involved in antisocial behaviour and/or the destruction or the damage to their property evicted. They say that that is a matter which has some urgency and requires resolution by the court. From the defendant's perspective, and particularly that on behalf of the second defendant – I do not mean to side-line the first defendant by this, but I concentrate for the moment on the second defendant – he would say that the Equality Act gives him protection as a vulnerable person and it is essential that his position under the Equality Act is properly considered, and that such a decision should not, as it were, be rushed by the court proceeding with this claim in an unstructured manner where there have been no proper pleadings.

8. The claimant in response would say that a proportionate way of dealing with this matter, considering the overriding objective, would be for the court to make directions and to continue to proceed with the matter utilising the *Sheffield v Hopkins* procedure. They have suggested the way that could be done, including a Scott schedule and for the claimant to provide a position statement setting out the features as to why it would be reasonable to dismiss the first and second defendant's application to have the warrant suspended.

9. I stand back and look at the case in this way. I accept that this is a case which needs a rapid resolution. The threat of eviction hangs over the head of the first and second defendant. No doubt they would wish that to be resolved sooner rather than later. From the claimant's perspective, they have tenants who they say are behaving in an antisocial manner and no doubt they would say to me that it is having an impact upon their other tenants, and therefore they too would wish for an early resolution.

10. I remind myself that in *Sheffield v Hopkins*, the Lord Chief Justice who gave the judgment said this:

> "Under section 85(2) I have little doubt that the legislation did not seek to confine the discretion of the court to facts connected to the ground which was relied upon for initially seeking possession. Nor is the court restricted to the ground on which the order is made. It would be very unfortunate if the position were otherwise. There could be matters occurring subsequent to the order for possession which make it very clear that it would be wrong to suspend or stay the execution of an order for possession. The consequence of Mr Lewison's submission if that were to happen would be that the only remedy that the landlord could have would be to seek a new order for possession if the court were to suspend or stay the execution of the order which had already been made because they were not able to take into account the new material which had arisen since the order for possession was made."

Those on behalf of the first and second defendant submit that that is actually precisely what the claimant should have to do in this case because of the unique circumstances, namely that a new defendant (the second defendant) has Equality Act issues which need to be considered. I also remind myself that in that self-same judgment the following was said:

> "28. I also consider that it is very important, if there are matters which are relied upon for saying that an order for possession should be the subject of further discretionary relief under section 85, that the tenant has proper notice of any allegations which are going to be made by the landlord and has the opportunity to deal with them. In considering whether an opportunity has been given to deal with the issues, the realities in a County Court must be recognised. It is especially important that district judges should not be placed in a position where they have to conduct other than the type of summary hearing that section 85 contemplates.
>
> 29. In order to try and assist district judges who have this important jurisdiction to exercise, I would seek to give the following guidance. We are concerned here with a discretion of the district judge which as a matter of law is only circumscribed by the requirement of relevancy. What is relevant is not confined to the limited grounds of the original application for possession. However, it is important that there should be consistency in the way the discretion of individual judges is exercised."

A list of factors is then set out. I go back to what was said in the earlier paragraph:

> "I also consider that it is very important, if there are matters which are relied upon for saying that an order for possession should be the subject of further discretionary relief under section 85, that the tenant has proper notice of any allegations which are going to be made by the landlord and has the opportunity to deal with them. In considering whether an opportunity has been given to deal with the issues, the realities in a County Court must be

> recognised. It is especially important that district judges should not be placed in a position where they have to conduct other than the type of summary hearing that section 85 contemplates."

11. I emphasise that, because in the vast majority of cases where a landlord seeks to rely on matters occurring from the date of possession until the warrant it is a matter for summary judgment and the process and procedure that has been followed to date is an entirely appropriate one. In this case, however, the second defendant raises an Equality Act defence to the eviction. The effect of the Equality Act is to reverse at stages the burdens, and in my judgment that cannot be remedied simply by the claimant providing a position statement. In my judgment, the judge trying the matter will require proper pleadings. I accept that by doing so I am reaching the conclusion that in the particulars of this case the procedure set out in *Sheffield v Hopkins* is not appropriate, and I accept that by saying that the claimant is going to be forced to issue fresh proceedings. I step back again and ask myself this question. Other than the inevitable expense, which I do not play down, what is the effect of fresh proceedings? The second defendant (as I concentrate on the second defendant for the moment) will have served upon him and his advisors the detailed claim and the detail of the justification for the decision making. The second defendant will be able to serve a defence to the pleaded case so that the judge at trial will have in front of him or her the pleaded case of both parties, together no doubt with witness statements and the like following on from the directions which will follow.

12. I do not foresee that process as taking much longer. I accept it will take longer, because there will be a claim form that needs to be issued and a defence, but I do not see that as being materially longer than where we would sit today, because the hearing next week come what may would have to be vacated. I think this matter requires a time estimate of 2½ days for the court to hear the evidence and submissions, to consider the matter and then give a judgment. I do not foresee the matter coming back to court in short time with such a time estimate. The matter would require being reallocated to the multitrack. I simply do not see this matter as coming back much slower under the process that I am going to say is the right one than if we proceeded under the process as suggested by the claimant. The advantage of the process that I foresee is that the judge will have a proper pleaded case in front of him or her.

13. The order therefore is that the application to have the possession order set aside is dismissed, but I am going to vacate the hearing that is due next week. I cannot see that I need to make any other orders, but if the parties disagree no doubt they can address me on that.

(Further discussion followed)

14. I am asked to reconsider the way forward. I am not prepared to do so. I have reached the conclusion that the possession order is not to be dismissed, and I have reached the conclusion that the *Sheffield* approach is inappropriate in this case. I have therefore case-managed it such that the claimants will not be able to proceed with the antisocial behaviour type allegations within the current set of proceedings. I accept that it leaves the rent arrears aspect, and that can be listed and dealt with, but other than that I am not going to reconsider. I have given my judgment and it is now for the claimants to reissue if they so wish.

(Discussion re costs)

This Judgment has been approved by the Judge.

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