Neutral Citation Number: [2016] EWCA Civ 1034

Case No: B5/2016/0387

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Cardiff Civil and Family Justice Centre
His Honour Judge N Bidder QC
3CF00338

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2016

Before :

LADY JUSTICE ARDEN
and
LORD JUSTICE BRIGGS

- -

Between :

Cardiff County Council	**Respondent**
- and -	
Lee (Flowers)	**Appellant**

- -
- -

Cerys Walters (instructed by **Duncan Lewis**) for the **Appellant**
Carys Williams (instructed by **Cardiff County Council**) for the **Respondent**

Hearing date: 19 October 2016

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Approved Judgment

LADY JUSTICE ARDEN:

1. This appeal turns on one issue: can the court proceed to validate a warrant of possession where a landlord who seeks to enforce his right to possession because of an alleged breach of the terms of a suspended possession order has not complied with CPR 83.2? That non-compliance consists of failure to apply to the court for permission to issue the warrant with the result that he did not provide the court with information which is required to be given on any such application. The appellant, the tenant, says that CPR 83.2 is mandatory in this situation and cannot be waived. The judge below, HHJ Bidder QC disagreed, and dispensed with the need for a prior application for permission to issue a warrant. In my judgment, the court clearly has power to do this under CPR 3.10. There was a procedural defect which the court could cure under that rule.

2. CPR 83.2 provides: -

> (1)
>
> This rule applies to—
>
> …
>
> (d)
>
> warrants of possession.
>
> (2)
>
> A writ or warrant to which this rule applies is referred to in this rule as a "relevant writ or warrant".
>
> (3)
>
> A relevant writ or warrant must not be issued without the permission of the court where—
>
> …
>
> (e)
>
> under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled; or
>
> …
>
> (4)
>
> An application for permission may be made in accordance with Part 23 and must—
>
> (a)

identify the judgment or order to which the application relates;

(b)

if the judgment or order is for the payment of money, state the amount originally due and, if different, the amount due at the date the application notice is filed;

(c)

where the case falls within paragraph (3)(a), state the reasons for the delay in enforcing the judgment or order;

(d)

where the case falls within paragraph (3)(b), state the change which has taken place in the parties entitled or liable to execution since the date of the judgment or order;

(e)

where the case falls within paragraph (3)(c) or (d), state that a demand to satisfy the judgment or order was made on the person liable to satisfy it and that that person has refused or failed to do so;

(f)

give such other information as is necessary to satisfy the court that the applicant is entitled to proceed to execution on the judgment or order, and that the person against whom it is sought to issue execution is liable to execution on it.

(5)

An application for permission may be made without notice being served on any other party unless the court directs otherwise.

(6)

If because of one event, an applicant seeks permission under paragraph (3)(b) to enforce more than one judgment or order, the applicant need only make one application for permission.

(7)

Where paragraph (6) applies—

(a)

> a schedule must be attached to the application for permission, specifying all the judgments or orders in respect of which the application for permission is made; and
>
> (b)
>
> if the application notice is directed to be served on any person, it need set out only such part of the application as affects that person.
>
> (7A)
>
> Where—
>
> (a)
>
> the court grants permission, under this rule or otherwise, for the issue of a writ of execution or writ of control ("the permission order"); and
>
> (b)
>
> the writ is not issued within one year after the date of the permission order,
>
> the permission order will cease to have effect.
>
> (7B)
>
> Where a permission order has ceased to have effect, the court may grant a fresh permission order….

3. The purpose of the rule is obviously to provide a layer of judicial protection for a tenant whom the landlord wants to evict. This follows on from the decision of this court in *Southwark LBC v Brice* that the issue of a warrant was an administrative and not a judicial process. This puts the onus on the tenant if he considers that the conditions for suspension have not been breached to apply for a stay of a warrant. In many cases, particularly where the tenant is vulnerable, the tenant might not realise that he has to do this in time and this may result in his being wrongly evicted. While it is not possible to ascribe the reason for the insertion into the rules in 2014 of a new CPR 83.2 to the decision in *Brice*, clearly CPR 83.2 addresses what might reasonably have been considered to be a weakness of the system, namely that there was no judicial scrutiny of the landlord's case that the conditions had been breached. That judicial scrutiny occurs under CPR 83.2 without the tenant having notice of the application. Nonetheless it is a level of protection which the rules give him and which can be seen to have been given to a tenant for good reason.

4. The question before us (if the judge was right on discretion) is really about timing. The appellant was granted a secure tenancy of his flat ("the flat") on 19 January 2009 by the respondent, under s. 79 Housing Act 1985. On 19 March 2013, the respondent

made a claim for possession on the grounds of breach of tenancy, and nuisance and annoyance. On 3 September 2013, the court made an order for possession but this was suspended for two years (to 3 September 2015) on the terms that the appellant complied with the provisions of his tenancy agreement, which contained covenants against causing a nuisance or annoyance to neighbours. In 2015, there was a three-month period in which there were disputes between the appellant and his upstairs neighbour. The respondent warned the appellant that it intended to seek a warrant for possession.

5. On 12 August 2015, the respondent, thinking that this was a case where CPR 83.26 applied, filed the form appropriate in those cases, namely N325, which is a Request for a Warrant of Possession of Land, on the basis that the appellant had breached the terms of his tenancy agreement. Form N325 does not require the court to grant permission for the issue of a warrant of possession. On 14 August 2015, the Cardiff County Court issued the warrant. On 25 August, the bailiff gave notice of an appointment on 9 September 2015. On 3 September 2015, the appellant applied to the court to stay the warrant.

6. On 4 November 2015 District Judge Scannell dismissed the application to suspend the warrant. She found that the Appellant had breached his tenancy and that the warrant had been appropriately issued under CPR 83.26. this provides:

> 83.26—Warrants of possession
>
> 83.26 (1)
>
> A judgment or order for the recovery of land will be enforceable by warrant of possession.
>
> (2)
>
> An application for a warrant of possession—
>
> (a)
>
> may be made without notice; and
>
> (b)
>
> must be made to—
>
> (i)
>
> the County Court hearing centre where the judgment or order which it is sought to enforce was made; or
>
> (ii)
>
> the County Court hearing centre to which the proceedings have since been transferred.
>
> (3)

The court may, on an application by a debtor who wishes to oppose an application for a warrant of possession, transfer it to the County Court hearing centre serving the address where the debtor resides or carries on business, or to another court.

(4)

Without prejudice to paragraph (7), the person applying for a warrant of possession must file a certificate that the land which is subject of the judgment or order has not been vacated.

(5)

When applying for a warrant of possession of a dwelling-house subject to a mortgage, the claimant must certify that notice has been given in accordance with the Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010.

(6)

Where a warrant of possession is issued, the creditor will be entitled, by the same or a separate warrant, to execution against the debtor's goods for any money payable under the judgment or order which is to be enforced by the warrant of possession.

(7)

In a case to which paragraph (6) applies or where an order for possession has been suspended on terms as to payment of a sum of money by instalments, the creditor must in the request certify—

(a)

the amount of money remaining due under the judgment or order; and

(b)

that the whole or part of any instalment due remains unpaid.

(8)

A warrant of restitution may be issued, with the permission of the court, in aid of any warrant of possession.

(9)

An application for permission under paragraph (8) may be made without notice being served on any other party and must be supported by evidence of—

> (a)
>
> wrongful re-entry into possession following the execution of the warrant of possession; and
>
> (b)
>
> such further facts as would, in the High Court, enable the creditor to have a writ of restitution issued.
>
> (10)
>
> A warrant of possession to enforce an order for possession in a possession claim against a trespasser under Part 55 ("a warrant of possession against a trespasser") may be issued at any time after the date on which possession is ordered to be given.
>
> (11)
>
> No warrant of possession against a trespasser may be issued after the expiry of 3 months from the date of the order without the permission of the court.
>
> (12)
>
> Unless the court otherwise directs, an application for permission under paragraph (11) may be made without notice to any other party.

7. The appellant appealed. On 18 January 2016, HHJ Bidder QC dismissed the appeal. He held that a landlord requires the court's permission before a warrant for possession can be requested. The judge considered that CPR 83.26 was directed, as far as landlord and tenant cases were concerned, to simple situations where the court had made an order for possession and the tenant had not complied with the order and had remained in possession after the date for possession and has refused to leave. CPR 83.2 applied to particular types of warrants of possession (see 83.2(1) and (2)). The particular types of warrant of possession to which it applies are described in CPR 83.2(3) and they include in paragraph (e) "under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled".

8. The position on this appeal is that it is now common ground that that is the rule which applied. The respondent also informs the court that Cardiff has changed its systems so that in future applications for enforcement of possession where there has been a breach of a suspended possession order will be issued under CPR 83.2. So it is not strictly an issue before us whether the judge was right on CPR 83.2 but I would take the view that he was clearly right to apply that rule for the reason that he gave. In other words, when the respondent obtained possession it became entitled to the remedy of possession subject to the fulfilment of the condition that the tenant did not

comply with the terms of suspension. In my judgment, that is how that rule should be read.

9. So the respondent had to show that it had informed the court (among other matters) that the appellant had breached the terms of suspension. Although there ought to have been a two-stage procedure (application for permission followed by application for a warrant), the respondent had provided the relevant information at the trial before DJ Scannell.

10. Moreover, on the authority of this court in *Southwark v Brice,* the substantive determination of the appellant's rights took place at the hearing where the suspended possession order was originally made. So, in the judge's judgment, to hold that the court could not grant the application for a warrant would fetter the landlord's accrued right to possession. At most the defect in procedure made the warrant voidable, not void, and it is within the court's case management power (CPR 3.1(2)(m)) to remedy the situation, given that CPR 83.2(3) does not provide otherwise. The result was not unjust as DJ Scannall had fully considered the appellant's case. The only effect of the order being invalid would be that the landlord would have to go through the eviction process again by obtaining permission and issuing a fresh warrant.

11. The appellant contends that the court has neither power under CPR 83.2 to grant permission for the issue of a warrant of possession after the event nor power to waive the non-compliance with CPR 83.2 under CPR 3.1(2)(m).

12. Ms Cerys Walters, for the appellant, relies on the mandatory language of CPR 83.2(4) and she submits that it is unjust for the appellant to be evicted from his home on the basis of an improperly obtained writ of possession. The mandatory wording excluded the presence of a power to make an order which superseded the defect under CPR 3.1(2)(m). The judge's order undermined the protection for tenants which was obviously intended by CPR 83.2.

13. We asked counsel first to address us on CPR 3.10. CPR 3.10 states:

> 3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> > (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> >
> > (b) the court may make an order to remedy the error.

14. Ms Walters submits that the error that was made in this case was indeed "an error of procedure" but that CPR 3.10 does not apply because of the mandatory language of CPR 83.2 which provides protection for the tenant and which cannot be waived. She relies on the principle established in *Vinos v Marks and Spencer PLC* [2000] 3 All ER 784. In that case the appellant claimed personal injuries and his solicitors issued a claim form within the limitation period. However it was only served after the expiry of the four month period after the date of issue within which CPR 7.5 stipulated that the claim had to be served. CPR 7.6 provided that a claimant could apply for an order extending the period within which the claim form had to be served. However there was a special rule applying where an application was made after the time for service

had run out. That enabled the court to extend time only if certain conditions were fulfilled which were not fulfilled in that case. This court held that the general language of CPR 3.10 could not be used to grant an extension which was plainly excluded by this provision.

15. May LJ held at paragraph 20

> The general words of rule 3.10 cannot extend to enable the court to do what Rule 7.6 (3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time.

16. Likewise Lord Justice Peter Gibson at paragraph 27, the other member of court, held that:

> A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision.

17. He held that CPR 3.10 could not override the unambiguous and restrictive conditions of CPR 7.6(3) (at 27).

18. Ms Walters submits that those observations are applicable in this case.

19. CPR 3.10 was further considered by this Court in *Steele v Mooney* [2005] EWCA Civ 96, another case under CPR 7.6. In that case the claimant solicitors had applied for an extension of time in which to serve particulars of claim for damages for personal injury but their application had not included permission to serve the claim form itself. This Court considered CPR 7.6(2) and importantly stated that, in general, where there was a very good reason for failure to serve the claim form within the specified period, an extension of time would usually be granted (see *Hashtroodi v Hancock* [2004] 1 WLR 3206).

20. Ms Walters relies on paragraph 27 of the judgment of Lord Justice Dyson (giving the judgment of the court) in which he drew a distinction between making an application which contained an error of procedure and erroneously not making an application at all. He added "it is important for the proper application of the *Vinos* principle to bear this distinction in mind". Ms Walters submits that in the present case the respondent made no application at all for permission and therefore CPR 3.10 was inapplicable.

21. Very properly, Ms Walters accepts that the appellant was not prejudiced by the respondent's failure to apply for permission in the events which happened. But she forcefully points out, and I accept, that the position could have been very different if he had not taken advice and his solicitors issued an application for a stay of the warrant.

22. Ms Carys Williams, for the respondent, submits that CPR 83.2 does not exclude the exercise of the power under CPR 3.10. She distinguishes paragraph 27 in *Steele v Mooney* on the grounds that the respondent did make an application (by its form

N325). She submits that the appellant has suffered no prejudice and it was therefore appropriate for the court to allow the warrant to be issued. She submits that if the judge had decided that he had no power to grant permission for the issue of the warrant or to waive the issue of the warrant at the later stage when the appellant's rights had been determined, the respondent would simply have had to issue a new application and "we would have always ended up where we ended up." CPR 3.10 was specifically designed to deal with errors of procedure and what happened here was simply that. She accepts that every case under CPR 3.10 would have to be considered on its merits. She submits that all this appeal is about is when that permission has to be obtained.

Discussion

23. In my judgment Ms Walters is right to say that despite its opaque language CPR 83.2 contains an important protection for tenants. After all, the landlord may not be a social landlord which uses eviction as a measure of last resort but a landlord who is unscrupulous and wishes to take advantage of a claimed breach of a suspended order when that cannot be substantiated and would not pass judicial scrutiny. The scheme of CPR 83.2 is clear that all landlords should in the case of conditional orders for possession have to establish that the condition entitled them to the possession has been fulfilled before the tenant become embroiled in an eviction from his home.

24. I now must consider the decisions of this Court on CPR 3.10.

25. There is no doubt as to the principle established by *Vinos*. However the later case of *Steele v Mooney* shows that the approach to the interpretation and application of this CPR is one which is designed to reduce costs and delay. This is apparent from the Court's application of CPR 7.6(2) in *Hastroodi*. It is also apparent from this Court's approach to "an error of procedure" in CPR 3.10. The problem in that case was that HHJ Rudd had held that the error in that case was not an error of procedure such as failure to comply with a rule or practice direction and that it was simply a drafting error on the part of the solicitors. Therefore it was not a procedural error to which CPR 3.10 applied. He would however have made an order remedying the matter if he had come to a contrary view. This Court held that there was no need to give the phrase "error of procedure" an artificially restrictive meaning. The Court gave three reasons:

> [21]
>
> In our judgment, there are three reasons why there is no need to give the phrase 'error of procedure' in r 3.10 an artificially restrictive meaning.
>
> [22]
>
> First, if the phrase 'error of procedure' is given a narrow meaning, difficult questions of classification will arise. This will inevitably lead to uncertainty and sophisticated arguments as to how to characterise an error. This would be highly undesirable. It seems to us that a broad commonsense approach is what is required.

> [23]
>
> Secondly, r 3.10 gives the court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly (see r 1.1(1)). If remedying one party's error will cause injustice to the other party, then the court is unlikely to grant relief under the rule. This gives the court the necessary control to ensure that the apparently wide scope of r 3.10 does not cause unfairness.
>
> [24]
>
> Thirdly, the general language of r 3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by *Vinos*'s case.

26. This Court's approach to an error of procedure is instructive. While the appellant accepts that the error in this case in using the wrong form of application was an error of procedure for the purposes of CPR 3.10, this Court's liberal approach in *Steele v Mooney* to errors of procedure is in my judgment a matter which informs our approach to dealing with this case.

27. The real argument of Ms Walters centred on paragraph 27 of Lord Justice Dyson's judgment. She argued that this was a case of erroneously not making an application at all rather than an application which contained an error. Lord Justice Dyson made that point in a paragraph where he was dealing with an example given by counsel suggesting that it would be possible to correct an application for disclosure of documents which had been made in time by substituting for it an application for an extension of time for service of the claim form. Lord Justice Dyson held at paragraph 27 of his judgment:

> But in our judgment it would be absurd to say that an application for disclosure of documents was made in mistake for an application for an extension of time for service of the claim form. There is no connection between these two applications such that it could be said that the making of the one was in error for the making of the other. The error would not lie in a mistaken application for disclosure of documents, but in the fact that the claimant had simply failed to apply for an extension of time for service at all within the specified period: i.e. it would be a *Vinos* case. There is a difference between (a) making an application which contains an error, and (b) erroneously not making an application at all. It is important for a proper application of the *Vinos* principle to bear this distinction in mind.

28. In this case, however, what the respondent did was make an application by virtue of issuing Form N325, which requested the issue of a warrant. It was the wrong form of application. But its application was clearly connected with, and in error for, the

application for permission under CPR 83.2 which it ought to have made. So this is not a case within the *Vinos* principle as explained by Lord Justice Dyson in paragraph 27 of his judgment. In my judgment, this is a case where the discretion under CPR 3.10 arises.

29. Ms Walters places much emphasis on the word "must" in CPR 83.2. It is indeed imperative language but that sub-Rule does not indicate that if there is an error of procedure the court cannot, in any appropriate case, remedy it. The wording is quite different from that for instance of CPR 7.6(3) considered in *Vinos*.

30. I have already set out the wording of CPR 3.10. The Rule expressly states that an error of procedure does not invalidate any step in the proceedings unless the court so orders. That means that the issue of the warrant was not invalid unless the court so ordered. The issue of the warrant was therefore voidable and not void, as the judge correctly held. CPR 3.10 also states that the court may remedy the error. Here it has remedied the error by hearing the appellant's application to discharge the warrant, and, having rejected that application, validating the warrant despite the error in procedure. I appreciate that there was no such application as is required by CPR 83.2. That application may be made by an application under CPR 23 but CPR 23.3(2)(b) states that the court can dispense with the making of an application in that form. What matters therefore is the substance and not the form of the application.

31. I am however mindful that had the circumstances been otherwise the appellant might not have applied for a stay at all. Possession might have been obtained without the tenant having the benefit of the important judicial pre-scrutiny for which CPR 83.2 provides. In this case, a genuine mistake was made but if the landlord could not show that it had made a genuine mistake in its error of procedure or that it knew that it was not entitled to proceed in this way and of course if it knew that it was not entitled to possession, then the outcome of the case would have been very different. Subject of course to considering any application on its merits (and as Ms Williams submits, each case must be dealt with on its merits), there seems to me that there would be no question of the court validating the warrant. Indeed the court might well have imposed a costs sanction on the landlord whether or not it was prepared to dispense with the application for permission. I reiterate that CPR 83.2 constitutes an important protection for tenants. It is not to be taken lightly. Social landlords must ensure that from now on their systems are such that the same mistake will not be made in future. I also hope that the Civil Procedure Rule committee will consider whether any amendment can be made to form N325 to make it clear that there are cases in which permission must be sought first. Hopefully also county court offices will be able to identify cases which are not within CPR 83.26 and this will assist the bailiffs who have to carry out warrants.

32. But I am satisfied that, in the unusual circumstances of this case, Ms Williams is right to say that the landlord would have ended up in the same place even if it had taken the right procedure and accordingly it would simply cause extra cost and delay not to be able to remedy this matter by use of the court's power under CPR 3.10. It would be contrary to the aim of saving costs and delay which underlies the CPR to conclude otherwise. In so far as it is necessary to re-exercise the judge's discretion, I would exercise it as he did.

33. I would dismiss the appeal. I would particularly commend both counsel for their arguments. They adapted their arguments to meet the Court's request to argue the case under CPR 3.10 and took every point available to them with concision.

Lord Justice Briggs

34. I agree.