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Kaye v Lees

[2022] EWHC 3326 (KB), [2022] All ER (D) 76 (Dec)

The King's Bench Division dismissed the applicant creditor's (K's) application to, among other things, cancel the respondent's (L's) mental health crisis moratorium; and to be permitted to take enforcement action (namely the possession and sale of L's leasehold interest in a ground floor flat (the property)), pursuant to reg 7(6)(c) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (the 2020 Regulations), SI 2020/1311. K had been awarded damages against L on K's claim, alleging nuisance and harassment. Charging orders and an order for sale and possession had been made, concerning the property. K had obtained a warrant for L's eviction, but L had then been granted a moratorium under the 2020 Regulations. Notwithstanding the grant of a further moratorium, L had been evicted pursuant to a notice of eviction K had obtained. K had then sold the property and dispersed the proceeds of sale pursuant to a court order, and he had paid a sum to Santander to discharge L's mortgage on the property. Subsequently, a County Court judge had held that the execution of the writ of possession and the purported sale of the property had been null and void. K applied, pursuant to the 2020 Regulations, for declarations to address the consequences of that order. The court held that: (i) K was subrogated to Santander's rights as creditor, but that that subrogated debt was not an additional debt, for the purposes of reg 15 of the 2020 Regulations, which had started time running under reg 17 for a review application; (ii) K's application for the moratorium to be cancelled in respect of the subrogated debt under reg 19 failed because it had been made outside the time permitted, there was no power to extend time to allow an application under reg 19 to be made, and the further condition in reg 19(1) that a debt advice provider had undertaken a reg 17 review had not been met; and (iii) the application under reg 7(2) of the 2020 Regulations (that K be permitted to take enforcement action in respect of the subrogated and/or judgment debts) failed because eviction from the property would be detrimental to L (who had regained possession). The court held that 'detriment' had to be given its ordinary meaning, that it was not limited to mental health detriment and that any detriment relevant for the purposes of reg 7(5)(b)(i) should be material, namely more than de minimis.

Catchwords

SUBROGATION – APPLICATION TO CANCEL RESPONDENT LEASEHOLDER'S MENTAL HEALTH MORATORIUM – WHETHER APPLICANT BEING SUBROGATED DEBT HOLDER, WHETHER DEBT BEING 'ADDITIONAL DEBT' TRIGGERING NEW RIGHT OF REVIEW AND WHETHER RESPONDENT'S EVICTION WOULD BE DETRIMENTAL

Background

In July 2018, a County Court judge found in favour of the applicant (K) on his claim against the respondent (L) in nuisance and under s 3 of the Protection from Harassment Act 1997 (PHA 1997). The County Court dismissed L's counterclaim for damages for nuisance and/or harassment. Those claims arose from the parties' respective residence in flats in London. K was the leaseholder of the first floor flat; and L was the leaseholder of the ground floor flat (the Leysfield Road flat).

In a further judgment handed down in January 2019, the judge (Judge Roberts) awarded K £96,963.00 in damages and ordered L to pay £50,000 on account of costs. Both sums were to be paid by 1 February.

The amounts due were not paid and charging orders were made. The orders covered both the judgment debt and the interest accruing on that debt.

On 6 March 2020, a district judge made an order for sale and possession, requiring L to pay £290,925.88 (the judgment debt, interest and costs) by 4 pm on 3 April. In default of payment, the order provided for the sale of the Leysfield Road flat at a price not lower than £470,000.

The order provided that: '... 2. The Property shall be sold without further reference to the court at a price not less than £470,000 unless that figure is changed by a further order of the court. 3. Perrin Myddelton shall have conduct of the sale. 4. To enable the claimant to carry out the sale, there be created and vested in the claimant pursuant to section 90 of the Law of Property Act 1925 a legal term in the property one day less than the remaining period of the term created by the lease under which the defendant holds the Property. 5. The defendant must deliver … possession of the Property to the claimant on or before 3rd April 2020. 6. The claimant shall first apply the proceeds of the sale of the Property: (i) To pay the costs and expenses of effecting the sale; and (ii) To discharge any charges or other securities over the Property which have priority over the charging order. 7. Out of the remaining proceeds of the sale the claimant shall: (i) Retain the amount due to him as stated in paragraph 1; and (ii) Pay the balance (if any) to the defendant'.

In June 2021, K obtained a warrant for L's eviction. In July, notice of eviction was given and the eviction was scheduled for 24 August. However, on 30 June, L obtained a breathing space moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (the 2020 Regulations), SI 2020/1311, and the eviction was cancelled.

On 28 September, the deputy district judge made an order, transferring the proceedings to the High Court 'for the purposes of enforcement'.

On 12 October, a further notice of eviction was issued, but it was cancelled following a decision on 26 October to grant L a mental health crisis moratorium under the 2020 Regulations.

Notwithstanding a further moratorium granted under the 2020 Regulations on 12 January 2022, on 13 January, L was evicted from the Leysfield Road flat, pursuant to the notice of eviction K had obtained on 5 January.

L applied for a declaration that the eviction, and the execution of the 6 March 2020 order, was null and void by reason of reg 17(2) of the 2020 Regulations. That application was heard by Judge Dight and was the subject of his 13 May 2022 judgment. Judge Dight granted L's application and, by an order sealed 16 May 2022, he granted a declaration that 'Both the execution of the writ of possession on 13 January 2022 and the purported sale of the property to [C], said to have occurred on 10 March 2022 are null and void' (Judge Dight's order).

By the time Judge Dight had heard L's application, K had already (on 10 March), sold the Leysfield Road flat to C, and he had dispersed the proceeds of sale, in accordance with paragraph 6 and 7 of the 6 March 2020 order, including payment of £188,963.90 to a bank (Santander) to discharge the mortgage L had taken out on the Leysfield Road flat.

The present application sought to address the consequences of Judge Dight's order. K applied for: (i) a declaration that he was a subrogated debt holder, following the order of Judge Dight on 13 May 2022, and that the subrogated debt was a qualifying debt for the purposes of reg 15 of the 2020 Regulations; (ii) an order pursuant to reg 19 of the 2020 Regulations that L's mental health crisis moratorium, dated 13 January 2022 (the moratorium) be cancelled in respect of the subrogated debt because it unfairly prejudiced K's interests as a creditor; (iii) further or alternatively, that the moratorium be cancelled in respect of the judgment debt owed to K following the order of Judge Roberts on 2 January 2019 (the judgment debt) because the moratorium unfairly prejudiced K's interests as a creditor; (iv) further or alternatively, for an order pursuant to reg 7(2)(b) that K be permitted to take enforcement action (namely the possession and sale of L's interest in the Leysfield Road flat), pursuant to reg 7(6)(c) in respect of the subrogated and/or judgment debts.

Issues and decisions

(1) Whether the consequence of the payment K had made to Santander was that he was subrogated to Santander's rights to collect the amount outstanding on the mortgage on the Leysfield Road flat, and if so, the significance of that for the purposes of regs 13 and 15 of the 2020 Regulations.

K submitted, among other things, that, notwithstanding that Judge Dight's order had declared the execution of the writ of possession to be void, L had been enriched by the payment to Santander, such that K should be subrogated to the mortgage debt, and that, by reason of the subrogation, there was, for the purpose of reg 15 of the 2020 Regulations, an additional debt which should have been recognised by the debt advice provider, thus triggering a new right of review under reg 18 (see [9]-[13] of the judgment for the 2020 Regulations).

K was subrogated to Santander's rights as creditor. However, the subrogated debt was not an additional debt for the purposes of reg 15 of the 2020 Regulations (see [32] of the judgment).

By reason of his payment of the balance owed by L on the mortgage account, K should be subrogated to Santander's rights as creditor. The submission for L, to the contrary, was that she had not been unjustly enriched because K had had no authority to pay the balance on the mortgage account. It was submitted that any mistake on his part to the effect that he had been acting in pursuance of the 6 March 2020 order, could not be operative because of Judge Dight's order declaring that execution of the possession order and the subsequent sale of the Leysfield Road flat were void. In support of the submission that there was no unjust enrichment, counsel for L also drew attention to correspondence with Santander since Judge Dight's order. So far as anything could be inferred from that correspondence, it was that Santander regarded the mortgage account as paid and had no interest in either reviving the account or entering into a new mortgage arrangement with L. It would, therefore, be fanciful to conclude that the debt to Santander still existed (see [16], [17] of the judgment).

In consequence of Judge Dight's order, L currently had possession of the Leysfield Road flat. The practical position was that she had possession of the flat and was subject to no obligation to repay Santander. When he had discharged L's indebtedness to Santander, H had acted under a mistake, i.e., he had been acting so as to discharge the terms of the 6 March 2020 order. Judge Dight's subsequent conclusion that the steps taken were void simply proved the existence of K's mistake. His order was not a reason to conclude that L had not been unjustly enriched in consequence of the mistake. Counsel for L submitted that there was no claim in restitution because K had acted 'without authority'. He relied on the judgment of the Court of Appeal, Civil Division, in *Crantrave Ltd (in liquidation) v Lloyds Bank plc* [2000] 4 All ER 473. However, the circumstances before the court in that case were no guide to the outcome in the present case. In *Crantrave* the defendant bank had made a payment to the claimant's creditor without Crantrave's authority. It had then attempted to resist an action by Crantrave's liquidator to recover the amount for the benefit of the liquidation. The liquidator's claim had succeeded. That case did not appear to have been put on the basis of the unjust enrichment principle. However, on the facts of that case, the bank's lack of authority to disperse its customer's assets was obviously highly material to how that principle might apply (see [18] of the judgment).

In the present case, the relevant question was not whether K had had L's authority to pay Santander. Rather it was whether K, when paying Santander, had acted under a mistake that, by reason of the terms of the 6 March 2020 order, he had been required to discharge L's liability, such that she had been unjustly enriched. The answer to that question was that K had acted under that mistake; that since then, L had had the advantage of that payment and that there was, and never had been, any realistic possibility that Santander would act to alter that state of affairs. In the premises, L had been unjustly enriched, and K should be subrogated to Santander's rights as creditor (see [19] of the judgment).

The next issue was the significance of that conclusion for the purposes of the 2020 Regulations. On 27 May 2022, K's solicitors had written to C of Mental Health and Money Advice, the debt advice provider for the moratorium granted for L, seeking a review under reg 17 of the 2020 Regulations on the ground that the consequence of Judge Dight's judgment was that K had become L's creditor. That was, it was contended, an 'additional debt' for the purposes of reg 15 of the 2020 Regulations which had started time running under reg 17 for a review application. C's initial response (in an email of 1 June 2020) had been that, while L's mortgage debt had been repaid, payment of that debt had given rise to no new indebtedness because no new demand for payment had been made. In response, K's solicitors had taken two steps. By an email, dated 14 June 2022, they had explained to C their contention that K stood in Santander's shoes by reason of subrogation. Then, on 7 July 2022, they had sent a further email to C formally demanding payment of £188,963.90. Between those two steps, on 21 June 2022, C had written again. While he had agreed that it was unlikely that the consequence of Judge Dight's judgment was that L had avoided the mortgage debt, he explained that, even assuming K was a creditor by subrogation, that did not create an additional debt for the purposes of reg 15. Instead, for the purposes of 2020 Regulations, the original debt continued to exist, albeit now owed to a different creditor (see [20] of the judgment).

Whether that conclusion was correct depended on the meaning and effect of reg 13 of the 2020 Regulations: '13. - Meaning of creditor by assignment (1) In these Regulations references to a creditor as a person to whom a qualifying debt is owed by a debtor include a reference to any person who, by assignment or operation of law, before or after the date of the application for a moratorium has -(a) assumed or has the right to exercise the rights and duties of the creditor, or (b) to whom the right to claim the whole or any part of the debt has passed, (a "creditor by assignment").

(2) In these Regulations, "assignment", in relation to Scotland, means assignation and "assigned" shall be construed accordingly.' The effect of that provision was that, although K was now a creditor, that had not given rise to an additional debt. By the subrogation, K had, for the purposes of reg 13, assumed the rights and duties of Santander 'by … operation

of law'. The submission for K was that, although the debt due to Santander had been discharged when he had made the payment on 10 March 2022, his position as creditor only arose when subrogation was recognised either by the debtor or by the court. Thus, between those events, there had been no debt, so that when the subrogation was recognised, an additional debt arose for the purposes of reg 15. The present court doubted that analysis – that there was a gap between the original indebtedness and the subrogated debt was correct. However, the position was put beyond argument by reg 13. By that regulation, K was deemed always to have been the relevant creditor. For that reason, the subrogation gave rise to no additional debt for the purposes of reg 15, and it had not started start time running for an application to review under reg 17. Given the purpose of the 2020 Regulations, there was good reason for that conclusion on the effect of reg 13. Any other reading of the regulation would lay open the possibility of abuse - i.e., assignment or subrogation of a debt simply to give rise to repeated opportunities for review under reg 17. There was no question of any abuse on the facts of the case. It was accepted that K's request, following subrogation of the mortgage debt, had been made in good faith. Nevertheless, the effect of reg 13 was clear. The subrogation of the mortgage debt had not given rise to any opportunity for review under reg 17 (see [21] of the judgment).

Crantrave Ltd v Lloyds Bank plc [2000] QB 917, [2000] 4 All ER 473, [2000] 3 WLR 877, [2000] All ER (D) 541 considered

Lees v Kaye and another [2022] EWHC 1151 (QB), [2022] 1 WLR 5121, [2022] All ER (D) 42 (May) considered

(2) Whether K's application under reg 19 of the 2020 Regulations, to cancel the moratorium granted on 12 January 2022 and/or a successor moratorium granted on 15 February 2022, should be allowed.

The conclusion stated on the application of reg 13, and the consequence of that, for the purposes of whether there was a reg 15 additional debt and an opportunity under reg 17 to request a review, was determinative of K's submission on reg 19. Since there was no additional debt there had been no event restarting the period permitted by reg 17(3) and/or (5) within which an application for a review could be made. On that analysis, any review under reg 17 had to have been requested within 20 days of the start of the present moratorium i.e., within 20 days of 15 February 2022. There had been no such review. It was not for the present court on the present application, to assess the evidence provided to C (of the debt advice provider) for the purposes of the discharge of his functions under reg 32 of the 2020 Regulations (see [22]-[26] of the judgment).

Accordingly, the application under reg 19 failed because it had been made outside the time permitted, there was no power to extend time to allow an application under reg 19 to be made. There was no legitimate basis on which to read-in to the scheme of the 2020 Regulations some form of power to extend time. There was no reliable standard that the court could legitimately use to supplement that which was provided for in the 2020 Regulations (see [24], [32] of the judgment).

The application under reg 19 had to also fail because the further condition in reg 19(1) that a debt advice provider had undertaken a reg 17 review had not been met on the facts of the present case. By reg 19(1), the opportunity to make an application to the court only arose if 'a debt advice provider has carried out a review of a moratorium following a request made by a creditor under regulation 17 and the moratorium has not been cancelled under regulation 18 in respect of some or all of the moratorium debts as a result ...'. In the present case, C had not carried out a review because the request had been made outside the permitted period. In those circumstances, the right of application to the court did not arise. On the facts, there could be no suggestion that C had acted incorrectly in declining to undertake the review (see [27] of the judgment).

R v Soneji [2005] UKHL 49, [2005] 4 All ER 321, [2005] 3 WLR 303, [2005] All ER (D) 294 (Jul) distinguished

(3) Whether K's application under reg (7)(2)(b) of the 2020 Regulations, to take enforcement action in respect either of the subrogated mortgage debt or the debt arising from the judgment of Judge Roberts of 18 January 2019 (i.e., the debt subsequently described in the 6 March 2020 Order), should be allowed.

The application under reg 7(2) of the 2020 Regulations failed because eviction from the Leysfield Road flat would be detrimental to L (see [32] of the judgment).

Regulation 7 of the 2020 Regulations specified the effect of a moratorium. Put generally, a moratorium prevented a creditor from taking any of a range of steps for the duration of the moratorium. He could not require payment of interest on a moratorium debt that accrued during the moratorium period or charge any fee or penalty in relation to a moratorium debt that had accrued during the moratorium period, or take 'enforcement action': see reg 7(6). Enforcement action was defined at reg 7(7) and included any of a range of a range of steps a creditor might otherwise take to protect his interests or recover the debt owed to him (see [28] of the judgment).

However, by reg 7(2)(b), a creditor could take enforcement action with the permission of the court. By reg 7(4), a court 'may ... determine an application for permission to take [enforcement action] ... in anyway it thinks fit [and may] give permission subject to such conditions as it thinks fit ...'. However, reg 7(5) provided that a court could only give permission to take enforcement action when it was 'reasonable to allow the creditor to take the step, and the step will not ... be detrimental to the debtor ... or ... significantly undermine the protections of the moratorium'. On the facts, it was not possible to conclude that eviction from the Leysfield Road flat would not be detrimental to L. Detriment was not a term defined in the 2020 Regulations. It had to be given its ordinary meaning. It was not, therefore, limited to mental health detriment (even when the moratorium in question was a mental health crisis moratorium). As a matter of principle, any detriment relevant for the purposes of reg 7(5)(b)(i) should be material i.e., it had to be something more than de minimis. What was de minimis for that purpose had to depend on the circumstances in which the regulation fell to be applied, from case to case. In the present case, K sought permission to obtain possession of the Leysfield Road flat. Removing L from the flat would, as a matter of ordinary language, be detrimental to her. That being so, K's application under reg 7(2) of the 2020 Regulations would be refused (see [29], [31] of the judgment).

Judgment date
21 December 2022

Judge
Judge Swift (King's Bench Division)

Representation
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