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Case Summaries

Lees v Kaye and another

[2022] EWHC 1151 (QB), [2022] All ER (D) 42 (May)

The Queen's Bench Division ruled that the applicant, who had owned a long lease in respect of one of two flats in a building, was entitled to an order which restored the position to what it had been before her eviction and the sale of the lease had taken place. The court so ruled on the applicant's application for a declaration that the execution of a writ of possession concerning the flat was null and void pursuant to reg 7(12) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020, SI 2020/1311, because there had been a mental health crisis moratorium in place to protect the applicant at the time of execution. The first respondent, who had acquired a long lease of the upper flat in the building, had succeeded in a substantive claim, alleging nuisance and harassment against the applicant. He had been awarded damages and costs, which he had secured by a (final) charging order over the applicant's lease. The first respondent had, subsequently, been granted an order for sale of the lease and possession of the flat. He had later sold his interest in the upper flat in the building and possession of the flat had then been taken pursuant to the writ of possession. The court held, among other things, that: (i) there was no basis for doubting the accuracy of the registration of the moratorium; (ii) pursuant to reg 7(12) of the Regulations, the effect of any action taken contrary to reg 7 'shall be null and void and, on a proper construction of reg 7, the applicant's eviction had been enforcement of the judgment debt in breach of the moratorium; and (iii) the sale had been enforcement in breach of the moratorium. The court rejected the contention that the judgment debt in the substantive claim had been exempted from the effect of the moratorium as a 'non-eligible debt' because it had been a debt consisting of damages for personal injury, and it held that it was unarguable that the judgment debt was a non-eligible debt by virtue of being secured by a charging order.

Catchwords

LEASE – WRIT OF POSSESSION – FORMER LEASEHOLDER'S APPLICATION FOR DECLARATION THAT EXECUTION OF WRIT OF POSSESSION CONCERNING FLAT NULL AND VOID BECAUSE OF EXISTENCE OF MENTAL HEALTH CRISIS MORATORIUM

Background

In 2013, the first respondent acquired a long lease of the upper maisonette (the upper flat) in a building in London. By then, the applicant had already owned the lease (the lease) of the ground floor flat (the flat) for a number of years.

The first respondent brought a county court claim (the substantive claim) against the applicant, alleging that she was guilty of nuisance and harassment and that she had disturbed his enjoyment of his flat.

The first respondent succeeded in the substantive claim and the judge (the judge) awarded him damages and costs, which he later secured by a (final) charging order over the applicant's long leasehold interest in the flat.

Subsequently, a district judge (the district judge) granted the first respondent an order for sale of the lease and possession of the flat in separate proceedings brought in the county court (the order for sale claim).

On 30 June 2021, the applicant successfully applied for a breathing space moratorium pursuant to the Debt Respite

Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020, SI 2020/1311 (the Regulations).

On 12 January 2022, she was granted a further mental health crisis moratorium (the moratorium).

On 13 January, possession of the flat was taken pursuant to a High Court writ of possession (the writ of possession).

On 10 March, exchange of contracts and completion of the sale of the lease of the flat to the second respondent for the sum of £505,000 took place. The mortgage over the lease was repaid and the balance of the proceeds of sale passed to the first respondent. That left the second respondent and her partner as the owners of the entire building, although registration of the transfer of the lease to the second respondent at the Land Registry had yet to take place.

The applicant sought a declaration that the execution of the writ of possession was null and void in accordance with reg 7(12) of the Regulations, because the mental health crisis moratorium had been in place to protect her at the time of execution. Alternatively, she contended that the execution of the writ of possession in the circumstances had amounted to oppression. The applicant also sought an order permitting her to retake possession of the flat.

The first respondent opposed the application, contending that there was no clear evidence that the moratorium had been in force at the date of the eviction and that, in any event, the eviction and sale had not breached the moratorium. Further, he contended that the court should not exercise its discretion in favour of the applicant, even if she otherwise succeeded in the application.

Issues and decisions

(1) Whether the moratorium had been properly registered and effective at the date of execution of the writ of possession, in accordance with reg 31(2)(a) of the Regulations.

There was no basis for doubting the accuracy of the registration of the moratoria or the dates of their commencement. Nor was there any basis in the Regulations for concluding that the registration, or the moratoria, had, in some way been invalid because the name of the creditor's solicitors had been specified as the owner of the debt, instead of the first respondent himself (see [55] of the judgment).

By virtue of reg 7 of the Regulations, a moratorium had effect 'in relation to a moratorium debt' during the relevant period. A 'moratorium debt' was, in accordance with reg 6, 'any qualifying debt', 'about which information has been provided to the Secretary of State by a debt advice provider under these Regulations' (reg 6(c)) (see [32], [33] of the judgment).

By reg 35, the Secretary of State was obliged to maintain an electronic system for the purpose of giving and receiving communications and notifications in connection with moratoria and maintaining a register of them (see [34] of the judgment).

The evidence showed that the Secretary of State had established an electronic system and register in accordance with reg 35 of the Regulations onto which information about the applicant and the moratoria granted to her from time to time had been loaded, including the dates when they had started (see [52] of the judgment).

A moratorium was initiated when a debt advisor provided the Secretary of State with the information specified in reg 31(1). The crucial information to be registered were the details of the debtor and the date on which the moratorium started (reg 36(1)). No active decision or step needed to be taken by the Secretary of State. Save for the loading of information onto the system by the debt advisor, there was no physical or mental activity required by anyone; the whole process thereafter, including the generation of notices and emails, was automated (see [53] of the judgment).

Contrary to what the first respondent suggested, it was not a question of the burden of proof in respect of demonstrating what was to be found on a register maintained by the state. What was contained on the register was a matter of record and should be taken at face value. There was no basis for going behind the register or for assuming that the correct procedure and process leading to the registration had not been followed (see [54] of the judgment).

(2) Whether the judgment debt in the substantive claim was exempted from the effect of the moratorium because it was a 'non-eligible debt' by reason of reg 5(4)(i) of the Regulations, as a debt consisting of damages for personal injury because £12,000 of the sum awarded had, effectively, been in respect of personal injury.

In Brown v Commissioner of Police of the Metropolis and another (Equality and Human Rights Commission intervening) [2020] 3 All ER 273, Coulson LJ, in considering what amounted to a claim for damages for personal injury for the purposes of qualified one-way costs shifting under CPR 44.13-44.16, had looked at the definition of that phrase used in the CPR. He had held (at [13]), as followed: 'A claim 'for personal injuries' (r 44.13(1)(a)) is defined at r 2.3 as follows: "claim for personal injuries" means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and "personal injuries" includes and disease and any impairment of a person's physical or mental condition ... This is the same definition as appears in the Limitation Act 1980 at s 38(1). It is trite law that "distress", "upset", "fear" and other similar human emotions do not constitute personal injury ...' (see [56] of the judgment).

The other two members of the Court of Appeal, Civil Division, had agreed with the judgment given by Coulson LJ. It was apparent that Coulson LJ's decision had been based on a consistent meaning of the expression 'personal injuries' across English civil jurisprudence, whether used in a statute or at common law. No distinction was to be made. Second, his statement that it was trite law that 'distress ... and other similar human emotions do not constitute personal injury' was not only consistent with authority, but it was a principle which bound the present court (see [56], [57] of the judgment).

No good reason had been advanced as to why the expression 'damages in respect of ... personal injury' used in reg 5(4)(i) of the Regulations should bear a different and wider meaning than used elsewhere in Acts of Parliament and at common law. Moreover, the argument that the expression should be used consistently was a compelling one (see [58] of the judgment).

In the present case, the first question, therefore, was into which category did the damages awarded by the judge to the first respondent fall. The present court accepted that damages for psychiatric harm would be damages for personal injury. However, there had been no claim for damages for psychiatric harm in the substantive claim, nor had there been any factual or expert evidence to support such a claim. More importantly, the judge had made no findings of such harm, nor was it possible to construe his award as one which had been intended to compensate the first respondent for such harm. The damages had been awarded in respect of distress and anxiety and other human emotions experienced by the first respondent falling short of psychiatric harm (see [59] of the judgment).

In any event, for the debt to be 'non-eligible' in accordance with reg 5(4)(i), the whole of the damages had to be in respect of personal injury, otherwise the use of the words 'consists of' in that subparagraph of the regulation would not be given proper effect to. The sub-paragraph excluded 'any debt which consists of a liability to pay damages ... in respect of ... personal injury'. The words 'consists of' bore a different meaning to the word 'includes', which was what the draftsman of the Regulations could have used instead of, or in addition to, the words 'consists of'. The natural meaning of the expression was that the liability comprised only a personal injury award. Support for that construction was to be found in the decision of Turner J in *R (Gate) v Secretary of State for Transport* [2013] All ER (D) 84 (Oct), who, in construing s 14 of the Planning Act 2008 (PA 2008) as to the meaning of nationally significant infrastructure projects, had held that: 'The wording of s 14 of the 2008 Act establishes that a "nationally significant infrastructure project" means a project "which consists of any of the following ...". In their ordinary meaning the words "consists of" require that the project must fall entirely within the relevant definitions of an NSIP to fall within the scope of s 14. Otherwise, the word "includes", or an equivalent, would have been used' (see [60] of the judgment).

Therefore, even if it were otherwise possible to come to the conclusion that the award of damages made by the judge in the substantive claim had included damages for personal injury, the debt would still fall outside the definition of a non-eligible debt because the award giving rise to the debt did not fall entirely within the expression 'personal injuries', but merely included an element in respect of such a head of damages (see [61] of the judgment).

Gate v Secretary of State for Transport [2013] All ER (D) 84 (Oct), [2013] EWHC 2937 (Admin) considered

Brown v Commissioner of Police of the Metropolis and another (Equality and Human Rights Commission intervening) [2019] EWCA Civ 1724, [2020] 3 All ER 273, [2020] 1 WLR 1257, [2019] All ER (D) 124 (Oct) applied

Johnston v NEI International Combustion Ltd; Rothwell v Chemical and Insulating Co Ltd; Topping v Benchtown Ltd (formerly Jones Bros Preston Ltd) [2007] UKHL 39, [2007] 4 All ER 1047, [2007] 3 WLR 876, [2007] All ER (D) 224 (Oct) considered

Kimathi and others v Foreign and Commonwealth Office [2018] EWHC 1305 (QB) considered

(3) Whether the judgment debt had been excluded from the effect of the moratorium by reason of reg 7(13) because it had been secured by a charging order.

The present issue turned on the proper construction of reg 7(13) which provided that nothing in reg 7 'affects ... (a) a charging order made before the start of the moratorium'. The obvious meaning of that provision, in the context of a regulation which prevented the creditor from taking steps to enforce a judgment debt, was that while the charging order was preserved and remained as security for the underlying debt, the creditor was prevented from enforcing payment of the debt by seeking the remedies which would otherwise be available to an equitable chargee. The words 'affects ... a charging order' were plain and related to the existence or status of the charging order, which was to remain unaffected by the existence of a moratorium. They need not be stretched, and there was no justification for stretching them, to mean that the chargee could seek the usual remedies during the moratorium period in the face of the very specific prohibition contained in reg 7(6)(c) which prevented a creditor during the period of the moratorium from taking 'any enforcement action in respect of a moratorium debt'. See, also, the duties of the court under reg 10(5). That construction would be consistent with the policy underlying the Regulations which protected the debtor from action during the period of the moratorium, but did not deprive the creditor of their rights in respect of the debt, which would become exercisable again when the moratorium came to an end. The fact that reg 7(13) only applied to charging orders 'made before the start of the moratorium' reinforced that conclusion (see [62] of the judgment).

It was unarguable that the judgment debt in the present case was a non-eligible debt by virtue of being secured by a charging order. Reg 5(4)(a) excluded, as a non-eligible debt, a 'secured debt', which was specifically defined for the purposes of the Regulations by reg 2 as a secured credit agreement, a hire-purchase agreement or a conditional sale agreement. The debt arising from the award of damages in the substantive claim had been none of those three things and had not, therefore, fallen into the category of non-eligible debts (see [63] of the judgment).

(4) Whether, at the time of the sale to the second respondent, the applicant had had an interest in the lease of a type which had been caught by the moratorium.

It was said that the sale had been of legal interest in the lease, whereas the interest of the applicant had solely been a beneficial interest under a trust.

The fundamental question was whether, in obtaining possession of the flat and in selling the lease, the first respondent had been taking enforcement action in respect of a moratorium debt in breach of reg 7. There was no doubt that each of those steps had been prohibited by reg 7 (see [64] of the judgment)

While the charging orders might be said to have been granted as security for the underlying judgment debt, without doubt itself a moratorium debt, the order for sale claim and the order made by the district judge had resulted from steps taken by the applicant to enforce that judgment debt, steps which he had been perfectly within his rights to take until the moratorium had been granted. The fact that the operative parts of the district judge's order had only come into effect if the applicant had failed to pay the judgment debt made it plain that the orders for possession and sale had been part of the enforcement of the judgment debt. They had had no independent purpose. Further, the only legitimate purpose for which the applicant had been entitled to exercise his rights as chargee had been to obtain payment of the sum secured by the charges. It was settled law that: 'The estate, rights and powers of a mortgagee, however, are only vested in a mortgagee to protect his position as a mortgagee and to enable him to obtain repayment. Subject to this, the property belongs in equity to the mortgagor' (see [65] of the judgment).

The fact that, by the district judge's order, a term of years certain had been vested in the applicant had not altered the position. True it was that that had given the first respondent a proprietary interest in the lease which he had then sold to the second respondent. However, as paragraph 4 of the order had specifically stated, that had been 'To enable the claimant to carry out the sale' of the flat, or more specifically the applicant's interest in the lease. It was a well established method of providing the mechanics to an equitable chargee to enable the chargee to sell a property with a view to seeking repayment of the monies secured by the charge. It was not in dispute that the effect of such a sale in such a way was, once registered at the Land Registry, to transfer to the purchaser the title originally held by the debtor, not some new title created in favour of the creditor/chargee. The present court did not set out the well-known statutory provisions which gave effect to such a transaction in that way (see [66] of the judgment).

Accordingly, the eviction had been enforcement of the judgment debt in breach of the moratorium and the sale had been enforcement in breach of the subsequent moratorium, on a proper construction of reg 7 (see [67] of the judgment).

Co-Operative Bank Plc v Phillips [2014] EWHC 2862 (Ch), [2014] All ER (D) 58 (Sep) applied

Quennell v Maltby [1979] 1 All ER 568, [1979] 1 WLR 318 applied

(5) Whether, on a proper construction of reg 7(12), the sale of the lease to the second respondent had been null and void.

Regulation 7(12) was unequivocal. The effect of any action taken contrary to reg 7 'shall be null and void'. Thus, since both the eviction and the sale were actions taken contrary to reg 7, they were both null and void. Notwithstanding the fact that the sale of the lease had not been completed by registration, the transactional steps taken in the course of the sale, by which the court meant the contract for sale and the transfer, being actions taken to enforce a moratorium debt, were null and void. As between the applicant and the respondents, it was as if those actions had never been taken. Those actions had not bound the applicant. The relief to be granted to the applicant needed to reflect that conclusion (see [68] of the judgment).

The present court said nothing about the effect of that conclusion as between the other parties involved, being not only the respondents, but the applicant's mortgagee and any lender who might have advanced money to the second respondent in reliance on a new charge over the lease. Nor did those third parties need to be joined to the present application to determine whether the eviction and sale were valid or void. There would no doubt be complicated arguments about restitutionary rights and remedies which were not matters for the present court to determine on the application (see [69] of the judgment).

The court's primary task was to construe the Regulations in light of the dispute between the parties. It had done so and had set out its conclusions. While there might, in the circumstances, be a limited discretion as to whether to make declarations as to the construction of the Regulations and the consequences of that construction there would be little point in declining to do so (see [71] of the judgment).

Moreover, given that the court had reached the conclusion that the first respondent had taken actions in evicting the applicant and in selling the lease which, because they were breaches of reg 7, had been null and void, the first respondent would have to identify and prove very exceptional circumstances to persuade the court to subvert the policy of the Regulations and deprive the applicant of the protection which they were designed to confer on her and had been conferred on her by grant of the moratorium, as a consequence of her receiving mental health crisis treatment. The factors relied on by the first respondent did not begin to satisfy that heavy burden (see [72] of the judgment).

(6) Whether the court should exercise its discretion in favour of the applicant if she otherwise succeeded in the application.

The court's primary task was to construe the Regulations in light of the dispute between the parties. It had done so and had set out its conclusions. While there might, in the circumstances, be a limited discretion as to whether to make declarations as to the construction of the Regulations and the consequences of that construction there would be little point in declining to do so (see [71] of the judgment).

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The applicant was entitled to an order which restored the position to what it had been before the eviction and sale had taken place (see [73] of the judgment).

Judgment date
13 May 2022

Judge
Judge Dight CBE (sitting as a High Court judge)

Representation
Daniel Clarke (instructed by TV Edwards LLP) for the applicant.
Ian Peacock (instructed by Perrin Myddleton) for the first respondent.
The second respondent appeared in person.