

A nightmare for social landlords and their tenants?

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On 19 October 2016, the Court of Appeal (Arden LJ, Briggs LJ) gave an *ex tempore* judgment in *Cardiff County Council v Lee (Flowers)* [2016] EWCA Civ 1034.¹ Having seen the transcript of the Judgment, it strikes us that the case is helpful neither to landlords nor tenants and, in this article, we shall try to explain why not.

One feature of the case is that the Council conceded that a landlord does need permission to enforce a suspended possession order under CPR r.83.2(e), so the only issue that the Court actually needed to decide was whether CPR r.3.10 could remedy a procedural defect when a landlord, and importantly when a social landlord, failed to seek permission from the court. The issue about whether permission under r.83.2(e) was even required in the circumstances was, unfortunately, never argued. Unsurprisingly, therefore, the need for permission was taken as read. While the Court commented on the importance of the rule as a protection for tenants and made passing reference to the pre-existing position (all of which would seem to be *obiter dicta*), the judgment contains no analysis at all of the relevant provisions or case law, and no discussion on the point, but merely asserted that Rule 82.2(e) introduced a requirement for permission to issue a warrant. In our view, that approach, unreasoned as it is, sits uneasily with the established case law and practice.

The issues and judgment in Cardiff CC v Lee (Flowers)

CPR r.83.2 applies to warrants of possession (a “relevant writ or warrant”): rr.83.2(1)(d) and 83.2(2). CPR r.83.2(3)(e) provides so far as is relevant:

“A relevant writ or warrant must not be issued without permission of the court where –

¹ The case has already been the subject of an article in the last SHLA newsletter (see Andrew Lane’s discussion [here](#)).

...

(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..."

The tenant's argument in *Cardiff CC v Lee* was that Cardiff had breached CPR r.83.2 by failing to apply to the court for permission to issue the warrant. He argued, *inter alia*, that given the mandatory language of r.83.2, the procedural defect of not applying for permission could not be remedied by CPR r.3.10. Rule 3.10 provides:

"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".

Cardiff's case was that r.83.2 did not exclude the exercise of the r.3.10 power.

The Court of Appeal held (on the Council's concession) that Rule 83.2 contained an important protection for tenants making it clear that a landlord, having obtained a suspended possession order, had to establish that the condition entitling it to possession had been fulfilled before the execution of any warrant for possession. Cardiff County Council had, by using form N325, used the wrong form. The language of r.83.2 did not, however, indicate that if the incorrect procedure had been used, the court could not remedy it under r.3.10 in an appropriate case. It was the substance of the application made by the landlord that mattered and, as the court had dealt with and dismissed the tenant's application to discharge the warrant, it had endorsed the warrant despite the procedural defect.

The Court of Appeal stated that social landlords should not simply rely upon r.3.10 in the future; they should not make the error Cardiff made and have systems in place to prevent it. There was a call for the Civil Procedure Rules committee to amend form N325 to make clear that permission had to be sought in certain cases.

Social housing framework

Where the tenant has a secure or assured tenancy pursuant to the Housing Act 1985 or Housing Act 1988 ("the Housing Acts") respectively, the tenancy cannot be brought

to an end by the landlord without an order of the court. In order to obtain an order the landlord must, generally: first, serve a notice seeking possession;² secondly, commence proceedings; thirdly, prove at a hearing that any grounds for possession are made out; and, finally demonstrate that it is reasonable for the court to make an order for possession. Thereafter, the tenant must provide cogent evidence as to why any possession order should have the benefit of a suspension.³ The judge will decide whether it is reasonable to make an order for possession, and if so, whether the order should take effect immediately or be suspended on terms. Any order suspended on terms will give a date for possession to be given up by the tenant. The court retains power, until execution of the possession order, to stay or suspend the execution or to postpone the date for possession for such period or periods as it thinks fit (s.85 1985 Act; s.9, 1988 Act).

If the order for possession is suspended on terms, and the tenant does not comply with the terms, the landlord then has to apply to the court to issue a warrant of possession. The practice has been that the warrant is issued by an officer of the court, and an appointment is made with the bailiffs for its execution. It would then be for the tenant to make any application to suspend the warrant for possession based on the court's Housing Acts powers.

It is well established that the making of a possession order, whether suspended, postponed or outright, means that the landlord's right to possession has been established and that the parties' rights have been determined. What follows after a possession order, by way of enforcement, is merely an administrative act giving effect to the earlier judicial determination. Enforcement of a possession order does not therefore involve any additional determination of a person's civil rights or obligations and, until *Cardiff*, unless the tenant applied to halt the process, enforcement required no judicial involvement: see *Southwark LBC v St Brice* [2002] 1WLR 1537 at [32].

² Subject to notice being dispensed with in appropriate circumstances.

³ See e.g. *Birmingham CC v Ashton* [2012] EWCA Civ 1557; [2013] HLR 8 and *City West Housing Trust v Massey*; *Manchester and District Housing Association v Roberts* [2016] EWCA Civ 704; [2016] H.L.R. 31.

The landlord could not be required to prove again what it has already proved when establishing its right to possession: *St Brice* at [17] and [40].

Discussion

The wording of CPR r.83.2(3)(e) did not have to be considered by the court due to Cardiff's concession, notwithstanding that the settled position prior to the case was that permission was not required unless specified in the possession order. As a result, all landlords in England and Wales now appear to be subject to a requirement to obtain permission before issuing a warrant to enforce any suspended possession order. We understand that, in Cardiff, the court is refusing to deal with permission applications on the papers but is listing them all for an oral hearing.

Is it arguable that r.83.2(e) does not apply?

Although we appreciate that r.83.2(e) was introduced into the CPR after *St Brice*⁴ and its endorsement in other cases, in our view, it is strongly arguable that the rule does not apply in the way Cardiff has interpreted it. Given the language of r.83.2(e), the language of the Housing Acts and the way in which housing law has developed over the years, such an interpretation of the rule is unlikely to be correct. The Court of Appeal felt unable to say that the rule had been introduced to reverse the effect of *St Brice* (at [3]), and, indeed, considered its language "opaque" (at [23]).

The rule requiring permission applies where "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 (emphasis added). This suggests that the party seeking the warrant has been granted a remedy conditional on doing something which he says he has now done.

It seems to us to be at the very least worthy of argument that the landlord's *remedy* in a suspended possession case (*i.e.* possession) is not subject to the fulfilment of a condition which he alleges has been fulfilled. To the contrary, the landlord's remedy

⁴ The principles go back further than *St Brice* but we have taken it as our example given its clear position on the points we deem relevant to the *Cardiff* case.

is barred for so long as a different party (the tenant) fulfils a condition imposed on him, which it is alleged (by the landlord) has *not* been fulfilled. Although an argument along these lines was rejected by the High Court in an old relief from forfeiture case (*Fleet Mortgage and Investment Co. Ltd v Lower Maisonette, 46 Eaton Place Ltd* [1972] 1 WLR 765) which we discuss further below, the wording of the rule applicable to that case was different, as were the circumstances.

Anyway, under *St Brice*, by the possession order, the landlord has obtained its remedy and it is entitled to enforce it if the tenant does not comply with the conditions of any suspension.⁵

The only way r.83.2(3)(e) could apply would be if the “condition” on any suspended order was that the landlord needed to prove the tenant’s non-compliance in order to evict, but this is neither the position under the security of tenure legislation nor is it the reality of the situation. Such an approach sits oddly with the housing regime under which the onus is on the tenant to make an application to stay or suspend execution of a warrant where he or she is alleged to have breached a condition.

We suppose rule 83(2)(e) could apply where a tenant was complying with an order suspended on rent arrears and the conditions were being complied with but the landlord wanted to execute a warrant for possession for other reasons but even this seems a stretch and, in any event, the Housing Acts and case law provide for such a situation: see, *e.g. Manchester City Council v Finn* [2002] EWCA Civ 1998; [2003] HLR 41 (see also *Sheffield City Council v Hopkins* [2001] EWCA Civ 1032; [2002] HLR 12.)

The rule may also apply to circumstances where, for example, a possession order can only be enforced where a landlord has to provide suitable alternative accommodation and the landlord is asserting it has fulfilled that condition. Again, that is a very different kind of condition – not least because it is imposed on the landlord – than a

⁵ The tenant technically being in contempt of court when he breaches any such order.

suspension on terms that a tenant must pay a certain amount or must do, or not do, certain things

We referred, above, to *Fleet Mortgage*,⁶ in which, in a relief from forfeiture case, a similar but differently worded rule was applied in the way the Court of Appeal considers Rule 83(2)(e) to apply.⁷ It is important to note that the rule in question in *Fleet* did not apply where any person is entitled to “a remedy” subject to the fulfilment of any condition but where any person is entitled to “relief” subject to the fulfilment of any condition. Even having regard to the modernisation of language in statutes and rules, it is very different to say that because relief from forfeiture qualified as “relief” under the old rule, it must follow that the benefit of a suspended possession order must be treated as “a remedy” under Rule 83(2)(e). The stay and suspension powers of the court under the Housing Acts would not normally be described as a remedy for the tenant.

In any event, the reasoning of the Court in *Fleet* was based on natural justice requiring that the tenant must have some opportunity to assert that the condition had been fulfilled which would not have been possible unless the rule was read in the tenant’s favour. As we have already said, the position is entirely different under the Housing Acts where the tenant can make an application, at any time, to suspend execution of a possession order.

If r.83.2(3)(e) had been thought by the Rules Committee to represent so significant a change to the way housing law operates, it seems to us inevitable that they would have consulted on its introduction, or at the very least announced what they were doing. So far as we are aware, and we have conducted a search, no consultation or announcement was ever made. It must be remembered that r.83.2 does not deal only with warrants for possession of land, but encompasses all types of proceedings where paragraph (e) would be far more obviously applicable.

⁶ *Fleet Mortgage and Investment Co. Ltd v Lower Maisonette, 46 Eaton Place Ltd* [1972] 1 WLR 765.

⁷ See the comments on that case in Andrew Lane’s article available on the SHLA website (link at footnote 1 above).

Furthermore, CPR Part 83 still retains separate rules for warrants of possession in the county court (CPR 83.26) and writs for possession in the High Court (CPR 83.13). The Rules Committee made no amendment to either rule and so continued the longstanding anomaly that in the High Court, subject to a few exceptions, a landlord seeking to enforce an order cannot issue a writ of possession without the permission of the court: r.83.13(3). If the Rules Committee intended to make the change identified by the Court of Appeal, why did it not simply introduce the equivalent provision into Rule 83.26?

What does this potentially mean in practice?

We note that under r.83.2(5) applications for permission can be made without notice being served on any party. It may be, therefore, that so long as a landlord can demonstrate an alleged breach on an application permission can be given by the court without notice to the tenant. The court can, however, order otherwise so it is not a given that this will happen and with the Cardiff courts insisting on an oral hearing, it is a real concern that this decision will add another layer of court hearings and, of course, expense and delay.

This is not the only concern. Any application for permission to issue a warrant based on a tenant's alleged breach of conditions would need to be supported by evidence. In anti-social behaviour cases, this is likely to mean that landlords will have to tell their witnesses, who are often reluctant in such cases to give evidence in the first place, that they are likely to have to come to court and give evidence again before a warrant can even be issued.

Such witnesses may of course have to come to court on a tenant's application to suspend, but witnesses may now have to come to court before the issue of a warrant and then again on a tenant's application to suspend. It might be possible to deal with both applications at the same time, or for the court to hold that a second hearing of evidence is unnecessary, but, there could be further incidents or other change of circumstances between issue of a warrant and an application to suspend it, and it is hard to see how a tenant could apply to suspend a warrant that is not yet in existence.

Social landlords will, therefore, have to wait a few weeks for their permission application to be heard (if not longer if it goes to a contested hearing) and, thereafter apply for a warrant (giving a further few weeks before execution) at which point the tenant is given time to make his application to suspend.

This may make seeking a postponed rather than a suspended order more attractive despite the need to go through the second stage of application for a date to be fixed. Most courts are still prepared to carry out this second stage on a paper basis and r.83.2(e) will not be a problem once the date for possession has been fixed because at this point there is no conditionality.

There must also be a real risk that social landlords will be less open to discussions with tenants about agreeing suspended orders and will simply leave the decision in the hands of the court. Given the additional procedural step, landlords could, for example, rely more heavily on cases such as *Canterbury v Lowe* (2001) 33 H.L.R. 53 where it was held that it was necessary, when the court was deciding what type of order to make, to consider the difficulty of proving a breach of the order. It was said that having come to court once, the fear of the witnesses in having to come to court again was a factor which must be borne in mind when deciding whether to suspend an order as there is a need to support those who have the courage to come forward and make legitimate complaints about their neighbours.

Another issue is that warrants lapse after a year. Presumably, permission will need to be sought again after that. If a warrant is suspended on terms, is permission needed in the event of an alleged breach? Whatever the situation, it strikes us that this decision will have huge implications for the budgets of social landlords (also meaning that asking for an immediate order and having just one trial on that may well be the cheapest and most attractive solution).

Finally, in a guest post by Michelle Caney and Nicholas Towers⁸ on the Nearly Legal blog,⁹ they provide the latest Ministry of Justice Statistics which show that from Q2 2016 37% of landlord possession orders made were suspended (10,406) and there were 18,186 warrants of possession issued in that period. As the authors state in their post, this decision will have clear implications on already overstretched court time and resources, especially if the Cardiff courts' listing practice is followed elsewhere.

Conclusion

The decision is troubling for both social landlords and, we think, tenants given the approach that may be taken to future cases but the Court of Appeal has spoken albeit in our view strictly speaking on an *obiter* basis. That, for now, is that, but we think it is unlikely to be the last word on the issue.¹⁰

⁸ St Ives Chambers.

⁹ Available [here](#).

¹⁰ This article does not explore the court's decision in relation to CPR r.3.10. If Cardiff CC and the Court of Appeal are correct that permission is required under r.83.2(e), one can perhaps question why there was no mention in the judgment of *Hackney London Borough Council v White* (1996) 28 H.L.R. 219. In *Hackney*, it was held that the warrant would be set aside as it had been obtained without the leave of the court which constituted an abuse of the process as the granting of leave by the court was more than a mere formality. The case concerned Order 26, r.5 (the old rules) *i.e.* a "warrant of execution shall not issue without the leave of the court where - (a) six years or more have elapsed since the date of the judgment or order". Failure to obtain leave from the court could be remedied by Order 37, r.5 - "[w]here there has been a failure to comply with any requirement of these rules, the failure shall be treated as an irregularity and shall not nullify the proceedings, but the court may set aside the proceedings wholly or in part or exercise its powers under these rules to allow any such amendments and to give any such directions as it thinks fit" - as that rule could not be used to remedy a breach of a plain mandatory requirement, such as that in Order 26, r.5.