



Neutral Citation Number: [2020] EWCA Civ 681

Appeal No: A3/2020/0718

Case No: F04EC791

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the County Court sitting at Central London
HH Judge Dight CBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT

LORD JUSTICE UNDERHILL

(Vice-President of the Court of Appeal (Civil Division))

and

LADY JUSTICE SIMLER

Between:

LONDON BOROUGH OF HACKNEY

Claimant/Respondent

- and -

KEVIN OKORO

Defendant/Appellant

Mr Stephen Knafler QC and Mr Timothy Baldwin (instructed by Mr Nathaniel Mathews of Hackney Community Law Centre) for the Appellant

Mr Michael Paget (instructed by The London Borough of Hackney) for the Respondent

Hearing date: 21st May 2020

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11.00am on 27 May 2020.

Sir Geoffrey Vos, Chancellor of the High Court, delivering the judgment of the court:

Introduction

1. This appeal raises a discrete issue, following on from our decision on 11 May 2020 in *Arkin v. Marshall* [2020] EWCA Civ 620 (“*Arkin*”) concerning the proper construction of Practice Direction 51Z, “Stay of Possession Proceedings – Coronavirus” (“PD 51Z”). We will not repeat the history of PD 51Z which is set out in detail in our judgment in *Arkin*.
2. The simple question on this appeal is whether the automatic stay imposed by PD 51Z applies to appeals from possession orders that were extant when the stay began, as much as to first instance possession claims themselves. More specifically, do the words “all proceedings for possession brought under CPR Part 55” in paragraph 2 of PD51Z include such appeals. The appellant tenant, Mr Kevin Okoro (“Mr Okoro”), contends that appeals are included, and the respondent landlord, the London Borough of Hackney (“Hackney”), contends that appeals are excluded.
3. It is useful to recite at the outset the amended terms of PD 51Z, which came into effect on 27 March 2020, and was amended with effect from 20 April 2020, as follows:-

“This Practice Direction supplements Part 51

1. This practice direction is made under rule 51.2 of the [CPR]. It is intended to assess modifications to the rules and [PDs] that may be necessary during the Coronavirus pandemic and the need to ensure that the administration of justice, including the enforcement of orders, is carried out so as not to endanger public health. As such it makes provision to stay proceedings for, and to enforce, possession. It ceases to have effect on 30 October 2020.
2. Subject to paragraph 2A, all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession are stayed for a period of 90 days from the date this Direction comes into force.
 - 2A. Paragraph 2 does not apply to-
 - (a) A claim against trespassers, to which rule 55.6 applies;
 - (b) An application for an interim possession order under section III of Part 55, including the making of such an order, the hearing required by rule 55.25(4), and any application made under rule 55.28(1); or
 - (c) An application for case management directions which are agreed by all the parties.
3. For the avoidance of doubt, claims for injunctive relief are not subject to the stay in paragraph 2, and the fact that a claim to

which paragraph 2 applies will be stayed does not preclude the issue of such a claim”.

4. Mr Okoro’s argument was simply that the expressed purpose of PD 51Z, as it was held to be in *Arkin*, makes it inevitable that appeals should be included to protect public health and ensure that the courts are not overwhelmed during the pandemic. Hackney submitted that PD 51Z does not even apply to all claims under CPR Part 55, because consent orders for case management directions and actions against trespassers are excluded. Moreover, the “proceedings for possession” under CPR Part 55 cease when a possession order is made, and the appeal process is entirely governed by CPR Part 52, so putting it outside the terms of PD 51Z.
5. Mr Stephen Knafler QC, leading counsel for Mr Okoro, submitted that at least 5 other types of possession order can be made outside CPR Part 55, namely (i) an order for possession made under CPR Part 73.10C, paragraph 4.5 of PD 73, and appendix A as part of enforcing a charging order, (ii) an order for delivery up of possession of land under CPR Part 40.17 in giving effect, in particular, to trusts of land, (iii) an order in favour of a trustee in bankruptcy under section 363 of the Insolvency Act 1986 requiring a bankrupt and their family to deliver possession of property, (iv) an order against a spouse or partner requiring delivery of possession under schedule 7 of the Family Law Act 1996, and orders under paragraph 9.24 of the Family Procedure Rules, and (v) health and safety remedies requiring possession under sections 270 and 338 of the Housing Act 1985.
6. These other types of possession orders were referred to in an attempt to understand why PD 51Z had referred specifically to “all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession” but not to other types of possession proceedings, nor to appeals. Mr Knafler submitted that there were two possibilities:
 - i) First, that “proceedings for possession brought under CPR Part 55” end with a final unappealable order for possession, and enforcement is mentioned separately because it is achieved under CPR Part 83. He acknowledged, however, that the reference to enforcement would not have been needed as regards the stay of proceedings brought under CPR Part 55, because a stay of the proceedings would stay any final order for possession.
 - ii) Secondly, that the reference to enforcement was required to prevent the enforcement of the 5 other species of possession order made outside CPR Part 55.
7. Either way, submitted Mr Knafler, appeals were included in the stay, because the proceedings for possession were stayed and those proceedings were not concluded until the final appeal determined whether there was or was not to be a possession order.
8. Mr Michael Paget, counsel for Hackney, reinforced his argument that appeals are dealt with under CPR Part 52 by pointing out that appeals to the Supreme Court are dealt with under that Court’s own rules, and are outside the jurisdiction of the Master of the Rolls, so that they could certainly not be covered by the stay imposed by PD 51Z.

Factual background

9. Little of the factual background to this particular case is relevant to the resolution of the question we have explained. It is worth, however, briefly explaining the route by which the case reached its hearing before us.
10. On 20 December 2019, Hackney issued a claim for possession under CPR Part 55 against Mr Okoro for possession of Room G21, Shuttleworths Hotel, 23-25 Well Street, London E9 7QZ and payment of rent arrears and damages for the use and occupation (the “money claims”).
11. On 24 January 2020 DDJ Tomlinson made a possession order after a 45-minute hearing. He adjourned the money claims to be heard on 17 March 2020, and refused permission to appeal. It was not possible to obtain a transcript of DDJ Tomlinson’s judgment, but the parties are in the course of agreeing a note of what he said. Mr Nathaniel Matthews appeared for Mr Okoro and sought an adjournment and permission to file a public law defence based on a dispute as to Mr Okoro’s entitlement to housing benefit.
12. On 25 February 2020, HHJ Monty QC granted Mr Okoro permission to appeal the possession order, and stayed it pending the outcome of the appeal. The appeal hearing was listed for 21st May 2020 in the County Court at Central London.
13. On 16 March 2020, the parties agreed a consent order adjourning the hearing of the money claims from 17 March 2020 pending determination of the appeal against the possession order.
14. On 27 March 2020, PD 51Z came into force.
15. On 7 May 2020, DJ Swan ordered that “[t]he case is stayed until 25 June 2020 or such later date as may apply under [PD 51Z] when the Claimant and Defendant may request such further direction as are appropriate, which shall be agreed if possible”. The agreed statement of facts refers to this order as being a stay of the adjourned money judgment claim.
16. On 15 May 2020, HHJ Dight CBE vacated the appeal hearing fixed for 21 May 2020, and transferred the claim to the Chancery Division, directing the parties to exchange and file (in accordance with directions to be given following transfer of the claim) written submissions on the question of the jurisdiction of the appeal court to hear the appeal pending the lifting or expiration of the stay.
17. On 15 May 2020, counsel for the parties submitted that the case should be heard by the Court of Appeal rather than the Chancery Division, and should follow the procedure adopted in *Arkin*, namely a transfer to the Court of Appeal under CPR Part 52.23(1).
18. On 18 May 2020, Mr Okoro filed an appellant’s notice contending that HHJ Dight had been wrong (i) not to order a stay of the appeal under CPR Part 52 pursuant to PD 51Z after the decision in *Arkin* on 11 May 2020, and (ii) to implicitly lift the stay imposed by PD 51Z in order to refer to the High Court the issue of whether PD 51Z imposed a stay on an appeal from a possession order.
19. On 19 May 2020, the Chancellor ordered that the appeal brought by the appellant’s notice dated 18 May 2020 be transferred from the High Court to the Court of Appeal

for determination pursuant to CPR r 52.23(1)(a) on the grounds that it raised an important point of principle and practice. He also granted permission to appeal for the same reasons.

20. Accordingly, as we have said, the sole issue before this court is whether the automatic stay imposed by PD 51Z applies to appeals from possession orders. If so, it is accepted that HHJ Dight had no power to make any order in relation to Mr Okoro's appeal (as he contends). If not, HHJ Dight was entitled to make the order he did. No criticism is made of the order that HHJ Dight actually made, since it has enabled this important question to be determined by this court.

Does PD 51Z operate to stay the appeal against the possession order?

21. It is important first to deal with some elements of the background to possession claims and to appeals from possession orders.
22. There are some 138,000 possession claims brought every year in the County Court, but the parties were able to provide no statistics on the number of appeals. It is, however, clear that appeals and applications to set aside possession orders on the grounds of the defendant's non-attendance under CPR Part 39.3(3) are not uncommon. Many defendants to possession claims are vulnerable and unrepresented, and only realise that action is required from them very late in the day.
23. Secondly, whilst our judgment in *Arkin* made no reference to appeals, reliance was placed on paragraph 42 as explaining the purpose of PD 51Z as follows:-

“The purpose was that during the 90-day period the burden on judges and staff in the County Court of having to deal with possession proceedings, which are an immense part of its workload, would be lifted, and also that the risk to public health of proceeding with evictions would be avoided. That purpose is of its nature blanket in character and does not allow for distinctions between cases where the stay may operate more or less harshly on (typically) the claimant. It would be fatally undermined if parties affected by the stay were entitled to rely on their particular circumstances – however special they might be said to be – as the basis on which the stay should be lifted in their particular case. Thus, while we would not go so far as to say that there could be no circumstances in which it would be proper for a judge to order that the stay imposed by PD 51Z should be lifted in a particular case, we have great difficulty in envisaging such a case”.

24. It is against this background that we have to determine whether PD 51Z imposes a stay on appeals from possession orders. We note first that the words “all proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by a warrant or writ of possession” do not mention appeals. Mr Paget is also correct to submit that CPR Part 52 provides a separate regime for the conduct and management of appeals, so that appeals are undertaken pursuant to CPR Part 52, not CPR Part 55.

25. In our judgment, however, the words of paragraph 2 of PD 51Z are broader than Mr Paget submitted. They stay “all proceedings for possession **brought** under CPR Part 55”. We have emphasised the word “brought”, because it focuses on how the proceedings were initiated. As a matter of ordinary language, we think that proceedings brought under CPR Part 55 are still “brought under CPR Part 55”, even when they are under appeal. It is true that the procedure governing the appeal is contained in CPR Part 52, but the proceedings remain proceedings brought under CPR Part 55.
26. We are reinforced in the view we take about the proper construction of paragraph 2 in relation to appeals by the purpose of PD 51Z. The objectives of the pilot PD 51Z to “protect and manage County Court capacity, and to ensure the effective administration of justice without endangering public health during a peak phase of the pandemic” are as much furthered by staying appeals as by staying first instance proceedings for possession, notwithstanding that there are fewer possession appeals than first instance possession claims. Moreover, it would be odd if applications to set aside a possession order made in the absence of a defendant were covered by the stay in accordance with the objectives of PD 51Z (as Mr Paget accepted they are), but appeals directed at achieving the same result were not.
27. This analysis makes it unnecessary to consider why PD 51Z stayed enforcement as well as “all proceedings for possession brought under CPR Part 55”. Whatever the thinking behind it, paragraph 2 of PD 51Z undoubtedly prevents enforcement of possession orders made under rules other than CPR Part 55. The words “all proceedings for possession brought under CPR Part 55” are competent to include every stage of such proceedings including first or second appeals up to a final judgment in the Court of Appeal. They would not, however, be competent to stay an ongoing appeal to the Supreme Court, not because of the words used, but because such appeals are beyond the jurisdiction of the Master of the Rolls in making Practice Directions under CPR Part 51.2.
28. In these circumstances, we agree with Mr Okoro that PD 51Z had the effect of imposing a stay on his appeal against the possession order made by DDJ Tomlinson. HHJ Dight was right implicitly to lift the stay to refer the disputed question of jurisdiction to the High Court. Now that the position has been clarified, this and other appeals against possession orders will not be able to proceed (subject to the exceptions in paragraph 2A of PD 51Z), whilst the stay remains in force.

Conclusion

29. For the reasons we have given, we will allow the appeal, and order that the stay imposed by PD 51Z applies to Mr Okoro’s appeal from DDJ Tomlinson’s order of 24 January 2020.
30. The outstanding aspects of the claim, including, of course, the appeal from DDJ Tomlinson’s order, will be returned to the County Court for further consideration after the termination of the stay imposed by PD 51Z.