Neutral Citation Number: [2002] EWCA Civ 1998
IN THE SUPREME COURT OF JUDICATURE B2/2002/1143
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MANCHESTER COUNTY COURT
(His Honour Judge Holman)
Royal Courts of Justice
Strand
London WC2

Thursday, 19th December 2002
B e f o r e :

LORD JUSTICE WARD

and

LADY JUSTICE ARDEN

MANCHESTER CITY COUNCILClaimant/Respondent

-v-

JOLEEN FINNDefendant/Appellant

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(Official Shorthand Writers to the Court)

Mr Jan Luba QC and Mr James Stark (instructed by Messrs Platt Halpern, Manchester) appeared on behalf of the Appellant Defendant.

Mr Andrew Arden QC and Mr Jonathan Manning (instructed by the Chief Executive's Office, Manchester City Council) appeared on behalf of the Respondent Claimant.

J U D G M E N T
(As Approved by the Court)

LORD JUSTICE WARD: I will ask Lady Justice Arden to give the first judgment.

LADY JUSTICE ARDEN:

1.This is an appeal from the order of His Honour Judge Holman, sitting in the Manchester County Court, dated 8th May 2002, allowing an appeal from the order of District Judge Needham, which in turn dismissed the appellant's application to revoke postponement of an order for possession made under section 85(2) of the Housing Act 1985.

2.The relevant statutory provisions in the Housing Act 1985 are as follows:

> “79Secure tenancies
>
> (1)A tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied.
>
> 80The landlord condition
>
> (1)The landlord condition is that the interest of the landlord belongs to one of the following authorities or bodies -

a local authority,

a new town corporation,

a housing action trust,

an urban development corporation,

...

the Relevant Authority,

a housing trust which is a charity, or

a housing association or housing co-operative to which this section applies.

81The tenant condition

The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; or, where the tenancy is a joint tenancy, that each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home.

82Security of tenure

(1)A secure tenancy which is either -

(a)a weekly or other periodic tenancy, or

(b)a tenancy for a term certain but subject to termination by the landlord,

cannot be brought to an end by the landlord except by obtaining an order of the court for the possession of the dwelling-house or an order under subsection (3).

(2)Where the landlord obtains an order for the possession of the dwelling-house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order.

83Proceedings for possession or termination: notice requirements

(1)The court shall not entertain proceedings for the possession of a dwelling-house let under a secure tenancy or proceedings for the termination of a secure tenancy unless -

(a)the landlord has served a notice on the tenant complying with the provisions of this section, or

(b)the court considers it just and equitable to dispense with the requirement of such a notice.

(2)A notice under this section shall -

(a)be in a form prescribed by regulations made by the Secretary of State,

(b)specify the ground on which the court will be asked to make an order for the possession of the dwelling-house or for the termination of the tenancy, and

(c)give particulars of that ground.

84Grounds and orders for possession

(1)The court shall not make an order for the possession of a dwelling-house let under a secure tenancy except on one or more of the grounds set out in Schedule 2.

(2)The court shall not make an order for possession -

(a)on the grounds set out in Part 1 of that Schedule (grounds 1 to 8), unless it considers it reasonable to make the order,

(b)on the grounds set out in Part II of that Schedule (grounds 9 to 11), unless it is satisfied that suitable accommodation will be available for the tenant when the order takes effect,

(c)on the grounds set out in Part III of that Schedule (grounds 12 to 16), unless it both considers it reasonable to make the order and is satisfied that suitable accommodation will be available for the tenant when the order takes effect;

and Part IV of that Schedule has effect for determining whether suitable accommodation will be available for a tenant.

(3)Where a notice under section 83 has been served on the tenant, the court shall not make such an order on any of those grounds above unless the ground is specified in the notice; but the grounds so specified may be altered or added to with the leave of the court.

85Extended discretion of court in certain proceedings for possession

(1)Where proceedings are brought for possession of a dwelling-house let under a secure tenancy on any of the grounds set out in Part I or Part III of Schedule 2 (grounds 1 to 8 and 12 to 16: cases in which the court must be satisfied that it is reasonable to make a possession order), the court may adjourn the proceedings for such period or periods as it thinks fit.

(2)On the making of an order for possession of such a dwelling-house on any of those grounds, or at any time before the execution of the order, the court may -

(a)stay or suspend the execution of the order, or

(b)postpone the date of possession,

for such period or periods as the court thinks fit.

(3)On such an adjournment, stay, suspension or postponement the court -

(a)shall impose conditions with respect to the payment by the tenant of arrears of rent (if any) and rent or payments in respect of occupation after the termination of the tenancy (mesne profits), unless it considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable, and

(b)may impose such other conditions as it thinks fit."

3.Mr Jan Luba QC appears for the appellant. He describes the statutory provisions in the following terms. There is a contractual tenancy which is surrounded by a statutory cloak provided by Part IV of the Housing Act 1985. The only way of setting aside the cloak is by an order for possession, which is, as it were, a sword in the landlord's possession. The provisions for notice in section 83 are to provide a shot across the bows for a tenant.

4.The facts in this case are not in dispute and may be taken from the judge's judgment as follows:

"2.On 23 February 2000 the Claimant obtained a possession order against the Defendant over 12 Finishing Walk, Miles Platting, Manchester. There were arrears of rent of over £1,860. The terms of the order required the Defendant to give possession on March 22 unless she paid the current rent plus £2.60 per week off the arrears. The Defendant has complied with this order.

3.In November 2000 the police executed a search warrant at the house and recovered stolen property to a value of some £28,000. In due course the Defendant was made the subject of a 3 year Probation Order for handling stolen goods, and her partner, Paul Upton, was sentenced to 5 years imprisonment.

4.The terms of the tenancy agreement require the tenant and anyone living at the house not to use it for any illegal activity. The Claimant interviewed the Defendant about these events in June 2001 and she was sent a letter afterwards, which among other matters confirmed that she was in breach of her obligations as a tenant.

5.In August 2001 the police found 5 stolen microwaves at the house. On 30 October 2001 the Defendant pleaded guilty at the City Magistrates Court to a charge of handling and was sentenced to 3 months imprisonment suspended for 12 months.

6.In December 2001 the Claimant applied for the possession order to be varied on the grounds that the Defendant had broken the terms of her tenancy agreement and for possession to be given forthwith. The Claimant relied on Grounds 1 and 2 of Schedule 2 to the Housing Act 1985. The application was listed for hearing on 17 January 2002 but was then adjourned to 5 March 2002, when it came before District Judge Needham. He dismissed it and stated his reasons succinctly. I quote: `The court has no jurisdiction to entertain this application. It is functus officio having made the order for possession. No facts have arisen subsequent to that order for possession, which could give the court jurisdiction.' He concluded that Sheffield City Council v Hopkins was not authority for the proposition that he could amend the order for possession."

5.The application with which the judge had to deal was an appeal against the decision of the district judge, seeking an order in slightly different terms from that which had been sought from the district judge. The order sought was that the possession order of 23rd February 2000 be varied so as to include a condition that the defendant (the appellant in this appeal) or anyone living with her or visiting her should not use the property at 12 Finishing Walk, Manchester, for the purpose of any illegal activity, including handling stolen goods. As this was different from the issue before the district judge, the judge formulated the issue to be resolved thus:

> "... is it open to the court, where a tenant is complying with a suspended order for possession, to entertain an application either to revoke that order and substitute an immediate order for possession or to amend the terms of the suspension?" (see judgment, para 9)

6.I now turn to the reasons which the judge gave. The first point with which the judge dealt was an argument of the local authority (the respondent to this appeal) that the court had jurisdiction to revoke or vary a possession order by virtue of Civil Procedure Rule 3.1(7). I need not deal with that submission as we have not called on Mr Andrew Arden QC, for the authority, to move his respondent's notice challenging the judge's ruling on this point.

7.On the appeal to the judge the contention for the appellant was that an order for postponement had been made, but it had not been breached, and that there was no power in the Act for the court to vary or revoke the order while it was still running. The money instalments could be varied under Part 22 of the County Court Rules.

8.The judge held that the relevant question that he had to ask himself was whether there was anything in the scheme of the Housing act 1985 which precluded an application asking the court to consider afresh in the light of the circumstances prevailing at the date of the application whether it remained appropriate for the court to exercise its powers under section 85. The judge considered the decision of this court in Sheffield Corporation v Hopkins [2002] 1 HLR 12. In that case this court held that, where a possession order had been made on one ground, the court had power, on an application by a tenant who had failed to comply with the conditions attached to the order and sought a stay of execution of the order, to consider fresh evidence as to grounds which might have been relied on for making a possession order on other grounds. The judge noted the purposive approach of this court in Sheffield City Council v Hopkins to section 85(2)(a) and observed that it was difficult to see why this same approach should not apply to section 85(2)(b) as well as to section 85(2)(a). He concluded that the ratio of Hopkins was applicable and that accordingly the court had jurisdiction to hear the application. He concluded by observing that the observations of Lord Woolf CJ in that case were still relevant to the exercise of discretion.

9.I go next to the order for possession that was made in this case on 23rd February 2000, which was as follows (with numbering added for simplicity):

> "1.The court has decided that unless you make the payments as set out in paragraph 3 you must give the claimant possession of 12 Finishing Walk, Manchester M4 6GS on 22 March 2000.
>
> 2.You must also pay to the claimant £1,867.51 for unpaid rent, use and occupation of the property and £120.00 for the claimant's costs of making the application of possession.
>
> 3.You must pay the claimant the total amount of £1,987.51 by instalments of £2.60 per week in addition to the current rent. The current rent is £52.83 per week. The first payment of both these amounts must be made as and when current rent is due. When you have paid the total amount mentioned, the claimant will not be able to take any steps to evict you as a result of this order.
>
> 4.If you do not pay the money owed and costs by the dates given and the current rent, the claimant can ask the court bailiff to evict you and remove your goods to obtain payment. This is called `enforcing the order and money judgment'.
>
> 5.Payments should be made to the claimant at the place where you would normally pay your rent. If you need more information about making payments you should contact the claimant. The court cannot accept any payments."

That is on a standard form which is headed "Order for possession (possession suspended)", which is a shorthand and not necessarily wholly accurate way of describing the order.

10.The first submission that Mr Luba made to us in his careful argument on this appeal was as to the effect of the order. He argued that on its true interpretation the order was (in my words) a "rolling order", whereby possession was indefinitely deferred so long as the conditions were observed. He relied on the decision of this court in Greenwich London Borough Council v Regan (1996) 28 HLR 469. That may well be the correct interpretation of the order, but there is no need to decide the point and, as we have not called on Mr Arden to reply to the argument on this point, I will simply proceed on the basis that the submission is correct. If, of course, the contrary were the case, this case would be indistinguishable from Hopkins.

11.Mr Luba's argument was effectively a simple one, and it was that of the district judge in this case: once the order for possession is made and the court makes an order for postponement, the court is functus. The date for possession is never reached if a tenant fulfils the conditions in the order (here the conditions as to the payment of rent set out in paragraph 3). Therefore, a power to impose new conditions or make a new order of postponement can never arise. Moreover, an order for postponement of the date for possession can only operate prospectively as from the end of a prior order to postpone. This argument is important because of the consequences that follow.

12.In the present case the conditions effectively provide for the payment of instalments of rent over fourteen and a half years. The consequence of Mr Luba's argument is that, provided that the tenant complies with the condition in paragraph 3 of the order, the order for postponement will run for that period of time without any opportunity for variation. Secondly, if the local authority wish to apply to the court for termination of the tenancy on the ground of

breach of some other covenant in the tenancy agreement, new proceedings would be necessary. This would involve, of course, there being two possession orders and two sets of costs.

13. But at the end of the day Mr Luba does not resist the conclusion that, if there are appropriate grounds on which another possession order could be made, such an order could be made; it is simply that it would have to be in separate proceedings. What Mr Luba says is that, if that course were taken, the tenant would then have the protection of a fresh notice under section 83. But that protection is not an absolute protection on which the tenant is entitled to rely before the possession order is made since section 84(3) provides that where a notice has been served the court shall not make an order on grounds other than on the grounds set out in the notice, but the grounds so specified may be altered or added to with the leave of the court. No doubt the court would be concerned to see that the tenant was not disadvantaged or taken by surprise by reason of some new ground being relied on. Thus the net balance of prejudice to the tenant of the submission made by Mr Luba is not, as I see it, that great and can be met by the guidance which was given by Lord Woolf in Hopkins. I will refer to this in more detail below.

14. Mr Luba relies heavily on the fact that the Act contains no express provision entitling the court to rescind or vary an order for possession. All the court can do is to postpone the date for possession, which means that all it can do is put the date further forward. He relies on the fact that Parliament has stepped in to provide, as he puts it, a statutory cloak to protect tenants.

15. Accepting all of that, however, I do not consider that it is necessary to impute to Parliament an intention to require procedural steps to be undertaken simply for their own sake, and in substance, in my judgment, that is what the submission would achieve. It seems to me to be the trend of authority to give a purposive construction to the Act.

16. I have referred to the decision of this court in Hopkins. In that case an order for possession had been made against the tenant on certain conditions which had been breached. The tenant then sought a stay and the local authority sought to rely on evidence pertaining to a ground on which possession could have been sought but on which it had not been sought; and indeed the evidence extended to events which had occurred before the proceedings in which the possession order had been made. The question which the court had to consider was whether in those circumstances the fresh evidence, bringing forward material on new grounds, could be relied on by the local authority.

17. Lord Woolf, with whom the other members of the court agreed, said at para 22 of his judgment:

> "Under section 85(2) I have little doubt that the legislation did not seek to confine the discretion of the court to facts connected to the ground which was relied upon for initially seeking possession. Nor is the court restricted to the ground on which the order is made."

Lord Woolf then pointed out that the consequence of the tenant's argument in Hopkins was that the only remedy would be that the landlord would have to seek a new order for possession if the court were to suspend or stay the execution of the present order because it could not take into account the new material on which the local authority had sought to rely.

18. Lord Woolf recognised that district judges in such a situation have an important jurisdiction to exercise; and in paragraph 29 of his judgment he gave certain guidance for the assistance of district judges. I would read particularly subparagraphs (a), (b), and (c) of that paragraph. It is not necessary, I think, for me to read the remainder. Lord Woolf said:

> "(a)The discretion should be used to further the policy of Part IV of the Housing Act 1985, reinforced as it is by Article 8 of the European Convention on Human Rights and the Human Rights Act 1998. Accordingly, the courts should bear in mind that that policy is one which involves evicting the tenant from his or her home only after a serious breach of the tenant's obligations has been established, when it is reasonable to do so, and the tenant has been proved to have breached any condition of the order for suspension.
>
> (b)The overriding principles contained in Part I of the Civil Procedure Rules, and in particular the need for applications to be dealt with in a summary and proportionate manner. These principles may mean that wider issues cannot be dealt with in the framework of an application to suspend the execution of a warrant and they have to be dealt with in some other way.
>
> (c)The need for the tenant to have clear notice of the allegations being made, even though the position is one where what is being relied upon is not contained in the order for possession which was originally made."

19. The same purposive approach is, in my judgment, also to be found in the decision of the House of Lords in Burrows v Brent London Borough Council [1996] 1 WLR 1448. It is sufficient if I read a passage from the speech of Lord Jauncey at p.1459C-F:

> "The whole scheme of [Part IV of the Housing Act 1985] is to afford protection to the secure tenant and that is achieved in section 85 by conferring on the court flexible powers to continue an existing secure tenancy, to revive a determined secure tenancy or to create a state of statutory limbo which will afford to a defaulting tenant an opportunity to have restored to him all the benefits of a secure tenancy when he has complied with stipulated conditions. Parliament cannot have intended to penalise a landlord who

> acted within the spirit of the Act by granting indulgences to defaulting tenants without going through time-wasting and expensive court proceedings. Furthermore, a tenant who has reached an agreement advantageous to himself is not thereby prevented from making an application to the court under section 85(2) or (4). In this case the judge found as a fact that neither party contemplated that the agreement of 5 February 1992 created a new tenancy and I can therefore see no reason why it should not be given the same effect as an order of the court in similar terms suspending execution of the order for possession of 29 January 1992. Such a result would accord entirely with the spirit of the relevant statutory provisions, would be consistent with the intention of the parties and would preserve all the respondent's rights under subsections (2), (3) and (4) of section 85."

20. In my judgment those passages demonstrate a purposive approach to the Act by the courts and, in particular, a desire to ensure that the provisions are workable, provided of course the rights of the tenant are fully respected.

21. In that vein I return to section 85(2). The critical words are: "... at any time before the execution of the order, the court may ... postpone the date of possession, for such period or periods as the court thinks fit." The controlling words for the present purpose are the words "at any time". The court must give sensible meaning and effect to those words. It is possible that an order postponing possession is not made when the order for possession itself is made or that an order for postponement then made has to be extended, but the discretion is at large. There is nothing which says that the subsection can only apply in those circumstances. On that basis the only question is whether the new application in the present case is for an order postponing the date of possession.

22. In my judgment the terms of that subsection are satisfied if the order sought would provide for the date of possession to be postponed to a date subsequent to that on which possession was originally to be given up. Moreover, since the order is still running, in my judgment liberty to apply to the court is implicit and the liberty to apply in those circumstances does not need to be expressly stated in the court's order. Parliament must be taken to have enacted section 85 in the knowledge that it is the practice of the court to allow applications in proceedings at any time when orders are running without the need to start new proceedings. Parliament must therefore be taken to have known that an application could be made with respect to the present order while it was still running. This may indeed explain why express provision giving power to revoke or vary the order is not contained in the order. Mr Arden tells us that the model for section 85 comes from an Act of 1919. If that is so, it may well be that the legislative drafting was in those date more succinct than presently. Certainly the volume of legislation was far less then than now, if that is anything to go by.

23. I would therefore hold that the court can make a new order even if the old order for postponement of possession has not expired and even if the new order provides for possession to be given up forthwith. I would respectfully agree with what Ward LJ said in Greenwich London Borough Council v Regan at p.481:

> "The first point to make about subsection (2) is that the court's power to vary its order may be exercised at any time before execution of the order for possession."

24. Obviously the court's obligation to attach conditions or its power to do so, both contained in subsection (3) of section 85, will also arise if the court makes a fresh order for postponement. The court should also, of course, bear in mind the guidance given by Lord Woolf in Sheffield City Council v Hopkins.

25. Thus it is common ground in this case that it would not be right to make an order for immediate possession on new material if that order could not properly have been made if new proceedings had been issued and were being heard on that date. The court should be astute to see that the tenant is not taken by surprise, but is not, as I see it, bound to allow additional time simply because it would have taken the landlord longer to bring the matter before the court if he had had to issue fresh proceedings.

26. There are a number of other submissions made by Mr Luba which I would like to mention briefly. Before I do so, I would like to state how indebted I am to his argument. First, Mr Luba submitted that the decision in Hopkins was per incuriam because the Court of Appeal's attention was not drawn to Raeuchle v Laimond Properties Ltd (2001) 33 HLR 113. In that case Sir Richard Scott VC said:

> "The power to suspend an order for possession, where the case being made out is arrears of rent, and where the reasonableness ground that is relied upon is persistent failure to pay rent, should be directed, it seems to me, to the question of the payment of rent."

In this passage it seems to me that he was dealing with the question whether the tenant was taken by surprise and that, by "reliance", he was referring to the question as to whether or not the landlord could rely on matters which were not properly pleaded. The extraneous matters relied on in that case had not even been pleaded. I do not consider that this decision in any way demonstrates that the Hopkins decision was per incuriam.

27. Second - and this is by way of observation - it is, I think, a curious result of Mr Luba's approach, if it were correct, that monetary instalments can be varied only because an order for postponement in the current order is implicit. If it had been explicit (for example, because the order for possession was postponed until 22nd February 2000 or for so long as the tenant duly paid £2.60 per month) it must, as it seems to me, follow, on Mr Luba's submission, that it cannot be varied, despite his concession that it could.

28.Thirdly, moreover, the view that one might have of the measure of protection conferred on tenants by section 85(2) is, I think, somewhat diminished when one recalls that, on Mr Luba's submission, not only the tenant but also the landlord can apply to vary the instalments. He submits that this can be done under part 22 of the County Court Rules which are scheduled to the CPR. So on this basis instalments can be increased while the order is running: for example, if the tenant obtains a new job.

29.Thus the protection is not absolute and uniform in the Act. Obviously the court must give due effect to the rights which Parliament sought to protect. In my judgment in this case the rights are not prejudiced by the further material being brought forward in the existing proceedings.

30.At the end of the day, when it comes to the practical operation, in complex situations, of even detailed statutory codes like the Housing Act, Parliament and the public have to rely on the good sense of judges - in this case, that of district judges and county court judges up and down the country - to do what is just and fair and, metaphorically speaking, to put their fingers in the dyke, when that is the appropriate response on behalf of the disadvantaged. In my judgment the judge's careful judgment was correct. I would dismiss the appeal and remit the application to the district judge.

LORD JUSTICE WARD:

31.I agree.

32.I accept that the Housing Act 1985, re-enacting the 1980 Act, sets up a scheme with built-in protections for secure tenants, particularly: (1) what Mr Luba QC calls its ambulatory effect (that is to say, the ability for a tenant to lose and regain the status of secure tenant); (2) more relevantly for today, the need for notice in a prescribed form specifying the grounds on which the court would be asked to make an order for possession and giving particulars thereof (see section 83); (3) the restraint on the court's power to make an order for possession without being satisfied, pursuant to section 84, that it would be, for example, reasonable to make that order; (4) the extended discretion to adjourn, stay or suspend execution of the order or postpone the date of possession conferred by section 85, which are flexible powers to continue the existing secure tenancy.

33.Mr Luba submits that these protections must always be preserved and observed, with the consequence that if, after an order for possession has once been made on one ground, further grounds for possession arise, then the only action available to the landlord wishing to rely on them is to give fresh notice and start a fresh action. The further consequence has to be that the court would then be entitled to make an order on the merits of the new case and may therefore make an order for immediate possession or postpone possession but for a shorter period than the original order. If two orders for possession in mutually contradictory terms result, he seems to accept (though the inelegant words are mine) that it is just too bad but that is how the scheme has to operate. To my mind, that would be an extraordinary result.

34.Mr Luba concedes, however, that the landlord, like the tenant, can apply within the first and existing proceedings at any time. I think the concession is rightly made, in view of the opinion of Lord Jauncey in Burrows v Brent London Borough Council [1996] 1 WLR 1448, at 1457, that:

> "... the court's power to make an order postponing the date of possession is not restricted to exercise on the first application for an order for possession but may be exercised on the application of either party at any time prior to execution of that order ..."

I note that Lord Jauncey was contemplating there the power to make an order postponing the date of possession and indicating that it was not restricted to the exercise on the first application; but more of that anon.

35.Mr Luba submits, however, that, although such an application can be made, if it is made, the court's powers are restricted to the powers available to the court under section 85 (that is to say, to adjourn, stay, suspend or postpone). "Postpone", he says, means to cause the possession to take place at a later time, and that must necessarily mean at a later time than is already ordered. He submits that there is no power to bring forward an ordered date for possession.

36.I am unable to accept his submissions. First, it would be absurd if the landlord could achieve an earlier date for possession by bringing separate proceedings, yet not be able to do so by application in the existing proceedings. That would not be a pragmatic procedure. On the contrary, it is unnecessarily wasteful of costs.

37.Secondly, the essential task of the court is to judge the new case afresh and on its merits and decide, in accordance with sections 84 and 85, what order would be appropriate in the new circumstances. Having established the facts, the court would be obliged to ask itself whether or not, on grounds 1 to 8, for example, it would be reasonable to make an order for possession on one of those grounds and, if so, whether it would then be right to postpone that date for possession. The court would then be exercising its power to postpone or not to postpone. Far from being functus officio, it would be the court's duty to apply section 85 de novo and to consider the question of postponement. If the result is an earlier date, the order may need to be varied, but variation is a procedural necessity to give effect to an original exercise of the power. Purposively construed, that must be the effect of the Act.

38.Thirdly, there would be no significant prejudice to the tenant, who may not have had the prescribed notice, but: (a) he would originally have had it or it would have been dispensed with pursuant to section 83(1) only if it had been shown

to be just and equitable to do so; (b) the court can ensure that the notice of application gives the grounds and the particulars which will put the tenant to no greater disadvantage than presently envisaged by section 84(3), which permits grounds being altered or added in the course of proceedings with the leave of the court; (c) the court will in any event determine the application in exactly the same way as it would determine an original claim (that is to say, by invoking the following sections, sections 84 and 85).

39. In my judgment the judge was correct to find that he had the jurisdiction and, for the further reasons given by Lady Justice Arden, with which I agree, I too would dismiss this appeal.

Order: appeal dismissed and matter remitted back to District Judge Needham in the County Court for decision; appellant to pay respondent's costs (amount and liability of appellant to pay being adjourned to the costs judge); public funding assessment of the appellant's costs; no order on the respondent's notice; permission to appeal to the House of Lords refused; counsel to agree a minute of order.

SMITH BERNAL