Neutral Citation Number: [2023] EWHC 2371 (KB)

Case Number: KB-2023-003121

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

IN THE MATTER OF A CLAIM FOR INJUNCTIVE RELIEF PURSUANT TO THE LOCAL GOVERNMENT ACT 1972, SECTION 222

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 September 2023

Before :

MRS JUSTICE HILL DBE

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Between:

LONDON BOROUGH OF BARKING AND DAGENHAM

Claimant

-and-

(1) KEHINDE WILSON GBADEGESIN
(2) PHIL DAVIES ESTATE AGENTS LIMITS

Defendants

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Natalie Pratt (instructed by London Borough of Barking and Dagenham Legal Services) **for the Claimant**
The Defendants did not appear and were not represented

Hearing date: 22 September 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26/09/23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Hill DBE:

Introduction

1. This is a Part 8 claim brought by the London Borough of Barking and Dagenham in its capacity as a local housing authority.

2. The claim concerns residential property at 7 Butteridges Close, Dagenham RM9 6YD. On the Claimant's case the First Defendant is the leasehold owner of the property and the Second Defendant acts for and on behalf of the First Defendant in relation to the rental of the property.

3. The Claimant seeks a final mandatory injunction against the Defendants to secure compliance with Improvement Notices served under the Housing Act 2004 ("the HA"), sections 11 to 12.

4. By order sealed on 11 August 2023 Mr Justice Lane certified the claim as being appropriate to be heard as vacation business, given the health and safety concerns raised by the claim.

5. The claim was originally listed to be heard on 22 August 2023 but that listing was vacated to allow time for service of the claim and to allow the Defendants time to respond to the claim. The claim was re-listed for 22 September 2023, together with the hearing of the Claimant's application dated 18 August 2023.

6. I was provided with and have considered a two volume bundle of material including principally evidence from Paul Mahoney, a Housing Enforcement Officer who works for the Claimant, with extensive supporting exhibits, including the evidence from criminal proceedings that have already taken place. I was also provided with a slim bundle confirming the service of the relevant documentation on the Defendants comprising further evidence from Mr Mahoney and a witness statement from Adam Rulewski, employed barrister within the Claimant.

7. The Claimant was very ably represented at the hearing by Natalie Pratt of counsel. The Defendants did not attend and were not represented at the hearing, nor did they engage with the matter on being provided with a copy of this judgment in draft.

The factual background

8. In May 2022 Mr Mahoney received a complaint about disrepair at the premises from one of the tenants. I have seen a statement from the tenant, where he describes living at the property with his wife and four children under the age of 11. He sent Mr Mahoney evidence of a bedbug infestation at the property. Photographs showed bite marks from the bedbugs on his children. A video showed the bedbugs in the curtains.

9. Mr Mahoney identified the First Defendant as owner of the property from Land Registry records. The First Defendant was also registered at the property for Council Tax purposes.

10. On 7 June 2022 Mr Mahoney initiated correspondence with the First Defendant, warning him that he needed to apply for the relevant licence for a private rented property. Mr Mahoney also required him to produce various documents such as a gas safety record and electrical installation condition report.

11. On 13 June 2022 Mr Mahoney carried out an inspection of the property. He identified a series of problems. The front door had a defective lock with a loose barrel and was being held up by screws. The street door was coming away from the frame. There was only one source of heating in the property in the main bedroom. The heater in the children's bedroom was clearly broken and hanging off the wall. The light fitting in the children's bedroom was broken. The light fitting in the bathroom was hanging off the ceiling. There was damp and mould growth in the bathroom. The only smoke detector in the building was in the hall and was not working. The heater in the living room was defective. The kitchen units were dilapidated. An electrical switch placed above the hob was being held to the wall using a adhesive tape. Another electrical switch was being held in place with duct tape. The oven did not work.

12. The HA, section 2(1) defines a "hazard" as "any risk of harm to the health or safety of an actual or potential occupier of a dwelling or HMO [a House in Multiple Occupation] which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise)".

13. "Category 1" hazards are more severe than "category 2" hazards. Accordingly, where a local housing authority considers a category 1 hazard to exist on any residential premises, a duty to take "appropriate enforcement action" arises under the HA, section 5(1). Where a category 2 hazard exists, a power (but not a duty) to take particular kinds of enforcement action is conferred upon the local housing authority under section 7(1).

14. Consistent with this duty and power, on 16 August 2022 both Defendants were served with Improvement Notices under the HA, sections 11 to 12. The exact nature of the remedial works to be undertaken was set out in Schedules 1 and 2 of the Improvement Notices. In summary, the identified "category 1" hazards related to excess cold (deficient heating), fire (inadequate smoke detectors and electrical hazards), various electrical hazards and a bedbug infestation at the property. The identified "category 2" hazards related to defective locks and hinges on the front door, food safety (disrepair of the kitchen) and damp and mould growth. The remedial works were required to be completed by 16 September 2022.

15. Neither Defendant sought to appeal the Improvement Notice. Under the HA, section 15(6), a failure to appeal such a notice within the period provided in Schedule 1 (namely 21 days beginning on the date on which the improvement notice was served) has the effect that the notice is to be treated as final and conclusive as to matters that could have been raised on an appeal.

16. Under the HA, section 30(5), the obligation to take any remedial action specified in an improvement notice in relation to a hazard continues despite the fact that the period for the completion of the action has expired.

17. On 4 October 2022 Mr Mahoney visited the property and found that the Improvement Notices had not been complied with. There remained multiple category 1 hazards in the property.

18. Under the HA, section 30(1), it is an offence for the person on whom an operative improvement notice has been served to not to comply with that notice.

19. On 18 October 2022 Mr Mahoney sent Notices of Intention to Prosecute to both Defendants and they were indeed prosecuted. I was told that the Defendants did not engage at all with the criminal proceedings.

20. On 21 February 2023 the Defendants were convicted in their absence at Barkingside Magistrates' Court of a failure to comply with the Improvement Notice the HA, section 30(1). They were also convicted of related offences, namely failure to licence a property which requires licencing contrary to the HA, section 95(1); failure to comply with a request for documents contrary to the HA, section 236(1); and failure to respond to a request for information contrary to the Local Government (Miscellaneous Provisions) Act 1976, section 16(2).

21. Each Defendant received a fine of £2,500 in relation to the failure to comply with the Improvement Notice and was ordered to pay a £1,000 surcharge to fund victim services. Allowing for the fines on the other offences and orders for costs, the First Defendant was ordered to pay £11,233.50 by 21 March 2023. The Second Defendant was ordered to pay £11,000 by the same date.

22. Neither Defendant sought to appeal their conviction or sentence. It is not known whether the financial penalties have been paid.

23. On 28 March 2023 Mr Mahoney visited the property and found that the works required by the Improvement Notice remained incomplete.

24. On 19 June 2023 he visited the property again and found that the works had still not been completed. He took photographs during this visit which he has exhibited to his first witness statement. At paragraph 7 of that statement he said that there had been "no or minimal activity to improve the conditions that these households are experiencing". He also explained that the Defendants have ignored all correspondence from the Claimant.

The procedural history

25. This claim was issued on 14 July 2023.

26. On 11 August 2023 Mr Justice Lane made the order I have referred to.

27. On 15 and 16 August 2023 Mr Rulewski was in email communication with the listing office at this court to arrange the hearing of the claim. Both Defendants were copied into this communication via the e-mail addresses the Claimant had for them (two e-email addresses each).

28. On 17 August 2023 the Claimant's paralegal support team sent the claim form, supporting evidence and order of Mr Justice Lane by post to each of the addresses they had for the Defendants. In respect of the First Defendant the addresses comprised both the address of the property and an address in London SE3 where it is understood he lives, and where he is registered as being liable for Council Tax.

29. On 18 August 2023 at 10.50 am Mr Rulewski spoke to a person identifying himself as "Kehinde Gbadegesin", believed to be the First Defendant. Mr Rulewski describes this discussion at paragraph 5 of his witness statement. According to Mr Rulewski, the person he spoke to claimed that the property in question was "not his property" and that the Claimant was making a "terrible mistake". The person said that "he would not be responding to the Claimant or the court". He said nothing about his health. According to Mr Mahoney, he was also told by Mr Rulewski that the person in question confirmed their email address as being one of the ones the Claimant had on record for the First Defendant. He also responded to a call to a telephone number given to him by one of the First Defendant's tenants.

30. A further Land Registry search was conducted, confirming that the First Defendant remained the leaseholder of the property.

31. At 12.38 pm that day Tambi Allison, understood to be a representative of the Second Defendant, emailed Mr Rulewski, from one of the email addresses that had been used to contact the Second Defendant. The email stated that the First Defendant had been seriously ill and had been in intensive care at Queen Elizabeth Hospital in Woolwich for 5 weeks. The email stated that he had been on Ward 1 but was now on Ward 5. The email stated "I would advice you [sic] to put a stay on any action for now".

32. Shortly thereafter Mr Rulewski replied, indicating that medical evidence would be required and confirming that the claim had been re-listed for 22 September 2023. The letter stated that both Defendants would need to be in attendance or to have legal representation.

33. At 5.45 pm Tambi Allison replied, indicating that a letter from the hospital would be forthcoming on the following Monday, namely 21 August 2023.

34. The e-mail also asserted that (i) the Second Defendant only let the property on behalf of the landlord, who was responsible for all the management of it; (ii) the rent had always been paid to the landlord; (iii) the Second Defendant was not trading at present; (iv) its office had been closed for several months; and (v) emails were occasionally checked and responded to.

35. On the same day, the court listing office confirmed the listing of the 22 September 2023 hearing, copied to all the Defendants' email addresses.

36. On 23 August 2023 Mr Mahoney served a bundle containing all the relevant documentation including the application dated 18 August 2023 on the Second Defendant. A member of staff at the Second Defendant's offices accepted the bundle.

37. He also attempted to serve the same material on the First Defendant at the Queen Elizabeth Hospital. The hospital confirmed to him that nobody by that name was a patient within the hospital. At 1.59 pm Mr Rulewski emailed Tambi Allison saying "The hospital have confirmed that Mr Gbadegesin is not a patient at their hospital. We therefore require an explanation as to why you have told us that he is".

38. Mr Mahoney attempted to serve the documentation personally at the address in SE3 but nobody answered the door. The same occurred when he attended again on 23 August 2023. He therefore left the documents at the property.

39. Under CPR 8.3, a defendant must file an Acknowledgment of Service to a Part 8 claim not more than 14 days after service of the claim form and serve the same on the claimant and any other party.

40. Under CPR 8.5(3), a defendant who wishes to rely on written evidence must file it when they file their Acknowledgment of Service and under CPR 8.5(4), serve it on the other parties at the same time.

41. Neither Defendant acknowledged service or filed any evidence in the claim.

42. Late in the afternoon of 21 September 2023, the day before the hearing, the Claimant served its costs schedule on both Defendants. At 6.27 pm, Tambi Allison emailed the Claimant, in reply to Mr Rulewski's email quoted at [37] above, saying:

> "I am surprised by your response. Mr Wilson Gbadegesin was admitted to Queen Elizabeth Hospital in Woolwich. He was there for weeks and was moved from room one to another ward.
>
> He was recently discharged for home care. Unfortunately, I do not know where he is receiving the home care at present.
>
> The hospital won't give anything to me as I am not his next of kin. I will however go back to the hospital again to try and get information for you.
>
> I will also send some of the parking payments for the hospital car park when I visited him".

43. No information of the sort described in this email has been provided to the Claimant or the court. As noted above neither Defendant attended the hearing.

44. Under CPR 39.3(1) the court may proceed with a trial in the absence of a party. That course was appropriate here. The Defendants had been properly served with the

proceedings. They were plainly on notice of the claim, the Claimant's application dated 18 August 2023 and of the 22 September 2023 hearing, as their very limited engagement with the claim indicated. However, consistent with their position in the criminal proceedings, it appears that they have simply chosen not to attend or be represented at the trial of the claim.

The Claimant's application dated 18 August 2023

45. The first matter that required resolution was whether to permit the Claimant to amend its claim form and the details of the claim in the manner set out in an application dated 18 August 2023. The application was supported by the second witness statement from Mr Mahoney dated 21 August 2023.

46. All of the proposed amendments involved relatively minor matters of clarification or typographical correction. The application sought to amend the way in which the Second Defendant was described on the claim form from "Ltd" to "Limited". It sought to correct the description of the First Defendant as the leaseholder and not the freeholder of the property. It sought to add a further paragraph (2A) clarifying the status of the Second Defendant. Finally it sought to correct the dates on the claim form relating to when the Improvement Notices were served and when the remedial works were required to be completed by.

47. As Mr Mahoney's witness statement made clear at paragraph 8, none of these amendments resulted in any change to the substance of the claim. Further the subject matter of the amendments is such that they reflect information already known to the Defendants.

48. In those circumstances I had no difficulty in permitting the Claimant to amend the claim form in these respects under CPR 17.1(2)(b). It was also appropriate to dispense with service of the amended documentation on the Defendants under CPR 6.28. They had had sight of the draft amended documents since around 23 August 2023, save for the insertion of the new paragraph 2A. However they have been aware of the substance of the proposed new paragraph since the same date as it was included in Mr Mahoney's statement in support of the application. Further, as noted above, the amendments were all minor and reflected matters within their own knowledge.

The hearsay evidence

49. Ms Pratt sought to rely on Mr Rulewski's account of the 18 August 2023 conversation and what Mr Rulewski told Mr Mahoney about it (see [29] above) as evidence of what the First Defendant had said in the conversation.

50. This evidence constituted hearsay within the meaning of the Civil Evidence Act 1995, s.1(2). The Claimant had not complied with the process set out in CPR 33.2 by which a party must give notice of their intention to rely on hearsay evidence. However, I acceded to Ms Pratt's request to remedy this error by way of an order under CPR 3.10. This was on the basis that there would be no prejudice to the Defendants by doing so: they had had sight of Mr Rulewski and Mr Mahoney's evidence about it since around 14 September 2023 and had not sought to challenge it, engage with the claim in any meaningful way or attend the hearing. I therefore admitted the evidence.

51. In determining what weight to attach to it, I took into account the matters set out in the Civil Evidence Act 1995, s.4(1) and (2).

52. As part of the "circumstances" under s.4(1), I took into account the fact that both Mr Rulewski and Mr Mahoney were giving evidence in their professional capacities; and Mr Rulewski in his role an officer of the court. I also took into account the fact that the statement attributed to the First Defendant that he "would not be responding" to the Claimant or the court is entirely consistent with the position he adopted in the criminal trial and his conduct in these proceedings. This lends support to it being a reliable account.

53. I considered that it would not have been reasonable and practicable for the Claimant to have produced the maker of the original statement (the First Defendant) as a witness (under s.4(2)(a)), given that he was the other party to proceedings and they had done all they could reasonably do to ensure he attended the hearing.

54. I therefore attached considerable weight to Mr Rulewski's evidence and accepted it as a true account.

55. It was appropriate to afford less weight to Mr Mahoney's evidence, as this involved multiple hearsay under s.4(2)(c)), but I nevertheless accepted it as correct.

The Defendants

56. I am satisfied that, contrary to what was said during the conversation with Mr Rulewski on 18 August 2023, the First Defendant is the leasehold owner of the property. Exhibit PM/8 to Mr Mahoney's prosecution witness statement is an official copy of the title register generated on 31 May 2022, which shows that the First Defendant then held leasehold title to the property. The official copy of the title register generated on 18 August 2023 (exhibit PM/1) records the First Defendant as still holding the leasehold title. On that basis, the First Defendant was at the time of the Improvement Notice, and continues to be, the registered long-leaseholder of the property.

57. I note that the assertions made by Tambi Allison in the 18 August 2023 email about the First Defendant's health were not mentioned by him when Mr Rulewski spoke to him on the same date; were not corroborated by the hospital in question; and have not been supported by any medical evidence submitted to the court.

58. I am also satisfied that, contrary to Tambi Allison's 18 August 2023 email, the Second Defendant was the managing agent for the property. This can be inferred from the fact that by a tenancy agreement dated 8 February 2020, the Second Defendant purported to enter into agreement with the tenants by which the tenants were granted a six month assured shorthold tenancy at a rent of £1,200 per month. Further, the Second Defendant did not seek to appeal the Improvement Notice on the basis that it was not responsible for the property in the manner alleged; nor was this point raised in the criminal proceedings or on any appeal against conviction or sentence.

59. Although Tambi Allison's 18 August 2023 email stated that the Second Defendant is not trading at present, Ms Pratt informed me that the Second Defendant's website is

still active and it is still registered at Companies House. Further, the assertion that the office has been closed for several months is contradicted by Mr Mahoney's evidence that when he attended the office a member of staff took delivery of the bundle: see [36] above.

Legal principles relevant to the claim for an injunction

60. Under the Senior Courts Act 1981, section 37 the High Court may grant a final injunction "in all cases in which it appears to the court to be just and convenient to do so".

61. Under the Local Government Act 1972, section 222, a local authority may institute civil proceedings where it is considered "expedient" to do so "for the promotion or protection of the interests of the inhabitants of their area".

62. In *City of London Corporation v Bovis Construction Ltd* [1992] All ER 697 an interim injunction had been granted to enforce compliance with the terms of a notice served by the local authority under the Control of Pollution Act 1974, section 60. The notice sought to restrict the times at which operations that caused noise could be undertaken outside of the boundaries of the relevant construction site. The local authority laid 18 informations against the contractors before the Magistrates' Court for breaches of the notice, which were adjourned on several occasions. Meanwhile the contractors persisted in contravening the notice. Accordingly the local authority had sought and obtained the injunction in question.

63. The Court of Appeal dismissed the appeal against the grant of the injunction. In doing so, Bingham LJ considered the circumstances in which injunctive relief may be obtained under section 222. He held as follows at page 714 g-j:

> "The guiding principles must, I think, be: (1) that the jurisdiction is to be invoked exceptionally and with great caution: see the authorities already cited; (2) that there must certainly be something more than mere infringement of criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see *Stoke-on-Trent City Council v B&Q (Retail) Ltd* [1984] 2 All ER 332 at 335, 341 [1984] AC 754 at 767, 776 and *Wychavon DC v Midland Enterprises (Special Events) Ltd* (1986) 86 LGR 83 and 87; (3) that the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them: see *Wychavon*…at 89".

64. Bingham LJ continued at page 715 a-d:

> "…the question is whether the local authority can show anything more (and, I would interpolate, substantially more) than an alleged and unproven contravention of the criminal law, and whether the inference

> can be drawn that noise prohibited by the notice will continue unless Bovis are effectively restrained by law and that nothing short of an injunction will effectively restrain them.
>
> I am in no doubt that these questions must be answered in favour of the local authority. The conduct which the local authority seek to restrain is conduct which would have been actionable (if not at the suit of the local authority) in the absence of any statute. Even if the conduct were not criminal, it would probably be unlawful. The contrast with the planning and Sunday trading cases is obvious. I see no reason for the court pedantically to insist on proof of deliberate and flagrant breaches of the criminal law when, as here, there is clear evidence of persistent and serious conduct that may well amount to contravention of the criminal law and which may, at this interlocutory stage, be regarded as showing a public and private nuisance. It is quite plain that the service of the notice and the threat of prosecution have proved quite ineffective to protect the residents".

65. Generally, a local authority should seek to utilise criminal proceedings before invoking the assistance of the civil courts. However, a local authority may bypass criminal proceedings if the view is taken that the penalty available under the criminal law would not deter the conduct complained of: see *B & Q* at 776G, per Lord Templeman.

Submissions and analysis

66. The Claimant local authority, quite understandably, considers it to be expedient for the promotion or protection of the inhabitants of its area to seek mandatory injunctive relief to secure compliance with the Improvement Notice. For those reasons it has commenced proceedings under section 222.

67. The starting point is nevertheless, as Bingham LJ made clear in the *Bovis* case, that the jurisdiction to grant the relief sought is to be invoked exceptionally and with great caution. I bear that in mind.

68. In accordance with the second of Bingham LJ's principles there must be something more, he said "substantially" more, than mere infringement of criminal law.

69. Having considered Ms Pratt's helpful written and oral submissions, I am satisfied that this test is met.

70. As is generally expected, the Claimant has sought recourse via criminal proceedings before invoking the assistance of the civil courts. Both Defendants were convicted in the Magistrates' Court on 21 February 2023 for their failure to comply with the Improvement Notices.

71. Notwithstanding those convictions, the remedial works required by the Improvement Notice remain outstanding. The Defendants are in knowing and continuing breach of the criminal law. I accept Ms Pratt's submissions that the Defendants' continuing breach is a flagrant breach of the criminal law; and that in all the circumstances -

including the Defendants' lack of meaningful engagement with these proceedings - the clear inference is that their continuing breach is deliberate.

72. Further, the Defendants' disregard of the requirements of the Improvement Notice is causing the tenants to suffer unsatisfactory, and possibly unsafe, housing conditions, especially given the ongoing presence of category 1 hazards. This is not a situation of a minor or technical breach but one with, as Ms Pratt put it, potentially serious "real world consequences" for the tenants.

73. The disrepair of the property is also likely to be an actionable breach of both the express and implied terms of the tenancy agreement (derived from clause D7 of the tenancy agreement and the Landlord and Tenant Act 1985, section 11), such that the inaction of the Defendants is a "wrong" independent of the criminal law in any event.

74. Bingham LJ's third principle requires consideration of whether the unlawful conduct will continue unless and until retrained by an injunction; and whether nothing short of an injunction will be effective.

75. Again, I am satisfied that both aspects of this test is met.

76. Neither Defendant appealed the Improvement Notice, whether within the required time or at all. Neither Defendant participated in, or defended, the prosecution. Neither sought to appeal their convictions or sentences.

77. It is clear that the criminal penalty has been ineffective to compel compliance with the Improvement Notice. On that basis, the facts of this case are even more compelling than those in *Bovis*: this is not simply a case where it is speculated that the threat of prosecution will be ineffective, but one where the Defendants have been convicted and yet are in continuing and knowing breach of the criminal law.

78. In addition to their lack of participation in the criminal proceedings, neither Defendant has engaged meaningfully with these proceedings. Indeed the First Defendant specifically told Mr Rulewski on 18 August 2023 that he "would not be" responding to either the Claimant or the Court.

79. The Defendants have therefore shown no intention to comply with the Improvement Notice. It is clear to me that their disregard of it will continue unless and until restrained by an injunction and that nothing else will be effective in ensuring their compliance.

Conclusion

80. In those circumstances, I conclude that it is both just and convenient to grant the injunctive relief sought.

81. Further, the Defendants should pay the Claimant's costs of the claim on the standard basis. The Claimant has been wholly successful in the claim and there is no reason to depart from the general rule in CPR 44.2(2)(a) to the effect that it should recover its costs.

82. As to the amount of costs, the figure of £4,005.56 sought by the Claimant was, in my judgment, proportionately and reasonably incurred and proportionate and reasonable in amount for the purposes of CPR 44.4(1)(a). The conduct of the parties is also relevant under CPR 44.4(3)(a), in that the Claimant brought the claim in accordance with its public functions and for the benefit of the inhabitants of its administrative area, whereas the Defendants declined to engage with the claim in any meaningful way.