Case No: C1PP4593

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building,
Strand,
London,
WC2A 2LL

Date: 26 July 2023

Before:

HIS HONOUR JUDGE LUBA KC

- -

Between:

POPLAR HARCA

Claimant

- and -

JANET KERR

Defendant

- -

- -

MR STEVEN WOOLF of Counsel appeared for the **Claimant**
MR MARTIN HODGSON of Counsel appeared for the **Defendant**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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HIS HONOUR JUDGE LUBA KC:

INTRODUCTION

1. This is my judgment in a matter arising under claim number C1PP4593. In those proceedings the claimant is the Poplar Housing and Regeneration Community Association Limited, commonly known as Poplar HARCA. The defendant is Ms Janet Kerr. The matter before me is an application for permission to appeal from an order made in the County Court at Clerkenwell and Shoreditch by District Judge Bell. That order was made on 16 February 2022. By it, the judge varied an order for possession previously made in the proceedings to an outright possession order based on a mandatory ground for possession.

2. The application for permission to appeal is contained in an appellant's notice brought to this court as the appeal court for appeals from the County Court at Clerkenwell and Shoreditch. The application for permission to appeal has been advanced by Mr Hodgson appearing now, as he did below, for the defendant tenant. The application is resisted by Mr Woolf, counsel instructed for the claimant. Mr Woolf did not appear below.

3. Unsurprisingly, given the experience and specialism of those two advocates, I have had the benefit of oral and written submissions of the highest quality. I commend both counsel for the assistance they have given to the court. Before I come to the grounds of appeal, or indeed the immediate context of the appeal, it is necessary to say something about the essential factual background.

THE FACTUAL BACKGROUND

4. The claimant is a social landlord. The defendant, Ms Kerr, is one of its longstanding tenants. She has been a tenant since at least 2004. The property she occupies 3 Warner Terrace, Broomfield Street, London E14. That is a three bedroomed house with a garden.

5. Unhappily, a time came when the defendant tenant fell into arrear with her rent. The landlord gave her appropriate notice that if she did not restore her rent account into good order, it would seek possession from her. Ms Kerr did not take the necessary steps and the landlord began proceedings for possession. Even when faced with those proceedings for possession, she did not rectify the position. Indeed, she did not even attend the hearing of the possession claim.

6. Thus it was that as long ago as 7 February 2017, District Judge Pigram, sitting in what was then the County Court at Bow, ordered that the tenant should give up possession of 3 Warner Terrace on or before 7 March 2017. Moreover, despite the rent charged to the defendant tenant being a sub-market rent, he gave judgment to the claimant for the sum of £2,512.35 in respect of rent arrears.

7. However, the judge also exercised the statutory powers available to him to direct that there be a control on enforcement of the possession order he had made. He directed that:

> "This order is not to be enforced so long as the defendant pays the claimant the rent and the arrears and the amount for arrears."

He provided what payments would be required, namely:

> "£3.75 per week, the first instalment being paid on or before 13 February 2017."

The judge obviously recognised that an enormous length of time would be required for a debt of £2,500 to be discharged by a payment at a rate of £3.75 per week. It was unsurprising, therefore, that the order for possession still remained extant in respect of this property in the summer of 2020.

8. On 25 August 2020, a criminal offence was committed at the property by one of the defendant tenant's sons. The offence was possession of an imitation firearm with intent to cause of violence. At the Wood Green Crown Court on 19 November 2020, the defendant's son pleaded guilty to that offence and was sentenced to a term of immediate imprisonment of 14 months. The imitation firearm was ordered to be forfeit and destroyed.

9. The commission of that offence and the disposal at the crown court by the imprisonment of the defendant tenant's son came to the attention of the landlord. The landlord decided, in light of that conduct, and for other reasons, to seek to recover possession of the property. A notice of seeking possession was served on the defendant tenant personally in February 2021. It set out the grounds upon which the landlord intended to seek possession. These were ground 7A, which relates to the commission of the criminal offence, and also grounds 10, 11, 12 and 14. Grounds 10 and 11 are concerned with arrears of rent, 12 with breach of obligation of the tenancy, and 14 with what might loosely be described as nuisance or annoyance.

10. The notice seeking possession gave an explanation of why each ground was being relied upon. In respect of ground 7A the particulars were of the conviction of the tenant's son. The explanation continued:

> "Your landlord takes criminal and anti-social behaviour very seriously, particularly in relation to any negative impact serious criminal conduct may have on its residents, housing estates and local communities. Your landlord seeks possession in the interest of effective housing management."

As I say, an explanation was also provided in relation to the other grounds that the notice seeking possession gave notice might be relied upon.

11. A letter covering the notice of seeking possession and the notice itself, offered the defendant tenant an opportunity to have a review of the landlord's decision to seek to recover possession. The defendant tenant availed herself of that right and a review was undertaken. By a letter dated 30 March 2021, the review panel determined, at a hearing, that it would not reverse the decision to seek to recover possession.

12. In those circumstances, the claimant landlord was faced with a choice as to how to proceed. A first possibility was the issue of fresh proceedings for possession based on the grounds set out in the notice of seeking possession. But a second possible course, or at least one appearing to be open to the landlord, was to make an application to the court in the extant possession proceedings which had led to the making of the earlier possession order in 2017. It was that latter alternative course that the landlord in this case took.

13. By an application notice dated 1 June 2021, the landlord applied in the old proceedings, as it were, for the following:

> "An order converting the suspended possession order dated 7 February 2017 into an outright possession order in accordance with the rule in *Manchester City Council v Finn*."

The second paragraph of box 3 of the N244 dated 1 June 2021 read:

> "The defendant has failed to pay the rent or the outstanding arrears. The defendant's son has been convicted of a serious offence at the property. The defendant has breached the tenancy agreement and due to anti-social behaviour at the property."

14. The application notice sought the determination of the application at an oral hearing, albeit one rather ambitiously suggested to need only 45 minutes. The application notice was supported by a witness statement of the claimant landlord's legal officer. That was made on 28 May 2021. Unsurprisingly, it exhibited the material relating to the tenancy, the notices, the arrears schedule, the conviction, the review and so on. The application was subject to directions in the County Court at Clerkenwell and Shoreditch, which directions included the opportunity for the defendant tenant to put in evidence in reply. That was an opportunity she took.

15. Eventually the matter came on for hearing before District Judge Bell on 16 February 2022. District Judge Bell heard the evidence of an officer of the claimant landlord and heard and read the evidence of the defendant tenant. She then heard submissions from counsel for the respective parties and delivered at the end of the hearing an *ex tempore* judgment. As a result of her judgment, she promulgated the order which is the subject of this appeal. It reads:

> "It is ordered that: (1) the possession order dated 7 February 2017 is varied to an outright possession order pursuant to ground 7A of Schedule 2 of the Housing Act 1988; (2) vacant possession to be given by 2 March 2022; (3) the defendant's application to appeal on the issue of the Housing Act 1988 refused. Any further applications to a circuit judge."

The judge then went on to grant the claimant its costs of the application, subject to the protection from costs enforcement available to the defendant tenant as a person assisted by legal aid.

16. Before I turn to the criticisms made of the judge's order and her judgment by the defendant tenant in this application for permission to appeal, I need first to deal with the statutory schemes.

THE LEGISLATIVE FRAMEWORK

17. There are broadly two statutory schemes applicable to those who occupy social housing. Those who are the tenants of local housing authorities, most commonly district and borough councils, are secure tenants protected by the provisions of Part IV of the Housing Act 1985. Other social landlords let to assured tenants. They are mainly housing associations. The rights and protections of assured tenants are contained in Part I of the Housing Act 1988. The statutory schemes have certain striking similarities. First, the statutory protection of tenants works by providing them with a security of tenure of which they can be deprived by the landlord only by the landlord obtaining an order for possession of the court and executing that order.

18. Both statutory schemes control the basis upon which possession can be granted. Schedule 2 to each Act contains the grounds for possession which a landlord must make out in order to secure a possession order. These grounds are divided in both cases into discretionary grounds and mandatory grounds. The feature of a discretionary ground is that it requires the court to consider whether it is reasonable in all the circumstances to make an order for possession. The key feature of a mandatory ground is that if the landlord makes good the conditions for possession under that ground, then the court has no ability to take into account the reasonableness or otherwise of the making of the order.

19. A particular feature of both schemes in relation to discretionary grounds is that if an order for possession is made on discretionary grounds, the court is vested with additional powers to control recovery of possession under the possession order. In the 1985 Act those powers are contained in section 85 and in the 1988 Act they are contained in section 9. No one in the present case has sought to suggest that there is any material difference between section 85 and section 9.

20. The operation of the protective statutory regime for social housing tenants is graphically illustrated by the case of *Sheffield City Council v Hopkins* [2002] HLR 12. In that case, a social housing tenant had been subject to a possession order made pursuant to the provisions of the 1985 Act. The tenant applied for the exercise of the court's discretion in relation to the possession order and its enforcement pursuant to section 85. The possession order in that case had been made on grounds related to arrears of rent.

21. The issue with which the Court of Appeal was seized was whether it was permissible for the court to allow a landlord to introduce material in the consideration of the exercise of the court's discretion which went beyond the confines of the original ground for possession. The Court of Appeal, a division constituted by the Lord Chief Justice, Lord Woolf, sitting with Lord Justice Tuckey and Lady Justice Arden answered the question in the affirmative. At paragraph 22 of the judgment of the court, Lord Woolf said:

> "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. It would be very unfortunate if the position were otherwise."

22. Having identified that the court had a wide discretion to take account of the material going well beyond the material utilised to obtain the original possession order, the Court of Appeal gave guidance as to how it should be exercised. In paragraph [29] the court set out that as a matter of law the discretion of the court was "only circumscribed by the requirement of relevancy". Paragraph [29] then continues with a description of the way in which the discretion might sensibly be exercised. That case, as I say, demonstrated what might be called the usual or typical situation in which a tenant relies upon the extended discretion given by section 85 or, in the 1988 Act, section 9.

23. Neither of the two statutory regimes appears to have embraced the possibility of *a landlord* applying to obtain some change in an original possession order. However, that issue arose for determination in the later decision of the Court of Appeal in *Manchester City Council v Finn*, [2003] HLR 41. That appeal came before a two-member division of the Court of Appeal, Lord Justice Ward sitting with Lady Justice Arden. Lady Justice Arden had, of course, been a member of the constitution of the court a year earlier in the *Hopkins* case.

24. The facts of *Manchester City Council v Finn* were somewhat different. Mr Finn had not made any application in relation to the possession order running against him. The facts recorded by the Court of Appeal were that the claimant landlord:

> "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".

That was in the context of a previously made possession order made on a different factual basis. The district judge before whom that application came dismissed it on the basis that the court had no jurisdiction to reopen, as it were, an earlier final possession order.

25. By the time the matter came on appeal, the position of the landlord had changed somewhat. Paragraph [5] of the Court of Appeal's judgment records that the order being sought by the landlord was that the original possession order:

> "Be varied so as to include a condition that the defendant… should not use the property… for the purpose of any illegal activity including handling stolen goods."

In other words, by the time the matter came on for consideration at the appellate level, the landlord's ambition in the *Finn* case was simply to change the conditions upon which the possession order in that case had been originally imposed.

26. The Court of Appeal decided that the court did have power to make the formal order sought on the landlord's application in that case. The jurisdiction that the court had

was to be derived, the Court of Appeal decided, from what might be described as "liberty to apply." Lady Justice Arden said at paragraph [22]:

> "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 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."

Having found jurisdiction in the court in that way, Lady Justice Arden said at paragraph [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."

27. As to the way in which that discretion to vary a possession order might be exercised, Lady Justice Arden said this at paragraph [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."

In other words, the Court of Appeal had identified that the general liberty to apply in relation to an extant possession order could include liberty to apply by either party and thus by the landlord in a case such as *Finn*. Moreover, that the power to vary would be exercised by the judges before whom the applications came by doing what was "just and fair".

28. For his part, Lord Justice Ward decided that the task of such a judge is to consider "the new case afresh and on its merits" and to determine "what order would be appropriate in the new circumstances". That contemplated a possible outcome in which the court would require possession to be given at an earlier date. Lord Justice Ward said at [37]:

> "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."

29. Two points therefore are derived from *Finn*. First, the court was finding a jurisdiction to vary an extant possession order even in circumstances in which section 85, or in the 1988 Act section 9, had <u>not</u> been invoked by the tenant. Second, the court was

deciding that such a variation might include bringing forward a date of possession, or indeed making outright what had been previously a suspended or postponed order.

30. That then is the extent of the relevant jurisprudence for present purposes on the operation of the statutory provisions. I can now return to the judge's order, the judgment in the instant case, and the appeal from it.

THE JUDGE'S JUDGMENT

31. The judge gave a commendably succinct *ex tempore* judgment. She deals in her judgment with the four issues or points which had been distilled for her, by the parties, as requiring determination. The structure of her judgment is, unsurprisingly, that she sets out the factual background and then the evidence she heard. She then turns to consider the various grounds upon which the landlord sought to achieve a varied order, one providing for outright possession.

32. She dealt first with an argument advanced by the defendant tenant that it was not open to the landlord to rely on the ground of possession to be found in the new ground 7A added to Schedule 2 to the Housing Act 1988 given the terms of the tenancy agreement operating between the parties. The judge decided that it was open to the landlord to rely, if appropriate, on ground 7A and no appeal lies from her determination to that effect.

33. She then turned to consider a different point which she dealt with under a heading she described as "section 9". She described it thus:

> "The second issue for me to decide is whether the claimant can rely upon the section 9 mechanism to vary the existing suspended order."

That is the first sentence of paragraph [33] of her judgment. Having cast the issue in that way, she then sets out the competing arguments of the parties at paragraphs [34] to [37] and makes reference to the two cases, *Hopkins* and *Finn*, which I have already dealt with in some detail. At paragraph [38] she says this:

> "I accept that neither the decisions in *Hopkins* or *Finn* address the question of whether it is possible to apply, using section 9 or section 85, to rely upon a mandatory ground and both counsel have not referred me to any decision of another court addressing that issue. By the same token, I do not think that the cases preclude such a possibility. They were, of course, addressing the facts and cases before them."

34. Having thus found herself, as it were, in virgin territory as far as jurisprudence is concerned, the judge concluded as follows at paragraph [39] of her judgment:

> "In my judgment, section 9 can be relied on. Of course, the original possession order was granted on discretionary grounds and therefore, accordingly, under section 9 the court has the power to suspend or postpone that order and following *Manchester v Finn* to vary. I do not consider that that then

> goes on to preclude the type of grounds that can be relied on in seeking to vary the underlying order. If the grounds for variation are a discretionary, then section 9 is again itself engaged and the court would need to consider whether to postpone or suspend but where a mandatory ground is relied upon, the court does not go on to have to carry out that further exercise but it still needs to consider in respect of either type of ground whether the *Sheffield v Hopkins* guidance has been followed and there is no suggestion that it has not been and therefore, I will not examine it further."

In essence, the judge decided that she did have jurisdiction to allow an application to vary a possession order which had been made on a discretionary ground to a possession order treated as made on a mandatory ground.

35. The remainder of the judge's judgment dealt with two issues, the application or otherwise of the public sector equality duty under section 149 of the Equality Act 2010 and the applicability of any public law duty. Nothing arises from either of those last two matters. Finally, therefore, under the heading "possession" at paragraph [52] of her judgment, the judge said:

> "I am satisfied that ground 7A is made out, no issue having been raised regarding any of the conditions not being met. Therefore, I will vary the possession order on ground 7A to make an outright possession order."

36. In that last sentence she appears to have conflated two matters: firstly, variation in terms of the basis of the ground for possession and, secondly, variation as to its nature, ie changing it from a suspended or conditional order to an outright possession order. As I say, the judge's judgment is given effect by an order which varies the original order in the way I have already described.

THE GROUNDS OF APPEAL

37. Mr Hodgson advances a single ground of appeal expressed in the attachments to the Appellant's Notice in this way:

> "The learned judge erred in law in that the court has no jurisdiction to make a possession order on a mandatory ground pursuant to an application under section 9 of the Housing Act 1988."

I say immediately that I am satisfied that that ground of appeal, although I have some criticism of its drafting, is one that does pass muster as demonstrating a real prospect of success on appeal. I accordingly grant permission to appeal. I have directed, however, a rolled-up hearing. The parties accordingly addressed me on the basis that I might be proceeding to determine the appeal proper and that is what I now turn to do.

38. I said that I had some criticism of the way in which Mr Hodgson had expressed his ground of appeal. That is for two very obvious reasons. Firstly, no application was

before the judge under section 9 of the Housing Act 1988. As is made plain by the terms of the application notice itself, the application was an application to vary under the jurisdiction given by *Manchester City Council v Finn*, that is an application to vary under the 'liberty to apply' which attends upon any extant possession order, whether expressly stated or not. Secondly, the ground of appeal is framed as an attack on jurisdiction but the jurisdiction the judge was invoking was a jurisdiction to *vary*, not a jurisdiction to do any of the things provided for by section 9 of the Housing Act 1988.

39. It might be thought, therefore, that in those circumstances this court ought to have refused permission to appeal but, very sensibly, Mr Woolf appearing for the respondent landlord took no issue with the way in which Mr Hodgson had cast the ground of appeal but. Instead he sought to focus very properly on the real issue that divides the parties. I am content to proceed on that basis.

40. It seems to me that, in reality, this case has little or anything to do with the parameters of section 9 of the Housing Act 1988. True it is that the original possession order made in this case was a possession order based on a discretionary ground. True it is that, as a result, an application might have been made pursuant to section 9(2) to achieve some sort of stay or suspension of the order, or postponement of its terms, or the imposition of further terms. But that is not what has occurred in this case.

41. As I have explained, the judge was dealing with an application to vary. That her judgment is replete with reference to section 9 is perhaps understandable given that the only authorities she was taken to were those of *Hopkins* and *Finn* which were concerned with the discretionary equivalent in section 85 of the Housing Act 1985. A close reading of *Finn*, however, establishes beyond peradventure that despite extensive reference in that case (for understandable reasons) to section 85 of the 1985 Act, the court was in fact proceeding on a wider basis, namely the power to vary on an application made pursuant to the liberty to apply.

42. Perhaps recognising that the court might perceive the matter in that way, Mr Hodgson has sought to persuade me that even on an application to vary, the court could not do in tandem, as it were, two things. First, to change the basis upon which the possession order was made from the original one of a discretionary ground to the fresh one of a mandatory ground. Second, it could not therefore in consequence switch what had been an order subject to the discretionary powers of the court under section 9 to one which did not carry such discretionary powers and had necessarily to be an outright order.

43. Mr Hodgson's difficulty was to discern, as a matter of logic, why that should be so. The Court of Appeal in *Finn* had clearly contemplated an application to vary under the inherent power to apply to the court in relation to an extant possession order. As Lady Justice Arden had articulated, that might well extend to changing what had been a suspended possession order to an outright possession order. Why does it not also therefore embrace the possibility of changing what had been an order based on a discretionary ground to an order based on a mandatory ground?

44. It might have been suggested that the court should not take that course where mandatory grounds are coupled with certain statutory requirements. In this case, for example, Mr Hodgson pointed to the fact that the statutory ground, ground 7A of

Schedule 2 to the Housing Act 1988 is surrounded by preconditions and prerequisites as to, for example, the giving of a notice, the option of a power of a right of review, the conduct of review proceedings and the necessity for the specific conditions of the ground to be made out. His difficulty with that point is that although it might be a good or applicable point in other cases, it does not run in this case. As the district judge here found, all the necessary prerequisites have been honoured and the conditions of ground 7A were clearly established.

45. A second conceptual basis for distinguishing between the two types of variation, discretionary to discretionary, or discretionary to mandatory, was the very existence of distinct statutory regimes, separate mandatory and separate discretionary grounds, in Schedule 2 to both the 1985 and the 1988 Acts. On that basis, it might have been said that Parliament did not contemplate the possibility of obtaining a possession order on a discretionary ground and then having it varied onto a mandatory ground. But *Finn* itself contains the answer to that. Parliament must be taken to have known that the court reserved to itself a liberty (to any of the parties) to apply, where a possession order was extant, to vary it. Parliament has in no place provided that the variation cannot include the variation from an order made on a discretionary ground to one made on a mandatory ground.

46. This is redolent of Mr Hodgson's submission based on the section 9 framework, i.e. that section 9 and the discretionary power within it was simply not available in cases where what was sought was possession on a mandatory ground. He is plainly right as to that. But in this case the landlord was not bringing possession proceedings based on an alleged mandatory ground. It was inviting the court to exercise the power to vary under a liberty to apply from a possession order, which had a discretionary ground underpinning it, to one which had a mandatory ground underpinning it.

47. In those circumstances, one was left with the proposition that the landlord really had to take fresh possession proceedings based on the new statutory ground in a factual scenario where there was no good justification for that being the law. First and most obviously, it would lead to delay and expense. The landlord having been already seized of a possession order on one basis would then be required to run separate possession proceedings with all the concomitant cost and delay in order to obtain what would be a second possession order. The jurisprudence available across the landlord and tenant field speaks against the possibility of there being extant, at any one time, two possession orders for the same property. But if Mr Hodgson is right, such a nonsense would materialise. Mr Hodgson was therefore hard pressed to explain how the original possession order would in some way be 'expunged' by the new one.

48. I consider that the law does <u>not</u> require the issue of fresh proceedings and that the jurisdiction identified in *Finn* is sufficiently wide to enable the court to make an order of variation of the type made by the judge in this case. That is my determination of what I consider is the real ground of appeal in this case and the one for which I have given permission. Of course, the exercise of discretion by the judge in relation to variation might have been open to challenge but there is no such ground of appeal in this case. The question has never been, "should the judge have done what she did?", but, "could the judge have done what she did?" For the reasons I have given, I am satisfied that she could.

DISPOSAL

49. Accordingly, I shall grant permission to appeal in the present appeal but I shall dismiss the appeal itself. The order made by District Judge Bell shall stand. I shall, however, make certain corrections to the order in exercise of my power under the slip rule to change its grammatical content. That arises from the need to correct typographical errors in relation to the statute but also to make the wording of the varied order clearer. I will, accordingly, make amendments such as to produce an order which clearly states that the order has been made, by way of variation to an original order, to an order made on the new statutory ground and that the order be an outright order. The appeal is accordingly dismissed.

(Discussion re order follows)

(This Judgment has been approved by HHJ Luba KC.)

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