doughty street chambers

Avoiding Eviction at the Warrant Stage

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Avoiding Eviction at the Warrant Stage

Landlord Applications

Sarah Steinhardt

- Applications to enforce on the same grounds
- Applications to enforce on different grounds

Tenant Applications

Alice Irving

- Suspending the warrant
- Preventing eviction in mandatory grounds cases
- Post Possession order counterclaims

Jim Shepherd

- Setting aside the possession order
- Applications for re-entry

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Landlord applications

Sarah Steinhardt

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Applications to issue a warrant

83.2(3) *A [warrant of possession] must not be issued without the permission of the court where—*

(a) six years or more have elapsed since the date of the judgment or order;

(b) any change has taken place, whether by death or otherwise, in the parties—

(i) entitled to enforce the judgment or order; or

(ii) liable to have it enforced against them;

(e) under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled (other than where non-compliance with the terms of suspension of enforcement of the judgment or order is the failure to pay money)…

Applications to issue a warrant

83.2(4)*An application for permission may be made in accordance with Part 23 and must—*

(a)identify the judgment or order to which the application relates;

(b) if the judgment or order is for the payment of money, state the amount originally due and, if different, the amount due at the date the application notice is filed;

(c) where the case falls within paragraph (3)(a), state the reasons for the delay in enforcing the judgment or order;

(d) where the case falls within paragraph (3)(b), state the change which has taken place in the parties entitled or liable to execution since the date of the judgment or order […]

(f) give such other information as is necessary to satisfy the court that the applicant is entitled to proceed to execution on the judgment or order, and that the person against whom it is sought to issue execution is liable to execution on it.

Applications to issue a warrant

- Applications may be without notice: CPR 83.2(5)
- But, if made ex-parte:

  "The obligatory affidavit [no longer mandatory] *establishing the Applicant's right to relief must, in accordance with normal principles, place all relevant circumstances before the court"* *Hackney v White* Per Hirst LJ.

Applications to issue a warrant

- In *Hackney London Borough Council v White* (1996) 28 H.L.R. 219; Court of Appeal held that it was an abuse of process to issue a warrant without complying with the procedural obligations.
- Further, a failure to comply could not be saved by Order 37 r. 5, which provided explicitly that *"a failure to comply with any requirement of these rules, […] shall be treated as an irregularity and shall not nullify the proceedings".*
- Accordingly, an eviction without obtaining permission is unlawful and damages may be awarded: *AA v London Borough of Southwark* [2014] EWHC 500 (QB)

Applications to issue a warrant

- *AA v Southwark* [2014] EWHC 500 (QB):

  72 .. Where a warrant has been issued administratively without the landlord first obtaining the permission of a judge to issue it in circumstances in which the order for possession had been made six years or more prior to the issue of the warrant, it was invalid and its issue was not a mere irregularity. The requirement to obtain leave is a very important one since, after a gap of six years from the making of an order for possession, whether that order has been suspended for part or most of the intervening period or not, it is necessary that there should be a judicial inquiry into all relevant circumstances to determine whether it is fair and appropriate to issue the warrant after such a long period of time has elapsed since possession was first ordered"

Applications to issue a warrant

- BUT in *Cardiff v Lee* [2017] 1 W.L.R. 1751 the CA considered the identical provisions of CPR 3.10 which, provide:

  3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction –

  (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

  (b) the court may make an order to remedy the error.

Applications to issue a warrant

- *Cardiff v Lee* [2017] 1 W.L.R. 1751

  "That means that the issue of the warrant was not invalid unless the court so ordered. The issue of the warrant was therefore voidable and not void, as the judge correctly held. CPR 3.10 also states that the court may remedy the error. Here it has remedied the error by hearing the appellant's application to discharge the warrant, and, having rejected that application, validating the warrant despite the error in procedure."

Applications to issue a warrant

- Is *Cardiff v Lee per in curium*? No mention to *Hackney v White* or to *AA v Southwark.*
- Factual distinctions:
  - *Cardiff v Lee* was an application to discharge the warrant *prior to execution*, at which point the court had the necessary information before it to remedy the breach
  - *Cardiff v Lee* concerned formalities of making the correct application in relation to a conditional order, as opposed to the six year rule where a judge needs to make an evaluation as to whether the order should be enforced

Six years or more since the possession order

- *Patel v Singh* [2002] EWCA Civ 1938; Peter Gibson LJ at para. 21

  "the court must start from the position that the lapse of six years may, and will ordinarily, in itself justify refusing the judgment creditor permission to issue the writ of execution, unless the judgment creditor can justify the granting of permission by showing that the circumstances of his or her case takes it out of the ordinary."

- *Duer v Frazer* [2001] 1 WLR 919; Evans-Lombe J at para. 25
  "the court would not, in general, extend time beyond the six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the judgment creditor…

Six years or more since the possession order

… Each case must turn on its own facts but, in the absence of very special circumstances … the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor." *Duer v Frazer*

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Cases where the landlord's interest has transferred

- In those cases it is not uncommon for the landlord to obtain a 'global' substitution order substituting the new landlord for the old landlord in existing possession orders or pending possession claims.
- However, such order while entitling the landlord to the benefit of the possession order, does not dispose of the requirement under CPR 83 to make an application for a warrant in the manner envisaged by that section; that is, by formal application notice supported by evidence.

Conditional orders

83.2(3) *A [warrant of possession] must not be issued without the permission of the court where—*

(e) … any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled (other than where non-compliance with the terms of suspension of enforcement of the judgment or order is the failure to pay money)…

No longer applies in relation to rent arrears cases but will apply to anti-social behaviour cases.

Transfer to the High Court

- CPR 83.13 is a amended from 20 September 2020.
  - No longer any requirement for the court's permission; and,
  - No longer any requirement to give notice to the tenant

Enforcing the PO on different grounds

- Landlords may apply to ‘convert’ a suspended possession order (or outright order with a warrant suspension) obtained on one ground, such as rent arrears, to an outright order on another ground, such as anti-social behaviour: *Manchester v Finn* [2003] HLR 41, and to thereby fix a date for possession
- In such cases the court should bear in mind the guidance given by the Court of Appeal in the case of *Sheffield City Council v Hopkins* [2002] H.L.R. 12

Enforcing the PO on different grounds

- In *Sheffield City Council v Hopkins* [2002] H.L.R. 12 the Court of Appeal held that in exercising its discretion to suspend or stay the execution of a possession order the court is not necessarily restricted to consideration of facts connected to the ground for possession on which the order was granted.
- However the court is not obliged to allow the landlord to rely on new matters and it may not be appropriate to do so.

Enforcing the PO on different grounds

- The Court of Appeal found that [para 29] when *exercising its discretion* whether to consider evidence which is not relevant to the original ground for possession the court should bear in mind that "*the discretion should be used to further the policy of the Housing Act 1985 that a tenant should only be evicted where a ground for possession has been established, it is reasonable to do so and the tenant has breached the terms of any suspension of the possession order;*
- Further various other matters are relevant including: -
  - The practicality of dealing with the new allegations if they are contested;
  - Whether the new matters arose after the PO or could have been raised within the original claim

Pre-execution Tenant applications

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Pre-execution Tenant Applications

1. Power to stay or suspend the warrant
2. Challenging evictions in cases of mandatory possession
3. Public law and proportionality at the warrant stage
4. Counterclaims at the warrant stage

1. Power to stay or suspend the warrant

- Power exists in cases where possession order made on discretionary grounds. See:
  - Housing Act 1988, section 9(2) (assured tenancy)
  - Housing Act 1985, section 85(2) (secure tenancy)
  - Rent Act 1977, section 100(2) (protected tenancy / statutory tenancy)
- Tenants outside protection of these Acts, or against whom a possession order was made on a mandatory ground cannot apply to stay or suspend execution of a warrant, other than to delay for max period of 6 weeks from date of the order

Section 85(2) Housing Act 1985

- At anytime before the execution of the possession order, the court may stay or suspend the execution of the order, or postpone the date of possession, for such period or periods as the court thinks fit
- On stay, suspension or postponement, court:
  - shall impose conditions for payment of rent arrears / rent unless it considers this would cause exceptional hardship to the tenant / would otherwise be unreasonable; and
  - may impose such other conditions as it thinks fit

- Many judges apply unofficial quota whereby a certain number of stays will be allowed / certain level of rent arrears permitted
- Burden of proof on application to suspend on the tenant (*Southwark LBC v St Brice*)
- Hearing for application to suspend warrant should be adjourned where there is lack of clarity about rent arrears / benefit entitlement (*Haringey LBC v Powell*)

If no clear written confirmation from landlord that a warrant will not be executed, should apply to stay warrant if the eviction is likely to take place before the hearing of the substantive application

CPR 3.1(2)(f): Court power to stay execution

Section 88 County Courts Act 1984:

- Court power to stay any execution issued in proceedings for such time and on such terms as the court thinks fit
- Power arises where appears to the court that party to proceedings unable to pay any sum / any instalment of sum recovered against him

2. Mandatory possession cases

Section 89 Housing Act 1980:

- Applies where possession order made on mandatory grounds
- Limits court's discretion to postpone possession
- Giving up of possession shall not be postponed (by variation, suspension or stay) to a date later than 14 days after making the order, unless exceptional hardship would be caused
- Shall not in any event be postponed to a date later than 6 weeks after making of possession order

Diab v Countrywide Rentals plc

- Where it is unclear on the face of the order(s) whether a possession order was made on mandatory or discretionary grounds, it should be assumed it was made on discretionary grounds
- Therefore, the court will retain the discretion to stay / suspend a warrant

However, there are still options in mandatory possession cases:

- Where enforcing the possession order would amount to public law illegality, may apply to discharge the warrant or to make such declarations as would prohibit public body from enforcing the possession order
- Where enforcing possession order would be oppressive / abusive, common law jurisdiction to discharge the warrant (see *Barking & Dagenham LBC v Saint*)
- Where enforcing possession order would be discriminatory contrary to Equality Act 2010, court can discharge the warrant (see s 35, *Lewisham v Malcolm*)

3. Public law and proportionality

Public law defences

- Public body's decision to seek execution of possession order may itself be unlawful. Can:
  - apply to stay or suspend execution in county court; or
  - apply for JR of decision to apply for a warrant and seek interim order for stay of enforcement of possession order (would be unusual to do this, but might PAP to apply pressure)
- Previous decision at possession hearing on public law defence cannot be relitigated; change of circumstances required to raise at warrant stage (see *Powell v Dacorum BC* re: PSED)

Equality Act 2010, s 35

- Person managing premises must not discriminate against occupier by evicting them or taking steps for the purposes of securing eviction
- Often, s 15 (discrimination arising from disability) applies
- Under s 15, *prima facie* discriminatory conduct can be justified if proportionate means of achieving a legitimate aim
- Where suspended possession order held to be proportionate and thus not discriminatory when made, court need not reconsider the same question when order came to be enforced in the absence of a material change in circumstances (*Paragon Asra Housing Ltd v Neville*)

Article 8 ECHR

- Cannot raise Art 8 at warrant stage where this would be abuse of process; i.e. relitigating a decided issue, raising for first time when could and should have been raised earlier
- However, can raise at warrant stage where fundamental change in personal circumstances after making possession order, before enforcement (*R (JL) v SS for Defence; Lawal v Circle 33 Housing Trust*)

4. Counterclaims at warrant stage

- CPR 20.4(2)(b): counterclaim can be brought ‘at any time’ with the court’s permission
- Where eviction has not been executed, court has discretion to grant permission to bring counterclaim (*Rahman v Stirling Credit*)
- CPR 20.9(2): sets out factors relevant to exercise of discretion
- E.g. disrepair, breach of quiet enjoyment, harassment, discrimination
- Should apply for order suspending the warrant and permission to bring counterclaim

Post-eviction Tenant applications

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Post eviction applications - the real "Lazarus applications"

- The client comes off the street and tells you that they have been evicted after the stay is lifted. What can you do?
  - a) Nothing
  - b) Something
  - c) It depends…

When is it time to give up?

- There are cases in which there is nothing that can be done. For instance there has been a trial at which the client was represented and a possession order was made and executed properly and there are no prospects of an appeal.
- However what I intend to focus on here are cases in which you can help notwithstanding the fact that the client has already been evicted.

Does the court have jurisdiction?

- Once the eviction has taken place the court's powers under Rent Act 1977,s.100; Housing Act 1985,s.85 and the Housing Act 1988,s.9 cease.
- You can't apply to suspend a warrant that has already been executed - see *Leicester CC v Aldwinkle* (1991) 24 H.L.R. 40, CA.

Does the court have jurisdiction?

All is not lost however because the court can set aside a warrant that has been executed in the following cases:

a) The possession order on which the warrant is based is set aside: *Governors of the Peabody Donation Fund v Hay* (1987) 19 HLR 145, CA

b) The warrant has been obtained by fraud: *Hammersmith v Hill* (1994) 27 H.L.R.368: Fraud unravels everything.

c) There has been an abuse of process or oppression in the execution of the warrant: *Leicester CC v Aldwinkle* (1991) 24 HLR 40, CA

Seeking to set aside where the client failed to attend the possession hearing

- Under CPR 39.3(5) the court may set aside an order made in a party's absence if he or she: -

  a) acted promptly when he found out that the court had made an order against him;

  b)had a good reason for not attending the trial;

  c)had a reasonable prospect of success at trial.

All three requirements must be met: *Regency Rolls v Carnall* [2000] EWCA Civ 3

Setting aside the possession order

- The initial hearing of a possession claim is not a trial for the purposes of CPR 39.3 (1) it is rather a summary process of determination and decision. However CPR 3.1(2)(m) (under which the court may *take any other step or make any other order for the purpose of managing the case and furthering the overriding objective*) is wide enough to give the court power to set aside the possession order if in its discretion, it considers that the interests of justice demand it i.e. furthering the overriding objective: *Forceclux v Binnie* [2010] HLR 20.

Setting aside the possession order

- However in the absence of some unusual and highly compelling factor the court should generally apply the requirements of CPR 39.3(5) by analogy: *Hackney v Findlay* [2011] HLR 15.
- If each of the hurdles in CPR 39.3.5 is crossed it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in Art 6 of the Convention that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing: *Bank of Scotland v Pereira* [2011] EWCA Civ 241 [25].

Setting aside the possession order

- But note that as well as satisfying the criteria in CPR 39.3.5 you also have to get relief from sanction per the *Denton* test
- If you are going to make an application to set aside pursuant to these provisions it is vital that you include a draft defence so that the court can better assess the reasonable prospect of success criteria.

Seeking to set aside order when client attended hearing

CPR 3.1(7: The court's power to vary or revoke an order under CPR 3.1(7) has been the subject of a line of jurisprudence beginning with the oft-cited dicta of Patten J in Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen [2003] EWHC 1740 (Ch) at (7).

The Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him.

Leading case is *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] 1 W.L.R. 2591

Note distinction between final orders and interim orders – see White Book commentary to CPR 3.1 (7).

Set aside based on lack of capacity

- The test of litigation capacity is set out in Mental Capacity Act 2005, ss2 and 3. The medical practitioner needs to address all of the factors in s.3 – see *Fox v Wiggins* [2019] EWHC 2713 (QB
- In *Masterman v Brutton* [2003] 1 WLR 1511 the CA also confirmed that where there are potential capacity issues these should be investigated at the first opportunity.
- CPR 21 provides protection for litigants who are protected parties.
- CPR 21.2 (1) states that a protected party must have a litigation friend to conduct proceedings on her behalf

Set aside due to lack of capacity

- CPR 21.3(3) states that if during proceedings a party lacks capacity to continue to conduct proceedings no party may take any further step in the proceedings without the permission of the court until the protected party has a litigation friend – This illustrates the potential fluidity of the situation as regards capacity.

- Further under CPR 21.3 (4) any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise. In other words any orders made at a time when a protected party did not have a litigation friend are liable to be set aside.

Set aside the warrant due to oppression in its execution

Oppression

- "… oppression may be very difficult if not impossible to define, but it is not difficult to recognise. It is the insistence by a public authority on its strict rights in circumstances which make that insistence manifestly unfair. The categories of oppression are not closed because no-one can envisage all the sets of circumstances which could make the execution of a warrant for possession oppressive."

Southwark L.B.C. v. Sarfo (1999) 32 H.L.R. 602, CA, at 609, per Roch L.J.

Set aside the warrant due to oppression in its execution

- Judge made law
- Its often a high hurdle to surmount to show that there has truly been oppression in the execution of the warrant. Much depends on the particular facts and circumstances of the case. Evidence gathering at an early stage is therefore vital.
- The cases in which the facts are as clear as you want them are few and far between. e.g the housing officer promises not to evict and then goes ahead and evicts. Most social landlords are aware of the requirements to inform the tenant of their rights to seek a suspension of warrant.

Set aside the warrant due to oppression in its execution

Remember that the categories of oppression are not closed *Camden v Akanni* (1997) 29 H.L.R. 845 - so there is always an opportunity to find a new angle.

However there must be someone to blame. Somebody must have acted in a way which is open to criticism *Jephson Homes Housing Association v Moisejevs* (2001) 33 HLR 54- it is not enough that its unfair that your client has been evicted!

Oppression cases

- *Barking & Dagenham v Saint* (1999) 31 HLR 620 CA: Claimant obtains a suspended possession order. The Defendant is then remanded in custody. He tells the HB department he is inside. They send a form to renew his HB to his home!. HB ceased and the Claimant evicts him. The Court of Appeal set aside the warrant on the basis of oppression. The Claimant had been relying on their own wrong. They knew he was not aware of the impending eviction and could not apply to suspend the warrant

Oppression cases

- *Southwark v Sarfo* (1999) 32 HLR 602: tenant made an application for HB. Her housing officer sent her a copy of a report that said "stop court proceedings please". Her HB was delayed and the warrant was executed. Court of Appeal set aside the warrant on the basis of oppression. Tenant was entitled to conclude from the report that no further steps would be taken until her HB was sorted. Also authority had failed to comply with their own policies on rent arrears

- *Lambeth v Hughes* (2001) 33 HLR 33 CA - failure to indicate the possibility of relief under HA 1985,s.85(2) in either the notice of eviction or through advice obtained from housing officer was oppressive. Also failure by a bailiff to warn the tenant of the eviction in enough time for her to act on it was itself oppressive.

Oppression cases

- *Hammersmith LBC v Lemeh* [2001] 33 HLR 23,CA tenant received a warrant of possession and went to the court office to seek a stay. The court staff told him that there was no outstanding warrant . This was wrong. He was evicted. The Court of Appeal held that oppressive conduct is not confined to the conduct of the landlord but could include any state of affairs which were oppressive to the tenant (but see *Moisejevs* below).
- *Jephson Homes HA v Moisejevs* (2001) 33 HLR 54: tenants paid off the arrears but did not apply to the court to suspend the warrant. The warrant was executed. In the Court of Appeal the tenants argued that an end result which was unfair to the tenant was sufficient to establish oppression. The Court of Appeal rejected this argument.

Set aside the warrant due to oppression in its execution

So in summary to pursue an oppression application

- Look closely at the evidence.
- Identify the act or omission that can be criticised
- Identify how the said act or omission has prejudiced the evicted party
- Prepare a detailed witness statement to accompany the re-entry application

Abuse of process

- For detail under this category in particular in relation to applications for warrants after 6 years see Sarah's talk.

- Extreme example of abuse of process was *AA v Southwark* [2014] EWHC 500 (QB) – tortious conspiracy to evict and misfeasance in public office on the part of officer

- See also *Nicholas v Secretary of State for Defence*, Chancery Division, 24 August 2015, where the application for permission to enforce the writ in the High Court did not mention that the Supreme Court had granted an extension of time to lodge an application for permission to appeal. The High Court held that the omission of that information was important because it was something that should have been considered when deciding whether to grant permission. Further there had been an abuse of process by failing to give notice of the application for permission contrary to CPR 83.13.