COVID-19 - trespasser possession and injunction proceedings - Application of the new Civil Procedure Rule Practice Direction 51Z

The back drop to this case is that the new Practice Direction CPR 51Z effectively stays possession proceedings and enforcement issued pursuant to CPR 55 for 90 days from March 2020.

It does not need to be reiterated that hospital beds are now a scarce resource and in the recent case of **University College London Hospitals NHS Foundation Trust v MB[2020] EWHC 882 (QB)** a patient was thought to be "bed-blocking" – a serious issue amidst a pandemic when the NHS is under stress.

The NHS trust brought a claim for possession pursuant to CPR 55 and then applied for an interim injunction against a patient which, if granted, would be tantamount to a final order securing possession despite the stay imposed by the new PD. The basis of the possession claim was that the licence to occupy the bed/room had been terminated, no tenancy or enhanced rights being applicable in the circumstances. At law therefore, there was an unqualified right to possession save for public law, human rights or proportionality arguments.

The facts were that the patient continued to occupy a bedroom on a 12-bed ward intended for those requiring acute neuropsychiatric care for a maximum of 28 days. She had been there over a year and suffered from a number of complex psychological conditions. After detailed consideration, the staff at the hospital believed that she could be cared for at home with a care package arranged with the local authority (Camden) and that it was in her best interests to be cared for in that way as the risk to her in hospital was the increased risk of contracting COVID-19. However, MB refused to be discharged and leave the hospital because she did not agree with the care plan (although she did in general agree she should be discharged). She wanted guaranteed 24 hour care for 12 months whereas the care package on offer was adapted accommodation and 24-hour care for three months, subject to review. She also requested various alterations to the property before she moved in.

In defence to the claim, MB argued that requiring her to leave hospital without her concerns being addressed would breach either/or articles 3 or 8 of the European Convention on Human Rights as it would amount to discrimination on the grounds of disability and breach of the duty to make reasonable

adjustments contained in the Equality Act 2010 as well as breach of the Public Sector Equality Duty (s149). She also argued that the decision may lead to self-harm or suicide and a request was made for time to obtain medical evidence (independent of the treating doctors at the NHS Trust) in support of her defence.

In relation to her application to rely on independent medical evidence, it was held that it would be inappropriate to allow the patient to adduce independent medical evidence because: (a) a decision by an NHS hospital not to provide in-patient care in an individual case might be challengeable on public law grounds. However, if such a decision were taken on clinical grounds, it was not open to a claimant to adduce expert evidence with a view to impugning the clinical basis of the decision. It would go well beyond the limited circumstances in which expert evidence was admissible in judicial review proceedings; (b) clinicians could not be required to provide treatment contrary to their own clinical judgement; the treating team's view was that the patient did not require hospital care and could safely be discharged. It would be wrong for the court to entertain expert evidence with a view to compelling them to continue to provide care, even if other clinicians took a different view; (c) even if independent evidence were relevant, the COVID-19 emergency meant that there was no prospect of obtaining it within a reasonable time. The practical effect of an adjournment would be to delay the patient's discharge at precisely the time when her bed was most needed by other patients, thus defeating the purpose of the trust's application. The evidence provided by the Trust was detailed and balanced, and reflected conclusions reached by an impressive multi-disciplinary team (see paras 42-45 of judgment).

The court agreed with the treating staff and found that MB's physical healthcare needs could be met at home with the care package currently offered; the patient found it difficult to trust those from the hospital and local authority; considerable efforts had been made by the local authority to accommodate her concerns, but it was unrealistic to suppose that they would ever be addressed to her satisfaction; the patient used threats of self-harm and suicide to persuade others to give her what she considered she needed, but she had not resorted to self-harm in the past; the risk of suicide or self-harm was moderate to low, and would be managed by 24-hour care; the patient would suffer extreme distress if discharged, but that was capable of being managed by the 24-hour care (para.46).

COVID-19 - trespasser possession and injunction proceedings - Application of the new Civil Procedure Rule Practice Direction 51Z continued...

The effect of CPR PD 51Z was widely discussed at the training provided by St Ives Chambers last week via our Zoom seminar and was a focal point in this case it is therefore of interest to housing practitioners although not a case brought by a housing authority or association. As we know, the effect of CPR PD 51Z is to stay possession proceedings for 3 months. In this case it was clear that the NHS Trust had terminated the patient's licence to occupy the room, and she was now a trespasser. Ordinarily, the Trust would be entitled to seek an order for possession pursuant to CPR 55 but that was not currently possible because of the general stay on possession claims. However, as practitioners are aware, CPR PD 51Z does not apply to injunction applications and we are seeing numerous applications for injunctions to deal with anti social behaviour and breaches of the social distancing rules.

The case of Manchester Corp v Connolly [1970] Ch. 420 and Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11 had previously held that a person with a right or interest in land had a general right to apply for an injunction against a trespasser. In this case, a hospital amounted to an owner of land but it was noted that the effect of the Trust's application for an interim injunction, if granted, would be tantamount to final relief, which meant that it should not be granted unless the court was satisfied that there was clearly no defence to the action. The balance of convenience also had to be considered (paras 37-38, 51).

The question that then had to be considered was whether the patient had a defence? The court considered that the need for the bed by others had to be considered alongside the patients own needs and did not accept that art.3 would be breached by discharging the patient. The circumstances being highly unusual and meaning that hospital beds were in desperate need were key factors. The positive duty was only to take reasonable steps to avoid suffering, R. (on the application of Pretty) v DPP [2001] UKHL 61 followed. MB would be cared for by way of 24 hours care at home which would adequately deal with any deterioration in her mental health. When looking at her arguments pursuant to article 8, the court had to consider, even if infringed, whether such action was justified. It found that it was when balanced against the rights of others who needed hospital treatment. The court held that MB's arguments under the Equality Act 2010 were also without merit. The patient had no arguable public law defence to the claim (paras 54-62).

COVID-19 - trespasser possession and injunction proceedings - Application of the new Civil Procedure Rule Practice Direction 51Z continued...

The final question to be addressed was that of the balance of convenience – The court held that without an arguable defence, the balance of convenience was in the Trust's favour. The court went on to consider the situation that the defence did have real prospects of success and found that the the needs of patients who needed inpatient care compared with MB's wish to be cared for in hospital while her concerns were further considered when she had 24 hour care at home meant that the balance of convenience fell firmly in favour of the Trust in any event. (paras 63-64).

Accordingly, an injunction was granted with the effect of removing MB from the room.

The order was:

> (a) MB must leave the Ward by [12 noon the next day], provided that by that time the Hospital has made arrangements to facilitate the transfer of MB (by ambulance trolley and ambulance) and her belongings from the Ward to the accommodation to which she is to be discharged;
>
> (b) if such arrangements are made, MB must not obstruct or impede their implementation;
>
> (c) MB may thereafter not re-enter the Hospital's premises without the prior written permission of the Claimant, save if admitted by ambulance.

This effectively acts as a final order despite the possession claim not yet being considered.

Whilst the injunction was an effective way of obtaining possession despite CPR 51Z PD, it can only be used against trespassers and in strict circumstances where there is no arguable defence and the balance of convenience lies firmly in favour of granting the relief. It is unlikely to apply in many housing situation and would need to be assessed on a case by case basis.

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St Ives Chambers
16 April 2020