CIVIL PROCEDURE: Application by non-party to set aside judgment under CPR 40.9

Winston Jacob

Are individual directors or shareholders of a company entitled to apply under CPR 40.9 to set aside a judgment against the company? No, said the Court of Appeal in *Mohamed v Abdelmamoud* [2018] EWCA Civ 879.

CPR rule 40.9 states:

"A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

The appellants (As), each of whom was both a director and a shareholder of the second respondent company, applied under CPR 40.9 to set aside a default judgment against the company. They were successful at first instance but the decision was overturned on appeal. They appealed to the Court of Appeal.

The Court of Appeal noted that CPR 40.9 did not empower the court to set aside a judgment whenever it might think it appropriate. It was a precondition that the applicant was "directly affected" by the judgment. Furthermore, it could hardly be appropriate to allow a third party to apply to set aside a judgment unless he would be in a position to either defend the claim on the Defendant's behalf or to put forward a defence of his own.

The Court of Appeal held that As were not "directly affected" by the judgment and therefore they had no standing to bring an application under CPR 40.9.

Their status as directors gave them neither a personal interest nor decision-making powers, except as members of the wider board of directors. To allow individual directors to apply under CPR 40.9 would subvert the allocation of responsibility for management to the board.

Meanwhile, members of a company (whether a charitable company or an ordinary commercial company) could not be considered to be "directly affected" by a judgment against the company. Any other conclusion would allow particular members to take upon themselves matters allocated to the board and, moreover, to do so without having to satisfy requirements such as those laid down by the Companies Act 2006 for derivative claims.

In unanimously dismissing As appeal, the Court of Appeal has provided some helpful guidance on the circumstances in which a party may be permitted to make an application under CPR 40.9.

CIVIL: PHILIP JAMES CLAY v TUI UK LTD [2018] EWCA Civ 1177

Napier Miles

When do your own actions break the chain of causation? Mr Clay went on holiday to Tenerife with his wife, children and his parents. The family had one room and the grandparents another. The rooms were next door to each other on the second storey and both had balconies. One evening, having put the children to bed, Mr Clay joined the other grownups on the grandparents' balcony for a drink. He shut

the sliding balcony door behind him to keep insects out of the bedroom and heard a "click". It became clear the glass door had locked itself and them on the balcony. They were in no danger and nor were the children. The night was warm. After 30 minutes of trying and failing to attract attention Mr Clay decided to try to cross over to the balcony of the other room. Before doing so he discussed his plan and the risks with his father. Mr Clay was a security/fire officer at an oil refinery and his father had been a truck driver with health and safety responsibilities. The Judge found they were sensible people not young men on a spree. The balconies were over 3 feet apart but there was a ledge running under each balcony which lessened the gap to 78 cms Unfortunately when he trod on the ledge it gave way and he fell. The ledge was simply a design feature albeit it looked to be part of the balcony and made of the same concrete. He was seriously injured but made a good recovery over time. He brought an action under the Package Tour Regulations. The Judge found the lock was defective and in breach of local standards. The key issue was whether his action in stepping on to the ledge was so unreasonable as to break the chain of causation created by the door locking. The Trial Judge said it was and the Court of Appeal agreed but with a powerful dissenting judgement by Moylen LJ . So there is lots of good material on both sides for when novus actus interveniens next blips up on the radar.

Property: Assessing General Damages in Unlawful Eviction Cases: Smith v Khan [2018] EWCA Cave 1173, 17 May 2018

Barbara Zeitler

Mr Khan had granted a twelve-month assured shorthold tenancy to the Claimant's husband in June 2014. In March 2015 the husband left the property and disappeared. On 1 April 2015 Mr Khan handed Mrs Smith a letter purporting to terminate her tenancy. A law centre contacted Mr Khan pointing out that the notice was unenforceable because Mrs Smith had a legal right to occupy the property under s. 30 Family Law Act 1996. On 15 April 2015 Mr Khan entered her property and changed the lock. Mrs Smith ended up sleeping on the floor of a friend's house for many months.

A district judge made an order for re-entry in mid May 2015, but it emerged the Mr Khan had re-let the property. Mrs Smith managed to retrieve her belongings, much damaged, at the end of June 2015. Her claim against Mr Khan proceeded as a damages claim.

At first instance, the judge awarded Mrs Smith general damages for trespass at £40 per night by reference to the rent payable - similar to disrepair cases – and for interference with her belongings in the amount of £9,280; aggravated damages (£1,500) for injury to feelings; exemplary damages (£1,200); damages for harassment (£500) and for loss of the property (£1,000). The award of damages for trespass covered the period from the eviction to the date for the hearing.

Mrs Khan appealed against the award of general damages, arguing that general damages should have been calculated at £200 per day.

The circuit judge awarded damages for trespass at £130 per day, but limited the period during which damages were due to 28 days from 15 April 2015 on the basis the Claimant's husband had surrendered

the tenancy and Mrs Smith's ability to remain at the property would have been limited to 28 days by s. 3 Protection from Eviction Act 1977.

The appeal court, noting that there had not been a surrender, but that Mrs Smith had abandoned her claim to be re-instated to the property, held that she was entitled to damages until 30 June 2015 (the end of the contractual term) because on that date neither her husband nor Mrs Smith was in physical occupation of the property. Further, the court held that in unlawful eviction cases damages must compensate the tenant not only for the letting value of the property, but also for anxiety, inconvenience and mental stress. The circuit judge been correct to award £130 per day, making a total of £9,880 for general damages in addition to the other unchallenged heads of damages.