

Possession in a Crisis

Those practising property law are stuck in the traps. Ongoing claims are stayed, claims which would have been issued based on pre-viral arrears may not be issued, notice periods have been extended and claims which would have arisen over the current period, whether or not arising because of the crisis, are also not allowed. When the doors are re-opened, expect a rush.

Nevertheless, in limited circumstances, property litigation continues.

In An NHS Foundation Trust v MB [2020] EWHC 882 (QB), The National Hospital for Neurology and Neurosurgery felt it needed to discharge an inpatient from a small specialist neuropsychiatric ward where patients were rarely expected to stay more than two weeks. However MB's occupation of its space was as a licensee, such that it needed to terminate the licence and enforce its right to possession at a time when possession claims were not taking place.

The Court's changed priorities are determined, during the COVID-19 'lockdown', by CPR51ZPD. The hospital relied on the fact that the obstacles to attaining possession do not apply where (as here) a Claimant seeks urgent injunctive relief, rather than relying on a conventional CPR55 claim.

MB's alleged that a care package proposed by the hospital on her discharge placed her at considerable risk of self-harm or distress. She wished to run a public law defence that the hospital was contravening its obligations under ECHR convention rights and the Equality Act 2010 (including the 'public sector equality duty', s.149).

MB had been given a side room, 24-hour mental health specialist nursing, her preferred staff, therapy sessions at convenient times so her sister could attend, and four toothbrushes each day to accommodate an outcome of her OCD. However during her treatment, both MB and her sister had (according to MB) been intimidating and adversarial, and her behaviour was consistently challenging.

In August 2019, MB initially declined to take part in a post-discharge community therapy discharge assessment, but then did so aggressively. Consideration of the appropriate care package took place over a year and she initially refused an offer of temporary, licensed property on the basis that it would be detrimental to her health.

By October 2019, a suitable property was found for MB, subject to the need for the local authority to make adaptations. In March 2020, she signed a tenancy agreement for that property, but then refused to leave the hospital unless and until guaranteed 24-hour care for at least a year.

The hospital gave evidence that "*since [MB] signed the tenancy agreement, the situation at [the Hospital] and within UCL H as a whole, has changed dramatically due to the COVID-19 pandemic. We are now in desperate need of beds for patients unwell with COVID-19 and all patients who are medically fit for discharge are being discharged home or into other care arrangements that are*

deemed safe, as per the Government's guidance". That guidance urges hospitals, wherever possible, to discharge patients to be cared for at home.

MB was issued a Notice to Quit, terminating any licence she had to occupy a hospital bed, and it was explained to her that her move to the new flat was being expedited in the light of the impact of the pandemic on the hospital and its services. She refused to go. In response to the claim, it was argued that unless MB's concerns were satisfactorily addressed, she would suffer extreme distress, which may lead to self-harm or suicide.

Chamberlain J explained the property law framework in this way: *"The Claimant brings this claim to enforce its private law rights as property owner. As a matter of private law, MB became entitled to occupy the room she is currently in because the Claimant permitted her to do so by admitting her to the Hospital. The Claimant has now terminated her licence to occupy that room. It follows that she is now a trespasser. Ordinarily, the Claimant would be entitled to seek an order for possession pursuant to CPR Pt 55. That is not currently possible because of the general stay on possession claims effected by CPR 51Z PD. The stay does not, however, affect claims for injunctions: see para. 3 of the Practice Direction. A property owner is in general entitled to an injunction to enforce its rights as against a trespasser: see the decisions of the Court of Appeal Manchester Corporation v Connolly [1970] Ch 420 and Supreme Court in Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11, [2009] 1 WLR 2780. A hospital is no different from any other proprietor in this regard."* (para.37).

Injunctive relief would only be granted where (as here) there would clearly be no defence, subject also to other familiar discretionary factors, such as the balance of convenience (para.38).

MB also asked the Court to adjourn for further medical evidence, which the Court declined to do a number of reasons (paras.43-45).

The Judge considered that *"Patients have no right to occupy beds or rooms in hospitals except with the hospital's permission. A hospital is entitled as a matter of private law to withdraw that permission. In deciding whether to withdraw permission, the hospital is entitled and indeed obliged to balance the needs of the patient currently in occupation against the needs of others who it anticipates may require the bed or room in question. Unless its decision can be stigmatised as unlawful as a matter of public law, there is no basis for the court to deny the hospital's proprietary claim to restrain the patient from trespassing on its property."* (para.51)

The Court was unpersuaded that MB's Article 3 rights were infringed because there was no positive act by the state amounting to torture or inhuman or degrading treatment, but rather a more limited negative risk that this would be the indirect effect. Similarly, the state has a wide margin of appreciation in relation to Article 8 (privacy and family rights) which were not breached. Absence of reference to a discharge of the Public Sector Equality Duty was also not indicative of its breach.

MB sought to delay possession by a week once the injunction had been granted. Given the basis of that decision, its urgency and context that the bed was needed by other patients, that request was also unsuccessful.

This, then, is a rare possession claim which a licensor was able to pursue at a time when possession claims are otherwise at a standstill. MB's right to occupy a hospital bed was considered a license, upon whose termination the hospital was able to claim possession by way of urgent injunctive relief. This does not, however, mean that trespassers claims are to be dealt with 'as normal' during the crisis, or that landlords need only seek injunctive relief to subvert the obstacles which are currently constructed. This is therefore likely to be an exceptional case. Normal service will, it is hoped, be resumed a little later in the year when the courts will have a great deal of catching up to do.

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