Case No: 9PB76894

IN THE COUNTY COURT SITTING IN BIRMINGHAM

Date: 06/11/2015

Before :

DISTRICT JUDGE SALMON

- -

Between :

BIRMINGHAM CITY COUNCIL	**Claimant**
- and -	
MR C AND MRS S MONDHLANI	**Defendants**

- -

- -

Ms Amy Knight (instructed by **Birmingham City Council Legal Department**) for the **Claimant**
Mr Andrew Byles (instructed by **The Community Law Partnership**) for the **Defendants**

Hearing dates: 30th October 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DISTRICT JUDGE SALMON

District Judge Salmon : -

Introduction

1. This case arises from a "pilot scheme" operated by Birmingham City Council who wants to transfer to the High Court the enforcement of many of its County Court residential possession orders. It has entered into contractual arrangements with Marston Group Limited who engages the services of High Court Enforcement Officers on behalf of their clients. Applications for transfer are made by Birmingham City Council itself but if transfer is granted the remaining steps including the obtaining of a writ of possession are handled by Malcolm Butler and Co a firm of solicitors who act for Birmingham City Council's agents, Marston Group Limited. Malcolm Butler and Co operate from Marston Group Limited's premises in Birmingham.
2. Birmingham City Council issues all its possession claims in the County Court. Whilst it is possible to issue such claims in the High Court, if a landlord does so it is not entitled to its costs (see section 110(3) of the Housing Act 1985). The enforcement of possession orders normally takes place in the County Court.
3. Bailiffs of the County Court enforce warrants of possession issued in the County Court. A writ of possession in the High Court is enforced by High Court Enforcement Officers who are directly engaged by the party who has the benefit of the underlying possession order.
4. In Birmingham there is a serious backlog of cases and a limited number of bailiffs. This means that from the issue of a warrant of possession to the

eviction being carried out can be up to 12 weeks. Counsel for the Defendants told me that for most other parts of the country the period is 2-3 weeks.

5. Birmingham City Council believe that there would be substantial advantages to the management of its social housing stock if it were able to transfer proceedings to the High Court for enforcement and engage High Court Enforcement Officers to execute writs of possession. The key perceived advantage is that enforcement in the High Court makes the process of eviction quicker. There are also other significant advantages arising from the greater degree of flexibility available to Birmingham City Council if it is enforcing a possession order under a writ of possession and has engaged High Court Enforcement Officers.

6. These advantages were set out in a witness statement in support of this application by Ms Sabah Sania and expanded upon in a Report by Tracy Holsey to an internal meeting of Birmingham City Council on 10th March 2015 that I assume endorsed the pilot scheme.

7. In more detail the advantages are said to be: -

   (a) If the time from warrant/writ to eviction is shorter then it reduces the potential for lost revenue and also allows for housing stock to be re let to tenants on the waiting list. The waiting list is over 13,000 and includes 2,200 homeless persons. The acuteness of the issue is illustrated by the fact that Birmingham City Council issues 1,500 applications for warrants of possession each year and anticipates this number is likely to rise given changes to welfare benefits brought in by this and the previous government.

   (b) Writs of possession do not expire after 12 months.

(c) A High Court Enforcement Officer, on instructions from Birmingham City Council, can agree to postpone enforcement on terms. A bailiff will only cancel an eviction of their own accord if all of the rent arrears are paid. Birmingham City Council can instruct the bailiff not to enforce the possession order. If it does so because it is prepared to accept an agreement in respect of arrears and, having cancelled the eviction, that agreement is broken, it has to apply again for a warrant with another delay of 12 weeks. If there was a writ of possession and its execution had been postponed for these reasons and the agreement was broken Birmingham City Council could instruct the High Court Enforcement Officer to enforce it.

This Case

8. The Defendants have since 1997 been secure tenants of properties let by Birmingham City Council. Since 21st February 2005 they have been secure tenants at 66 Jiggins Lane, Birmingham ("the property"). It is a 5-bedroom property. They live there with their 14 year old daughter.

9. On 17th December 2009 District Judge Sheldrake (at a hearing the Defendants did not attend) made a possession order requiring the Defendants to give up possession of the property on or before 14th January 2010. He further ordered that this order was not to be enforced provided they paid £71.76 per week in addition to their rent. At the time of that order the arrears of rent were £1,058.39.

10. On 31st August 2011 Birmingham City Council requested a warrant of possession as the terms of suspension had been broken. A warrant was issued that day and a date for eviction was fixed for 12th October 2011. An

application was made by the Defendants to suspend the warrant of possession on 3rd October 2011. District Judge Sheldrake on 7th October 2011 adjourned the application for suspension until 7th December 2011 and suspended the warrant until that hearing. On 7th December 2011 District Judge Dowding (as she then was) adjourned the application again and suspended the warrant to the next hearing. The reason behind this adjournment related to housing benefit issues. On 30th January 2012 District Judge Bull (at a hearing the Defendants did not attend) dismissed their application to suspend the warrant. The judge's notes of this hearing show he was told that the Defendants were failing to make payments in respect of a non dependent adult child who then lived in the property and were not co operating with Housing Officers of the Council. Birmingham City Council applied to re issue the warrant of possession and a date for eviction was set for 26th March 2012. On 22nd March 2012 the Defendants made an application to suspend the warrant. Deputy District Judge Hammersley suspended the warrant of possession on terms that the arrears - which were at that hearing £692.36 - be paid off at £5 per week in addition to the current rent. The terms of suspending the warrant were not complied with. A fresh application was made for a warrant of possession with an eviction date of 17th March 2014. On 12th March 2014 the First Defendant applied to suspend that warrant of possession. On 13th March 2014 District Judge Maughan suspended the warrant of possession on terms that the arrears of £1,601.40 be paid off by a lump sum payment of £500 and the remaining arrears be thereafter paid off at £62.85 per month in addition to the current rent. On 15th September 2014 Birmingham City Council made a request to the Court to

re issue a warrant of possession as the terms suspending the operation of the warrant had been breached. The warrant was re issued and a notice of eviction sent to the Defendants with a date of 1st October 2014. On 30th September 2014 District Judge Bull suspended the warrant of possession on terms that the arrears of £1,669.44 were paid at £23.22 per week in addition to current rent. This warrant of possession cannot now be re issued as warrants of possession in the County Court have a 12 month shelf-life (see CPR83.3(3)).

11. The terms of District Judge Bull's suspension of the warrant of possession have been breached. Birmingham City Council did not, as they could have done, request a re issue of a warrant of possession. Instead in accordance with their pilot scheme, it issued an application on 21st July 2015 asking the Court to make an order pursuant to section 42 of the County Courts Act 1984 to transfer the proceedings to the High Court for the purpose of enforcement. Perhaps surprisingly the application notice asked the judge to deal with the application without service of the application and without a hearing. The application was referred to District Judge Bull by the Court staff. He ordered that it be listed for a hearing on 4th September 2015 and ordered Birmingham City Council to file a skeleton argument setting down the principles the Court should apply in considering the application. The First Defendant says he received the application around the week of 17th or 24th August 2015.

12. The Defendants prior to the hearing on 4th September 2015 had gone to see solicitors at the Community Law Partnership. An emergency legal aid certificate was issued on 28th August 2015. The terms of the certificate I have seen included not only defending the current proceedings but also the

bringing of a counterclaim against Birmingham City Council (limited to obtaining a surveyor's report).

13. On 4th September 2015 the Defendants attended Court and were represented by Mr Bains of the Community Law Partnership. I adjourned the hearing to 27th October 2015 with directions for the Defendants to file and serve witness evidence in response to the application and a Skeleton Argument in reply to Birmingham City Council's skeleton argument a copy of which was provided to Mr Bains.

14. Subsequent to the hearing on 4th September 2015 I made arrangements for a number of identical applications in other cases that had not yet been listed to be listed before me on 27th October 2015.

15. On 10th September 2015 the First Defendant made a witness statement in opposition to the application to transfer the proceedings and Mr Stark of Counsel drafted a Skeleton Argument.

16. On 12th October 2015 the Defendants made an application under CPR 20.4 to add a counterclaim seeking damages in respect of alleged disrepair. This application also included a request that the application for transfer to the High Court be adjourned pending the outcome this application. The application was issued by the Court and referred to a District Judge on 21st October 2015 who re referred the application to me. I was on annual leave until 26th October 2015 and therefore did not see the application until my return.

17. At the hearing on 27th October 2015 Birmingham City Council withdrew all their other applications for transfer to the High Court save for three cases. I

adjourned two of these applications, as it transpired that the tenants not been served with the applications. This left the Defendants case and one other.

18. I refused an application initially made by Counsel for the Defendants and subsequently supported by Counsel for Birmingham City Council to adjourn the matter to be heard by the Designated Civil Judge and adjourned the hearing of the Claimant's application to transfer and the other case to Friday 30th October 2015. Unfortunately neither Counsel who appeared for the Defendants that day nor I made any reference to the application to add a counterclaim which had not been served.

19. On 30th October 2015 the other case was dealt with by way of a consent order dismissing the application to transfer to the High Court. This therefore left only this case to consider. Counsel for the Defendants raised the issue of the Defendants application to add a Counterclaim. It was agreed by the parties that I should proceed to consider the application by the Defendants with Birmingham City Council's solicitor giving oral evidence in respect of any factual matters relied upon by them in opposition to the application.

20. It is common ground that I should determine the Defendants' application first because it is agreed if permission is given then the proceedings should not be transferred to the High Court.

21. On 30th October 2015 I considered the material set out in a hearing bundle prepared by Counsel for Birmingham City Council along with the Defendant's application dated 12th October 2015 and also oral evidence by Miss Bello a solicitor from Birmingham City Council in response to the application. During the course of the hearing an issue arose in respect of the procedures adopted by the Council in other cases that fellow judges have transferred to the High

Court. I heard some additional oral evidence in respect of those cases and also on what the position of the Council would be if this case were transferred to the High Court. I allowed Counsel for the Defendants to cross-examine Miss Bello. I became clear that her understanding about matters in respect of other cases was based on what she had been told by others and was somewhat vague. As is set out later in this judgment, what has been occurring in other cases is of wider significance and so I had the fullest picture I ordered that Birmingham City Council provide the Court with a witness statement with regard to this. I received a statement from Mr David Fearn dated 2nd November 2015.

22. I was also provided at the hearing with an up to date rent account (which the parties agreed was accurate). As of 26th October 2015 the rent arrears were £2,382.50.

The Application to add a Counterclaim

23. The application to add a counterclaim is supported by a witness statement of Mr Bains dated 10th October 2015. This statement deals almost exclusively with the suggestion that the application for transfer should be adjourned due to an inadequate time estimate. However, at paragraph 12 it states that the Defendants rely on the first Defendant's witness statement provided in response to the application for transfer.

24. The basis of the Counterclaim is said to be actionable disrepair at the property. The First Defendant in his witness statement of 10th September 2015 sets out the alleged disrepair:-

(a) In June 2014 a radiator in one of the bedrooms was removed by the Council in order to carry out some repairs. It is said that it has not been replaced despite repeated requests to the Council.

(b) There is mould and dampness in another bedroom and this was reported to the Council in January 2015 by telephone. The 1st Defendant cannot remember to whom he spoke. Although in relation to the radiator the First Defendant made repeated complaints despite no one coming out to investigate the mould and dampness he does not allege he ever repeated this complaint.

(c) It is alleged that the back door needs replacing as it has become warped due to unspecified water damage. It is said it has been damaged for 2-3 years and has been reported to the Council over the telephone claims line. It is acknowledged that the Council have attempted to repair the door but it is alleged the repairs were insufficient.

25. Miss Bello's oral evidence (based on her having spoken to the Housing Department who looked at their computerised repairs system) was:

(a) A job was raised in April 2014 that included the need to remove the radiator. Following the completion of those works (I was not given a precise date) on four occasions from 11th July 2014 to 28th August 2014, unsuccessful attempts were made to gain access to the property. A note on the computer system shows that on 24th December 2014 the Council noted that the radiator still needed to be replaced and the system shows it was replaced on 29th January 2015.

(b) There were reports to the Council in September 2012 logged as condensation dampness affecting a number of rooms including a front bedroom and the bathroom. On 8th October 2012 an extractor fan was fitted in the bathroom. There are no other logged reports concerning mould or dampness.

(c) There was a report of water damage to an external door on 7th October 2009 and that was fixed on 8th October 2009. There are no other logged reports in respect of external doors. The computer records do however show that due to a failure by the Defendants to be present at the property so that the mandatory yearly gas inspection could take place the Council have on 3 occasions had to force entry to the property to carry out the inspections.

(d) The computerised records, that a member of the Housing Team interrogated to give her the above information, do record telephone complaints made in respect of disrepair and that those receiving telephone complaints are required to log them.

26. The application made by the Defendants is defective in the following respects. CPR PD20 requires: -

(a) The application notice should be filed together with a copy of the proposed additional claim (see paragraph 1.2 of PD20).

(b) Where delay has been a factor contributing to the need to apply for permission then an explanation of the delay should be given in evidence (see paragraph 2.2 of PD20).

27. Counsel for the Claimant asked me to dismiss the application due to the non-compliance with the Practice Direction and in the alternative because the

Counterclaim's prospects of success were weak and that the application was in reality an abusive device to stop the Court considering the application for transfer to the High Court.

28. She submitted:-

(a) The Defendants have experienced solicitors acting for them. Following amendments made to the overriding objective since the Jackson reforms, dealing with cases justly and at proportionate cost includes so far as is practicable enforcing compliance with Court practice directions.

(b) The failure to provide the proposed pleading is fundamental. In particular in this case the potentially most serious allegation of damp and mould is not supported by any evidence as to why this would be actionable under the implied repairing covenant under section 11 of the Landlord and Tenant Act 1985. Mould and dampness can arise due to disrepair in the structure of a building (and any damp or mould present may itself cause damage to the structure) but equally mould and dampness not giving rise to structural damage can arise from non-actionable causes such as condensation.

(c) The application was made in October 2015 when the alleged causes of action arose some time ago. No explanation for the delay has been provided.

(d) The merits of the proposed Counterclaim are poor. The Council's computer records are detailed and do not support the Defendants' case on notice or in respect of the alleged missing radiator. The application was not supported by an expert surveyor's report.

(e) Counsel asked me to infer that in effect the application was an abusive tactical move by the Defendants to prevent transfer to the High Court and/or eviction.

29. Counsel for the Defendants in response did not seek an adjournment of the Defendants application to correct the procedural defects with the application. He submitted: -

(a) The material provided in support of the application raised an arguable claim for damages for disrepair.

(b) The potential damages would be in the region of £1,000 to £1,500 and would substantially extinguish the rent arrears.

(c) I should take judicial notice of the fact that the reason that an application for a Counterclaim had not been made earlier was because the Defendants had been acting in person without the benefit of legal advice.

(d) That I should exercise my discretion under CPR20.4 and permit a Counterclaim to be brought despite the procedural deficiencies in the application as to do so would be just and proportionate and in accordance with the overriding objective and that delay of itself was not the determinative factor where a fair trial of the Counterclaim could take place.

30. I was referred to *Rahman –v- Sterling Credit [2001] 1* WLR496 and a decision of His Honour Judge Grant in *Midland Heart Limited –v- Makkedah Idawah* (unreported but available via Westlaw) in July 2014.

31. It is common ground that the effect of these decisions is that I have a discretion to give permission to add a Counterclaim. In *Rahman op cit* Lord Justice Mummery said at paragraph 35:-

> *"..The real question is whether the action is at an end, so that there are no longer any proceedings by the claimant to which the defendant can respond with a Counterclaim. This action is not at an end. Mr Rahman and his wife are still living in the property. Sterling continues to accept monthly instalments. Sterling has not yet obtained possession of the property. It cannot do so without a further application to the Court for a warrant of execution, the existing one having expired at the end of 12 months and more than six years has elapsed since the possession order was made: CCR Ord 26, r 5(i)(a) and Hackney London Borough Council v White (1995) 28 HLR 219. Although judgment for possession has been obtained, it has not been satisfied and it cannot be satisfied without a further application to the Court for a warrant of execution. Such an application would be proceedings to enforce the security relating to the credit bargain within the meaning of section 139(1)(b). ...."*

32. In relation to the matter of delays on the facts of that case he said at paragraph 39:-

> *"...As for delay in raising the Counterclaim I would not regard this alone as a reason for refusing permission ...."*

33. In *Midland Heart, op cit* His Honour Judge Grant considered an appeal from District Judge Williams who had granted permission to add a Counterclaim in circumstances analogous to these. The landlord had obtained a possession order in November 2002. On seven occasions the Court had suspended the warrant of possession. On 31st October 2013 the landlord requested a warrant of possession to be re-issued. An eviction date was set for 6th February 2014 (in passing I note this seems to illustrate the bailiff delays here at Birmingham). District Judge Williams on 6th February 2014 heard an application to suspend the warrant of possession and an application dated 20th January 2014 to add a Counterclaim. Prior to the issue of the application

the tenant's solicitors had intimated a claim in January 2013 supported by an expert report from Mr Wheeler dated 28th November 2012.

34. However, unlike this application the tenant's application in that case included in addition to witness statements in support, a proposed Counterclaim along with an updated re inspection report from Mr Wheeler dated 27th January 2014. District Judge Williams gave permission for the issue of the Counterclaim. His Honour Judge Grant held that District Judge Williams had the power to add a Counterclaim and that his exercise of his discretion was not one he should interfere with.

Discussion

35. I reject the submission by Counsel for Birmingham City Council that as the practical effect of allowing a Counterclaim was that the claim would remain in the County Court the bringing of the application in the circumstances of this case was merely a device to thwart the Council and therefore an abuse of the process of the Court. In my judgment the bringing of this application in the circumstances of this case cannot be said to be such a manipulation of the Court process so as to be abusive in its own right and meaning that I should dismiss the application on this ground alone (see commentary in *White Book3.4.3*).

36. CPR 20.4 provides that a Defendant may make a counterclaim against a claimant at any time after the service of his defence with permission of the Court. In considering how to exercise my discretion I should consider the overriding objective to ensure that the proceedings are conducted justly and at proportionate cost.

37. It is common ground that the application is procedurally defective for the reasons outlined. I have no explanation as to why a proposed counterclaim was not provided with the application. There is no witness evidence explaining the delays. I do know that (a) the Defendants did not have solicitors acting for them until 28th August 2015 (b) if their evidence is accepted they have been complaining to Council about disrepair and, I assume, hoping that it would be rectified and (c) the Defendants could not afford to bring proceedings without the assistance of legal aid.

38. The proposed counterclaim is not statute barred. If I refuse permission to bring the counterclaim the Defendants can still bring separate proceedings.

39. If I grant permission to bring a counterclaim it does not stop Birmingham City Council continuing to seek to enforce their possession order and money judgment. No issue of set off arises in circumstances such as these, as a set off has to be pleaded in a defence to a claim for rent arrears. This is of course no longer possible, there having been judgment in favour of Birmingham City Council (see CPR 16.6 and the discussion paragraphs 11 to 16 of His Honour Judge Grant's judgment in *Mitchell*).

40. Equally if proceedings are enforced in either the County Court or the High Court the Court will be faced with an application to suspend the warrant or writ. The Court in considering such an application will need to take into account either the counterclaim or any separate proceedings along with all the other circumstances of the case. An application to suspend a warrant or writ is not without merit. The arrears are not as high as I see in many cases. This is not a case where no payments have been made. Relatively regular payment is being made. On the face of it the rent should be affordable. The

Defendants have an income of £1200 per month plus Child Benefit for one dependent child. However, there have been many previous suspensions of warrants of possession and terms that have been broken, and - since the original possession order was granted - the arrears have doubled and have increased significantly since the last suspension.

41. Whilst there is no pleading before the Court, there is the evidence of the First Defendant. In my judgment despite the failure to comply with CPR PD20 and provide a proposed counterclaim it would be just if I looked to see if the material that was provided, in effect, disclosed a cause of action. The witness statement pleads sufficient facts to found a claim in respect of the radiator and the back door. However, it does not set out any basis for why the damp and mould is actionable disrepair. Mr Stark correctly put it in his Skeleton Argument when he said "there is damp and mould in another bedroom that requires investigation". Counsel for the Defendants valiantly argued that if there is damp and mould it followed that there must be damage to the plaster and plaster is part of the structure of the property and section 11 of the Landlord and Tenant Act 1985 requires the structure to be kept in repair. Unfortunately the witness statement does not say that the plaster has been damaged. In my judgment there is not sufficient evidence before the Court to permit a Court to allow a counterclaim in respect of the damp and mould as the evidence does not "plead" what is required for such a claim to be successful. I can only assume that at present the Defendants do not have sufficient evidence. Despite legal aid for an expert there is no report before me.

42. Therefore if I were to allow a counterclaim at all at this stage it will have to be limited to the issue of the radiator and the back door. As to those issues the prospects of success are poor but I cannot say at this stage there is not a real prospect of success. Of course the damages value of the Counterclaim on this limited basis would be very significantly less than the current rent arrears.

43. I accept that there has been delay in bringing the Counterclaim. However, it is only since 28th August 2015 that the Defendants have had solicitors acting for them and without legal aid they could not pursue any counterclaim.

44. If I do not grant permission it seems likely that the Court will be faced with two sets of proceedings. Two sets of proceedings causes additional expense and complexity. Ultimately the two claims would have to be managed together.

45. The only real practical difference between giving permission and not giving permission for a counterclaim is that the proceedings would have to stay in the County Court if permission is given to bring the Counterclaim. If there were a separate claim the Court could transfer the proceedings.

46. In my judgment the balance falls in favour of granting permission to bring a Counterclaim. Part of my decision is because many of the advantages of enforcement in the High Court are said to relate to time. However, enforcement in the High Court requires an additional step of an application on notice for permission to issue a writ of possession. This means if matters stay in the County Court and the warrant for possession is not suspended the likely date of eviction may not be very different than if I refuse permission and transfer proceedings. Enquiries of the Court reveal that at present short applications are being listed some months away. Thirty-minute applications

are being listed well into 2016. I am told that it might be possible to list a short application before Christmas. There is of course availability in the Court's emergency list. In this case where payments are being made, the Defendants' income ought to be sufficient to cover the rent and even if not the increasing rate of arrears is modest it could not be properly said that this case fills criteria for an emergency listing. Doing the best I can it seems a delay of at least 4 weeks would be likely before a hearing for leave to issue a writ of possession would take place. Obviously in the County Court the Council can apply for a warrant straightaway.

47. In the circumstances of this case if a warrant of possession is issued and the Defendants do not immediately apply to suspend it and seek to gain some advantage by waiting to make a last minute application that fact will be something the Court hearing a last minute application would take into account. It could well be determinative.

48. As I have already said, an application to suspend the warrant of possession has some merit. The quicker any application is made the better.

49. Taking all of the circumstances of this case into account I have decided to give permission to bring the Counterclaim.

50. The consequence of this decision is that the matter remains in the County Court and the question of transfer does not arise. However, despite what follows being *obiter dicta* I set out my views on how applications for transfer in circumstances similar to this case ought to be considered. I do so for these reasons:-

(a) I heard extensive argument in this case from experienced Counsel.

(b) In the course of argument it became apparent that Birmingham City Council's practice in other cases where judges have granted permission to transfer to the High Court was flawed.

(c) It may be that my fellow District Judges in Birmingham will find this part of my judgment of assistance to them when they face, in other cases, applications by Birmingham City Council to transfer to the High Court for enforcement.

Transfer to the High Court

51. I heard argument about the principles to be applied:-

(a) in respect of cases for transfer to the High Court for the purposes of enforcement of possession orders made in respect of secure tenancies under the Housing Act 1985; and

(b) in respect of the differences between enforcement of possession orders in the County Court and High Court.

52. Section 42 County Courts Act 1984 gives the County Court a power to transfer proceedings to the High Court. Section 42(1) of the Act deals with the situation where proceedings are started in the County Court that can only be brought in the High Court. Section 42(2) provides that in other cases the Court "*....may order a transfer of any proceedings before it to the High Court ....*". Section 42(3) provides that an order may be made by a Court of its own motion or on the application of any party to the proceedings.

53. The Court may on receipt of an application by a party make an order on an *ex parte* basis in the absence of any of the parties (see *The Governor and Company of the Bank of Ireland –v- Jeetan Shah and Lawrence Dubash [2015]*

EWCA Civ 1018 paragraphs 34 to 38). Such an order should of course contain a statement that any party affected may apply to set the order aside.

54. CPR 30.3(2) provides that when considering whether to transfer a case to the High Court the matters the Court must have regard to include: -

"....(a) the financial value of the claim and the amount in dispute, if different;

(b) whether it would be more convenient or fair for hearings (including the trial) to be held in some other Court;

(c) the availability of a judge specialising in the type of claim in question and in particular the availability of a specialist judge sitting in an appropriate regional specialist Court;

(d) whether the facts, legal issues, remedies or procedures involved are simple or complex;

(e) the importance of the outcome of the claim to the public in general;

(f) the facilities available to the Court at which the claim is being dealt with, particularly in relation to –

(i) any disabilities of a party or potential witness;

(ii) any special measures needed for potential witnesses; or

(iii) security;

(g) whether the making of a declaration of incompatibility under section 4 of the Human Rights Act 1998 has arisen or may arise;

(h) in the case of civil proceedings by or against the Crown, as defined in rule 66.1(2), the location of the relevant government department or officers of the Crown and, where appropriate, any relevant public interest that the matter should be tried in London...."

55. Section 42(5) and (6) make provision for the effect of a transfer to the High Court if the transfer is made for the enforcement or any judgment or order of the County Court. Firstly the order may be enforced as if it were an order of the High Court. Secondly, if transferred, the County Court retains its powers to set aside, correct, vary or quash the underlying possession order and any appeal from the that order is treated as if it were an order of the County Court.

56. Counsel agreed that most of the matters set out in CPR 30.3(2) are really related to transfer of proceedings for trial rather than transfer for the enforcement of a County Court possession order.

57. In almost all cases for transfer to enforce a County Court possession order, the only criteria above that perhaps have some relevance are:-

(a) the financial value of the claim

(b) whether it would be more convenient or fair for hearings to be held at some other Court.

(c) whether the facts, legal issues, remedies or procedures involved are simple or complex.

58. Of course CPR 30.3(2) is not an exhaustive list merely a list of factors to which the Court (to the extent they are relevant) must have regard. In addition the Court must when exercising its discretion under CPR 20.4 to transfer have regard to the overriding objective (see CPR 1.2(a)).

59. Both Counsel agreed I needed to consider the procedural differences between the two regimes and at my request provided me with a helpful agreed flowchart that I attach to this judgment.

60. I explain the difference in more detail below: -

The County Court

61. The procedure is governed by CPR83. 26. In summary it requires an application to be made to the County Court hearing centre. It may be made without notice. The application must certify that the premises have not been vacated. Applications are made using prescribed form N325. The issue of the warrant of possession in the County Court is an administrative act by Court staff. They issue a warrant of possession to the Court bailiff N49. They issue Notice of Appointment to the Claimant in form EX96 and a Notice of Eviction to the Defendant using a prescribed form N54. The N54 form contains a date and time when the eviction is to take place. It also contains information as to what happens at the eviction and what a tenant can do including a detailed explanation as to how in some circumstances a Court can decide to suspend the warrant and postpone the date for eviction and the procedure for so doing including a reference to the Court fee and fee exemption or remission. It also explains what to do if you can pay off any arrears.

The High Court

62. In the High Court the procedure is governed by CPR83.13. In contrast to the County Court, in the High Court permission is required to issue a writ of possession and before permission is granted every person in actual possession of the whole or any part of the land ('the occupant') must receive such notice of the proceedings as appears to the Court sufficient to enable the occupant to apply to the Court for any relief to which the occupant may be entitled (CPR 83.13(2) and 83.13(8)).

63. Counsel for Birmingham City Council recently appeared before Mrs Justice Rose in the unreported case of *Nicholas –v- Secretary of State, August 24th*

2015. I have been shown a note of the case prepared by Counsel in Eflash number 609, Arden Chambers. The facts were as follows. Mrs Nicholas lived in a flat owned by the Ministry of Defence. Her husband was a serving member of the RAF. The Ministry of Defence had granted him a licence to occupy the flat for the better performance of his service with the Crown. They divorced and Mr Nicholas left the property. The Ministry of Defence served notice and sought possession. Mrs Nicholas defended the proceedings. Her Defence was rejected by the High Court and the Court of Appeal. The Court of Appeal ordered Mrs Nicholas to give possession by 31st March 2015. The Secretary of State for Defence applied without notice to Mrs Nicholas to the High Court for permission to enforce the possession order. A Deputy Master gave permission. Mrs Justice Rose found that CPR83.13(8) requires notice of the application for a writ of possession must be given to every occupant and therefore notice of the application should have been given to Mrs Nicholas. In any event she found that the evidence supporting the application was incomplete because the Deputy Master had not been told that the Supreme Court had extended time for any application to them for permission to appeal (the Court of Appeal having refused permission) to 28 days from a final decision by the Legal Aid Agency on whether public funding should be extended.

64. Therefore there is a High Court decision binding on me that shows that an application on notice to all occupiers including the tenant must be made to a District Judge of the High Court seeking permission for a writ of possession. That approach is consistent with the old Court of Appeal decision in *Leicester City Council –v- Aldwinckle (1991) 24 HLR 40* where under the old Supreme

Court Rules phrased in a similar way Lord Justice Neill said that permission on notice was required to issue a writ of possession in the High Court when contrasting the position in the High Court with the old County Court Rules.

65. It follows that in this case as the only application before me was for transfer then if the matter is transferred to the High Court there will need to be a second hearing before a writ of possession could be issued. This will cause delay.

66. If permission is granted and a writ issued then the High Court Enforcement Officer can enforce the warrant without notice to the tenant. It is my understanding that there is no requirement for them to have with them or show the writ of possession to the tenant prior to eviction.

67. I did not hear argument as to whether it was possible to apply both for transfer to the High Court and permission to issue a writ of possession at the same time. In my judgment I cannot see why this approach would be objectionable provided that the requisite notice was given to all occupiers of the application.

The factors the Court should take account of in respect of a transfer

68. In my judgment factors of particular significance are:-

(a) One would normally expect County Court orders to be enforced in the County Court. I do not find section 110 Housing Act 1985 of much assistance. The fact that there is a bar on the recovery of costs if proceedings are started in the High Court does not mean that the Court should not in appropriate cases transfer cases to the High Court for enforcement. If it meant that it would have said that. The power to transfer is itself provided by the County Courts Act 1984 and nothing

in section 110 Housing Act 1985 in my judgment stops the Court from transferring residential housing cases to the High Court for enforcement.

(b) I do however agree that given that County Court orders are normally enforced in the County Court the burden is on an applicant for a transfer to show why the case should be transferred. They would normally do this by pointing to some significant advantage to the applicant by transferring the case to the High Court. This is likely to involve showing that a transfer has advantages for the applicant in the carrying out of its social landlord functions. This could be in terms of speed, cost to the applicant or the other advantages of having a writ of possession. Counsel for the Defendant argued that, rather than allow transfer of cases from the County Court in Birmingham, the answer lay with HMCTS. He said HMCTS should provide more resources to allow evictions to take place quicker. I agree that more bailiffs would reduce the delays. However, that is no answer to a social landlord.

(c) I agree it is important to ensure that a transfer to the High Court by virtue of the different procedures does not unfairly prejudice tenants. I agree with Birmingham City Council that the fact the process is quicker does not of itself amount to prejudice. It is procedural unfair prejudice one is concerned with and the fact it is quicker is irrelevant provided that the tenant has had an opportunity to seek to set the writ of possession aside.

(d) The Court must consider the impact of any transfer on the Courts resources and the impact on other cases.

(e) I also accept that the likelihood that any warrant or writ of possession - if issued - might be suspended by a Court, is a factor relevant to transfer as the advantages of transfer might be minimal if in fact a Court would probably suspend the warrant in any event. Thus the level of arrears and the history of the case are relevant considerations.

69. I look at these factors below.

The Advantages to Birmingham City Council of transfer

70. The time advantages are not as great as Birmingham City Council first thought in the manner cases are currently coming before the Courts. It now accepts that, after transfer it cannot simply apply for and obtain a writ of possession administratively. The process of making an application to the High Court takes time and Court resources. It seems to me that the extra step must add in delay. The statement of Ms Sania that "High Court bailiffs are able to ensure warrants of possession are issued and executed within 3 weeks" is wrong. It seems to be based on writs of possession being wrongly obtained on Birmingham City Council's behalf without the making of an application for permission. It follows that the potential revenue savings are not as claimed. However, I do accept that a saving of time might be achieved and in a case where full rent is not being paid there is a rental saving. I accept that any time saving also reduces the time before a property can be re let.

71. There are other advantages if a writ of possession is issued. Birmingham City Council has control over the process. It can postpone the execution of a warrant for example on terms agreed with the tenant and if those terms are broken that particular writ of possession can be enforced. By contrast, if a

warrant of possession is withdrawn because of an agreement and that agreement broken, Birmingham City Council has to re issue the warrant and the 12 week process starts again.

The prejudice to a tenant of transfer

72. A tenant gains the advantage that there is a Court hearing on notice before the writ of possession can be issued. The potentially unfair prejudice includes: -

(a) any greater costs of the High Court process being passed onto him;

(b) The potential that after a writ of possession is issued it will be enforced with no or minimal notice;

(c) He will not get a copy of the writ of possession and more importantly he does not get the information contained on the N54 that tells tenants facing eviction how they can apply to the Court to suspend the warrant of possession.

73. In the course of argument I asked about what steps Birmingham City Council took after a writ of possession was issued. I received confusing information from Miss Bello in oral evidence before me. The clearest evidence of the current practice comes from a document provided to the Defendants under a freedom of information request. It indicates that the High Court Enforcement Officer carries out a pre eviction "*health and safety check*" up to 2 weeks prior to the eviction and that the purpose of this visit was to provide *"clear and concise information to the tenant which notifies them of the eviction date. This assists the tenant in planning their future following eviction, allows them to seek advice on their housing options and also a final chance to try and re pay*

the debt." Implicit in this report is that tenants are not told of their ability to apply to the High Court to suspend the writ of possession or to the County Court, if they seek to set aside, vary or quash the judgment of the County Court.

74. I was told by Miss Bello in this case, if I granted permission to transfer the proceedings in this case to the High Court and permission was then given for the issue of a writ of possession, Birmingham City Council would provide the Defendants and any occupiers of the property with:-

(a) at least 2 weeks notice of any eviction date by letter as well as a visit by the High Court Enforcement Officer and

(b) information in writing like that contained on the N54 (suitably modified as the proceedings would be in the High Court).

I know from experience of another case that Birmingham City Council also does not seek to charge the tenant who is evicted using High Court enforcement officers any greater sum that would be charged if County Court bailiffs were employed.

75. Counsel for the Defendants asked me to treat with skepticism these assurances both in this case and generally. As I set out in an addendum to this judgment I have been alarmed by the current practice adopted by solicitors acting for Birmingham City Council in connection with the obtaining of writs of possession at present and the way in which the requirements of CPR83.13(2) have been side-stepped. Further I have been concerned about the deliberate policy of Birmingham City Council not to inform tenants of their ability to seek to suspend the writ of possession. I was also alarmed at the practice (albeit now stopped) of seeking permission to issue writs of

possession in the Huddersfield District Registry. However, I accept that this process has been something of a learning curve for Birmingham City Council and that they would comply with orders of the Court or if asked give suitable undertakings to judges.

76. In my judgment if the Court were minded to grant a transfer it should always be made to the District Registry in Birmingham and be conditional upon any application for a writ of possession being applied for in that District Registry. Further a Court should give consideration as to whether costs should be limited to the costs of using County Court bailiffs.

77. Usually the most appropriate time, in a Birmingham City Council case, to consider what other safeguards need to be put in place will be at the hearing for permission to issue the writ. If this is a separate hearing (as it would have to be on the facts of this case) the judge concerned will be in a better position to consider any procedural unfairness. For example the tenant may attend that hearing. The particular facts might demonstrate that no additional measures are necessary. The tenant may well understand their ability to apply to suspend the writ of possession. How much notice of an eviction date that should be given might vary from case to case.

78. It is beyond the scope of this judgment for me to say what any judge would or would not expect to see at the permission to issue a writ of possession stage. Each case is necessarily fact specific. However, in almost all cases I personally would expect the following conditions to be placed on Birmingham City Council if permission were given to issue a writ of possession: -

    (a) Written communication to the tenant informing him of the date of any eviction together with a copy of the writ of possession.

(b) Information akin to that contained within the N54 being provided in writing so that a tenant is aware of how he can apply to suspend the writ of possession and the fact he might be eligible for fee exemption.

(c) A date of eviction that provides sufficient time for the tenant to make an application, for example to suspend the writ of possession. This length of time may vary and may depend upon whether the tenant attends the hearing for permission to issue the writ of possession. In the course of submissions Birmingham City Council indicated that they now provide 14 days notice of eviction. That seems reasonable and mirrors the position in most County Courts.

The Impact on Court Resources

79. Counsel for the Defendants attractively put forward his arguments against transfer placing significant reliance on this factor. He said that the impact on the Court resources of applications for permission by Birmingham City Council to issue writs of possession in the High Court meant that a transfer was not an efficient use of Court resources. He adopted my observation in the course of argument that if there are 1,500 applications made a year for permission to issue writs of possession with a 5 minute time estimate that is the equivalent of 25 District Judge sitting days.

80. Despite the initial attractiveness of the argument in my judgment the cumulative effect on judicial resources of Birmingham City Council making lots of applications cannot be a reason for depriving Birmingham City Council of a transfer if the Court is satisfied it is appropriate in an individual case. To do so would deprive Birmingham City Council of the possibility of enforcement based simply on its size.

81. What the Court has to consider is the resource implications of the particular case that is being transferred in isolation and weigh this against any advantages of a transfer. This means on a case-by-case basis a judge on hearing an application for transfer might form the view that the arrears are so high that it would be appropriate for any application for permission to be listed as an emergency and hence there would be significant time advantages to transfer.

The chances that if a warrant /writ is issued it will be suspended.

82. The whole purpose of transfer is said to be for the more efficient enforcement of Court orders that should have but have not been obeyed. However, there would generally be little advantage to transferring a case to the High Court if it is clear to the Court that any warrant or writ would be suspended. However, I do accept that in certain cases the history of the individual case may show that the other advantages of a writ of possession albeit one that is likely to be suspended mean a transfer could still be justified. In many cases when considering a transfer (especially if the tenant does not attend) the Court may not be able to come to any obvious answer to the question posed. Traditionally District Judges have looked at the size of the arrears and if the arrears are, say, below a certain figure, choose not to transfer and if above another figure do. In my judgment this is a useful yardstick but it does not obviate the need to consider carefully all the circumstances including the factors I have set out above.

Summary

83. I reject the Counsel for the Defendants' submissions that transfer should never take place. The Court must have regard to CPR30.2 albeit most of the factors set out there are really not directly relevant to the exercise of the discretion. It must also have regard to the overriding objective. In my judgment provided a Court is satisfied by adequate assurances or conditions to transfer that does not prejudice a tenant then normally the decision will depend on there being sufficient advantages being demonstrated by the applicant for a transfer in a particular case. Consideration of the advantages should include the personal circumstances of the tenant in as much as that impacts on the likelihood of a Court halting the enforcement process by suspension of any writ of possession issued. However, a tenant cannot resist a transfer by merely saying, "I will be evicted quicker". In fact, if such a tenant happened to live in another part of the country the process could be much quicker!

Addendum to this Judgment

84. In the course of argument on 30th October 2015 I raised the question of the practice of Birmingham City Council in respect of cases that they have already obtained permission to transfer to the High Court. This Court has become aware that having obtained permission from a District Judge in this Court to transfer the proceedings to the High Court for enforcement in other cases Birmingham City Council have, through their agent's solicitors Malcolm Butler and Co, been obtaining writs of possession in the Huddersfield District Registry of the High Court. I was concerned as to how this was being done as on the face of the procedure it did not appear to be in compliance with CPR 83.13(2). I asked Birmingham City Council to provide a witness statement

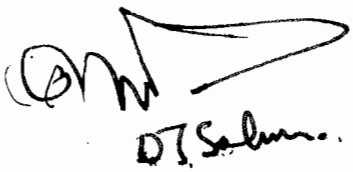
setting out the procedure. I received on 2nd November 2015 a witness statement from Mr Fearn. I have spoken to staff at Birmingham and was shown one case where after transfer an application was made for a writ of possession. It seems that under contractual arrangements, the details of which I do not have, Birmingham City Council do not themselves get involved in the obtaining of the writs of possession. This is left to Marston Group Limited as the council's agent who in turn instruct solicitors Malcolm Butler and Co. After an order for transfer to the High Court is obtained these solicitors write to the Court enclosing an N293A – Combined Certificate of Judgment and transfer up, a writ Form 66, a copy of the possession order and a cheque for £60. All High Court writs of possession must be in the form of writ Form 66 or 66A (see CPR PD83 para 3.1).

85. The form N293A at the bottom has the words *"This judgment or order has been sent to the High Court for enforcement by (Writ of Possession against trespassers) only."* That wording is very significant. Permission of the Court is **not** required for the issue of a writ of possession against trespassers (see CPR 83.13(3)). However, a secure tenant even after a possession order has been made and possession has not been given up is not a trespasser following the changes made to the Housing Act 1985 by the Housing and Regeneration Act 2008 that has effect from 1st April 2009. Court staff, no doubt relying on the N293A form, are simply issuing writs of possession. They have no authority to do so in a case where the tenant is not a trespasser. Writs of possession in these circumstances require permission from a judge under CPR83.13(2) and the judge has to be satisfied that appropriate notice has been given under CPR83.13(8).

86. I do not know why solicitors acting for Marston Group Limited have completed inaccurate forms. This addendum judgment is not the place to speculate. What is clear is that the practice must stop.

87. In respect of writs of possession that the Court has issued in the Birmingham District Registry and Huddersfield District Registry of the High Court in any cases where writs have been issued despite non compliance with CPR83.13 without permission being granted by a judge, Birmingham City Council must make immediate steps as is necessary to ensure High Court Enforcement Officers do not seek to enforce writs of possession that have not been validly issued.

88. Given that this addendum arises out of matters ancillary to the actual applications before me in this case I am prepared to consider any further submissions by Birmingham City Council with regard to these observations.



District Judge Salmon

10th November 2015.