

Case No. 3159/2001

Neutral Citation number [2004] EWHC 1 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand, London WC2A 2LL

12 January 2004

Before:

MR. JUSTICE CRANE

BETWEEN:
THE QUEEN
(on the application of SATPAL RAM)

Claimant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

and

PAROLE BOARD

Interested party

Mr.Stephen Cragg (instructed by Birnberg Peirce & Partners) appeared for the
Claimant.
Miss Dinah Rose (instructed by the Treasury Solicitor) appeared for the Defendant.

JUDGEMENT

1. This application raises the question whether damages to which the Claimant is entitled should be paid to him while he is unlawfully at large. Although the circumstances are unusual and the sum now involved is only £1000 (subject to the possible addition of interest), the application raises questions of principle and is not covered by direct authority.

The history

2. In 1987 the Claimant was convicted of murder and sentenced to life imprisonment, a mandatory life sentence, with a tariff ultimately set at 11 years. The Parole Board recommended his release in October 2000, but the Secretary of State declined to accept the recommendation. In 2001 the Claimant issued these proceedings for judicial review. In May 2002 the European Court of Human Rights decided *Stafford v. UK* (2002) 35 E.H.R.R.32 that after the expiry of a tariff, continued detention can be justified only by elements of dangerousness and risk associated with the original sentence for murder. Following that decision, the Secretary of State ordered the Claimant's release on licence in June 2002.
3. The judicial review proceedings were settled. A Tomlin order (that is, an order under CPR 40.6(3)(b)(ii)) was agreed. By the Consent Order signed by Master Mackenzie QC, dated 3 April 2003 and sealed on 17 April 2003 it was ordered that

"1. All further proceedings herein be stayed save for the purpose of giving effect to the terms of the attached Schedule, for which purpose there shall be liberty to apply;"

4. The remaining paragraphs dealt with costs, including an order that the Claimant's costs be assessed in accordance with the Community Legal Service (Costs) Regulations 2000.
5. The Schedule read as follows:

"The Defendant shall pay to the Claimant the sum of £20,000 in full and final settlement of the Claimant's claims in Case Number CO/3159/2001, and any other claim the Claimant may have arising out of his detention between 1 November 2000 and 18 June 2002, including any claim under the law of England and Wales, or pursuant to the European Convention on Human Rights, save any claim the existence of which the Claimant could not reasonably have known about at the date of this agreement".

6. Neither the Consent Order nor the Schedule contained any provision about when or how the damages were to be paid.
7. Subsequently costs arising from a separate personal injury claim which the Claimant discontinued were set off against the sum of £20,000. £1000 of the damages remains outstanding, subject to the possibility of interest being added.

8. Meanwhile on 24 April 2003 the Lifer Unit received a report from the London Probation Area recommending the Claimant's recall to prison, on the grounds that he was wanted for questioning over allegations of assault and criminal damage, and had disappeared. On 7 May 2003 the Claimant's licence was revoked. The Claimant did not surrender and has remained unlawfully at large.
9. On 3 September 2003 the Secretary of State informed the Claimant's solicitors that the outstanding damages, together with interest, would be paid by a cheque made out to him, available for collection by him personally at Islington Police Station at 10 a.m. on 12 September 2003. The Claimant has not attended to collect the cheque.
10. The Claimant has been in touch with his solicitors. He was aware of the availability of the cheque.
11. The Secretary of State has maintained his position that the outstanding sum will be paid only to the Claimant personally. In effect he is not prepared to pay the sum to the Claimant while the Claimant remains unlawfully at large. The Claimant through his solicitors has demanded payment to the solicitors. He would make arrangements for his brother to receive any balance on his behalf.
12. It is submitted on behalf of the Secretary of State that the damages would assist the Claimant in remaining unlawfully at large. This is not disputed. I accept that although the sum is not a large one, it can be inferred that the Claimant is likely as a person unlawfully at large to be in need of funds and that any further sum would be likely to assist him in remaining at large.
13. Statements lodged on behalf of the Claimant set out reasons for concluding that the original conviction was surprising and for criticising the Prison Service in connection with the treatment of the Claimant while in custody. However, I do not regard such evidence as relevant for present purposes, since no criticism has been made of the decision to recall the Claimant to prison.
14. The Secretary of State applied for the Consent Order to be set aside or varied to provide for payment to the Claimant personally at a nominated police station.
15. When the matter came before me, I had skeleton arguments from both Counsel and heard oral argument. However, it became apparent that further submissions were required, particularly on two issues: first, the statutory provisions relating to damages due to publicly funded Claimants required detailed attention; secondly, it was accepted by both Counsel that if I were to refuse the application by the Secretary of State, the question of the Court's discretion might arise on any application on behalf of the Claimant to enforce the payment. Although the matter raises issues of principle, Counsel were rightly conscious of the need to avoid unnecessary costs where the amount involved was modest. It was therefore agreed that both parties should have an opportunity to make any further application and to lodge further written submissions, following which I would hand down my judgment.
16. The Claimant has applied for specific performance. I have received written submissions from both Counsel. I bear in mind that although neither party specifically seeks declaratory relief, it would be open to me, subject to any submissions of Counsel, to consider such relief if it were the most appropriate outcome.

17. Counsel are agreed on the relevant statutory provisions. By section 10(7) of the Access to Justice Act 1999, sums expended by the Legal Services Commission ("the Commission") constitute a first charge on any damages recovered.
18. The Community Legal Service (Costs) Regulations 2000, as amended ("the Regulations") provide the mechanics for enforcing the statutory provision. Regulation 18 provides, so far as is relevant:

"(1) Subject to the following paragraphs of this regulation ... all money payable to or recovered by a client in connection with a dispute by way of damages, costs or otherwise, whether or not proceedings were begun, and whether under an order of the court or an agreement or otherwise, shall be paid to the client's solicitor, and only the client's solicitor shall be capable of giving a good discharge for that money.

...

(3) Where the client's solicitor has reason to believe that an attempt may be made to circumvent the provisions of paragraph (1), he shall inform the Commission immediately.

19. Regulation 20 provides, so far as is relevant:

"(1) The client's solicitor shall forthwith:

- (a) inform the Regional Director [*sc.* of the Commission] of any money or other property recovered or preserved, and send him a copy of the order or agreement by virtue of which the property was recovered or preserved;
- (b) subject to the following paragraphs of this regulation, pay to the Commission all money or other property received by him under regulation 18.

...

(4) The Regional Director may direct the client's solicitor to:

- (a) pay to the Commission under paragraph 1(b) only such sums as, in the Regional Director's opinion, should be retained by the Commission in order to safeguard its interests; and
- (b) pay any other money to the client".

20. The Commission must deal with any money paid to it in accordance with regulation 22. In effect, the Commission calculates what has been paid to the solicitor by way of costs and any amounts not covered by any costs order, before paying to the client any money not retained or paid to the solicitor.
21. There is no evidence before me as to whether the Regional Director is likely to make a direction under Regulation 20(4) or whether in any event, any part of the sum of £1000 will ultimately be retained by the Commission.
22. Submissions were made about terms that could be implied in the agreement embodied in the Consent Order as to the person to whom payment should be made. In the light of the statutory provisions there is in my view no room for such terms. The Act and the Regulations lay down how any damages must be paid and dealt with.

Implied term

23. Despite the statutory scheme, it is still necessary to consider the submissions made by Miss Rose that either a term should be implied in the agreement to the effect that the damages should not be paid to the Claimant if he is unlawfully at large or that the Consent Order should be varied to have a similar effect. Those submissions remain open to the secretary of State, because if such a term were to be implied or the Consent order were to be varied with similar effect, the damages would not in the present situation be "payable" to the Claimant within the meaning of Regulation 18(1).
24. It was submitted by Miss Rose that part of the factual matrix within which the agreement was entered into was that the Claimant was a convicted murderer subject to a life sentence, who had been released on licence. She submitted that it cannot have been the intention of the parties that the money should be paid even in circumstances in which its payment would assist the Claimant to avoid arrest. She submitted that it would be contrary to the public interest for the money to be paid in such circumstances. It was most unlikely, she submits, to have been the intention of the Secretary of State.
25. While I accept that the Secretary of State may well not, if he had thought about it, have intended to pay any sum to the Claimant when he was unlawfully at large, I do not accept that this would necessarily have also been the intention on the Claimant's side. At the time the Consent Order was made, the Claimant was lawfully on licence. In the absence of any term providing for time for payment, the money was payable forthwith, subject to section 25(1) of the Crown Proceedings Act 1947, to which I shall return. It does not seem to me that such a term is necessary - the usual test - to give it efficacy. There is the further difficulty that such an implied term could result in an indefinite postponement of the finalisation of the public funding arrangements.

Setting aside or variation of the Consent Order

26. The next question is whether the Consent Order should be set aside or varied by reason of a supervening event sufficient to undermine or invalidate the basis on which the consent order had been made. I have been referred to the judgment of Bracewell J. in *S. v. S (Ancillary Relief: Consent Order)* [2002] 3 WLR 1372, in which she reviewed the authorities in the context of an order for ancillary relief.
27. The principal authority is *Barder v. Barder* [1988] AC 20. Lord Brandon at page 42 laid down several conditions to be fulfilled before leave to appeal from a consent order would be granted:

"My Lords, the result of the two lines of authority to which I have referred appears to me to be this. A court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided that certain conditions are satisfied. The first condition is that new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. The second condition is that the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months. The third condition is that the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case. To these three conditions, which can be seen from the authorities as requiring to be satisfied, I would add a fourth, which it does not appear has needed to be considered so far, but which it may be necessary to consider in future cases. That fourth condition is that the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property which is the subject matter of the relevant order."

28. I agree with Bracewell J. in treating these conditions as applicable where the mechanism for reopening a consent order is an application to set aside rather than an appeal. I also agree with the following passages in her judgment;

"28. I do not accept the argument advanced by [Counsel] that only a fundamental change in the factual matrix can constitute a supervening event...".

...

47. Since *Barder's* case [1988] AC 20 the jurisprudence has developed, and I am satisfied that although *Barder's* case did not specifically refer to foreseeability it is implicit in the circumstances of that case that the death of the mother and children was not reasonably foreseeable, and in effect came as a bolt from the blue. Later cases have developed this aspect. ...".

48. From the reported cases I find that the following propositions arise. Firstly the new event must be a complete change of circumstances and not one arising from a development of facts known or which should have been known at the time of the order. If the possibility of an event occurring was, or should have been, recognised at the time of the order and that event duly happened but on a scale unforeseen then that will not amount to a qualifying supervening event.

49. Secondly even if the new event did not arise from pre-existing facts it must still be unforeseeable in the sense that it was not envisaged, and could not reasonably have been envisaged, at the time of the making of the order".

29. In the present case I accept that the failure of the Claimant to surrender occurred within a relatively short time. As to the promptness of the making of the present application, I do not know whether there was an agreement to await the outcome of the other action, but since the consent order in the other action was made on 15 August 2003, crystallising the liability of the Secretary of State's liability at £1000, I am prepared to accept that the application was made sufficiently promptly. Lord Brandon's fourth condition is not relevant here.
30. I turn to the crux of the matter: whether Lord Brandon's first condition, interpreted in the light of *Bracewell J's* judgment, is fulfilled. In my view a breach by a person released on licence, his recall and his failure to surrender cannot possibly be said to be unforeseeable. In my judgment therefore there was no supervening event of a kind that would justify the variation or setting aside of the Consent Order.

Discretion

31. I am informed that the Claimant has made an application for specific performance. While such an application could in many circumstances be an appropriate means of enforcement under the "liberty to apply" provision of the order, there appear to me to be two objections here. First, Regulation 23(2) requires the consent of the Regional Director for the taking of proceedings by a client to give effect to an order or agreement under which the client is entitled to recover money. As far as I am aware, no such consent has been sought or given.
32. Secondly, no consideration appears to have been given to section 25 of the Crown Proceedings Act 1947. Omitting words not relevant, the section reads:

"25. Satisfaction of orders against the Crown

(1) Where in any civil proceedings ... against the Crown, or in any proceedings on the Crown side of the King's Bench Division ..., any order (including an order for costs) is made by any Court in favour of any person against the Crown or against a Government department or against an officer of the Crown as such, the proper officer of the Court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the Court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the solicitor, or as the person acting as solicitor, for the Crown or for the Government department or officer concerned.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall,

subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon: Provided that the Court by which any such order as aforesaid is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such of any such money or costs."

33. I have not had the benefit of argument by Counsel on the effect of this section in the present situation. In my view the section prevents an order for specific performance being made. However, I consider that on an appropriate application, an "order" within the meaning of section 25(1) could be granted. If it was, the next step would be an application for a certificate. However, section 25(3) gives the Court power to direct that payment be suspended "pending an appeal or otherwise".
34. I am aware of no authority on this point. However, in the light of the words "or otherwise" I consider that the Court has a discretionary power to direct that payment be suspended. That provides the Court with a discretion to be exercised here on the analogy of the discretion to refuse an order for specific performance. Although no application is yet before the Court, I think I should address the crucial issue.
35. Thus the submissions of Mr.Cragg on the circumstances in which an order for specific performance will be refused become relevant. He refers me to Chitty on Contracts at paragraph 28-027ff. He relies on the words of the House of Lords in *Lamare v. Dixon* (1873) L.R. 6 H.L. 414 at page 423 to the effect that the discretion to refuse specific performance is "not an arbitrary ... discretion but one to be governed as far as possible by fixed rules and principles". Chitty then lists a number of categories of case in which an order may be refused even in the case on contracts of a type that are specifically enforceable: severe hardship to the defendant; unfairness and surprise; lack or inadequacy of consideration; conduct of the Claimant; contracts expressed to be revocable; inutility; impossibility; vagueness; good will; contract specially enforceable in part only; mutuality of remedy; and mistake, misrepresentation and delay.
36. As Mr.Cragg submits, the category of possible relevance here is the conduct of the Claimant, considered at paragraphs 28-032 to 28-034 in Chitty. As the House of Lords said in *Lamare* at page 423:

"The conduct of the party applying for relief is always an important element for consideration".

37. Mr.Cragg submits that the statutory provisions provide for payment of the money to the Claimant's solicitor and thereafter for payment of any balance to the Claimant either by the solicitor or by the Commission. The first point that

concerns me is that neither the solicitor nor the Commission should be deprived of any sums due to them. However, the words of section 25(3) are sufficiently wide to permit the suspension of payment "in part" and it would in my view be possible to draft a direction that suspended payment of any balance not required by the solicitor or the Law Commission

38. More fundamentally, Mr.Cragg points to the absence from the Regulations of an exception relating to the public interest, that is, an exception that would prevent the Claimant from receiving money to which he is entitled. However, I consider that the Regulations are dealing with the mechanics of how the money payable is to be dealt with. They do not create the liability, which here arises under an agreement that the court is being asked to enforce by an order.
39. I accept that the examples given by Chitty are very different from the present situation. I also accept that all the examples relate to the conduct of the Claimant in relation to the contract itself. The exercise of the Court's discretion which the Defendant seeks could have extensive ramifications. There must be many circumstances in which a Defendant could produce evidence that a sum due under a judgment was likely to be used for criminal purposes or, as here, to sustain a person unlawfully at large. It is submitted on behalf of the Claimant that the Court is not being asked to assist the Claimant in remaining at large, merely to enforce an agreement freely entered into. Moreover, it is pointed out, that agreement provided for the payment of damages for the unlawful detention in custody of the Claimant.
40. However, it is common ground that the categories set out in Chitty are not closed.
41. I have come to the conclusion that the Court's discretion should be exercised in such a way that the Secretary of State should not be obliged to pay the sum due to the Claimant while the latter is unlawfully at large. The Secretary of State clearly has a public duty to operate the release and recall provisions in the public interest. I test my conclusion in this way: suppose the sum was very large and the Claimant was very dangerous. Would the Court permit such a Claimant to receive that sum? If not, then the question becomes whether the same result should obtain where the sum is modest and in the absence of any evidence of dangerousness. The refusal of an immediate order resulting in the Claimant himself receiving any money should not necessarily extend to other circumstances or to other kinds of recovery and other situations would have to be considered on their particular facts.

Conclusion

42. For the reasons I have given I refuse the application for an order setting aside or varying the Consent Order. However, I am prepared to achieve a result, in the exercise of the Court's discretion, which prevents any of the balance reaching the Claimant personally while he is unlawfully at large. That could be achieved by an appropriately drafted direction under section 25(3) of the 1947 Act or by an appropriate declaration. In either event any financial interest of the Claimant's solicitors or of the Commission should be protected. I invite submissions from Counsel on the appropriate order.
43. I am invited by the parties to deal with the question of interest. No interest was payable under the Consent Order itself and the Schedule made no mention of interest. It appears to me that no interest was payable. However, it appears from

the statements of James Watt (of the Prison Service) and the written submissions on behalf of the Claimant that when agreement was reached on the balance due, it was agreed that interest would be payable.