Neutral Citation Number: [2024] EWCA Civ 681

Case No: CA-2023-000938

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
SITTING AT KINGSTON-ON-HULL
HER HONOUR JUDGE RICHARDSON
HOOKHO42

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 June 2024

Before:
LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between:

MICHAEL BURTON	**Appellant/ Claimant**
- and –	
MINISTRY OF JUSTICE	**Respondent/ Defendant**

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- -

Daniel Kessler (instructed by **The Law Office of Sarah Hougie**) for the **Appellant**
Raghav Trivedi (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 11 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 21 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Phillips:

1. The principal issue on this second appeal is whether a judgment creditor may be ordered to pay damages in respect of loss suffered by the judgment debtor as a result of an enforcement agent, in executing a warrant of control over the debtor's goods, breaching the provisions of the statutory procedure which must be used in that exercise. That procedure is set out in the Tribunals, Courts and Enforcement Act 2007 ("the TCEA") at Schedule 12 ("the Schedule").

2. The appellant debtor ("Mr Burton") contends that the effect of paragraph 66 of the Schedule is that the respondent creditor ("the MOJ") may be ordered to pay damages simply because it is the creditor; the MOJ argues that it could only be so ordered if the MOJ itself caused or contributed to the loss.

The essential facts

3. On 12 February 2020 Mr Burton was fined £193 by the Harrogate Magistrates' Court for a speeding offence, giving rise to a debt in favour of the MOJ of £308 once the victim surcharge and costs were added. On 30 December 2020 the same court issued a warrant of control to enforce the fine. The MOJ engaged Marston Holdings Limited ("Marston") to act on its behalf, and Marston engaged a self-employed enforcement agent, Mr Allen, to execute the warrant.

4. On 22 January 2021 Mr Allen attended Mr Burton's property to execute the warrant of control in respect of an amount of £83 outstanding in respect of the debt, plus fees of £310. Outside Mr Burton's property was a Citroen DS3 motor car ("the Vehicle"), held by Mr Burton subject to a hire-purchase contract. Despite Mr Burton informing Mr Allen that the Vehicle was on hire purchase, and showing him a letter from the finance company to evidence the relevant contract and Mr Burton's lack of beneficial interest in the Vehicle, Mr Allen proceeded to take control of it by applying a clamp.

The proceedings

5. Mr Burton commenced these proceedings against the MOJ in the Kingston-upon-Hull County Court on 9 February 2021, seeking an order that the clamp be removed and claiming damages pursuant to paragraph 66 of the Schedule. At a hearing on 15 February 2021, not attended by the MOJ, District Judge Boorman ordered that the clamp be removed and awarded Mr Burton damages of £897 plus a further £35.88 for each day the Vehicle remained clamped. That order was set aside on the application of the MOJ, but the Vehicle was not re-clamped. The claim for damages remained to be determined.

6. At a contested hearing on 18 October 2021 Deputy District Judge Burman held that Mr Burton did not have a beneficial interest in the Vehicle, with the consequence that it should not have been subjected to the Taking Control of Goods procedure set out in the Schedule. Following a further hearing on 21 January 2022, Deputy District Judge Burman held that the MOJ could in principle be held responsible for Mr Allen's actions under paragraph 66, but found that Mr Allen (and therefore the MOJ) had a reasonable belief that Mr Burton held a beneficial interest in the vehicle, and so had a defence

under paragraph 66(8) of the Schedule. Deputy District Judge Burman further found that, in any event, Mr Burton had not made out his claim for damages.

7. Mr Burton was granted permission to appeal, and the MOJ challenged the findings made against it by way of Respondent's Notice. In a reserved judgment handed down on 31 March 2023, Her Honour Judge Richardson ("the Judge") determined that:

   i) Mr Allen was not entitled to clamp the vehicle;

   ii) however, the MOJ had not caused or contributed to the loss, and Mr Allen was not the agent of the MOJ because he was an officer of the Court, so the MOJ was not liable for damages;

   iii) although not arising for decision, Mr Allen could not reasonably have believed that Mr Burton had an interest in the vehicle; and

   iv) Mr Burton had not established the quantum of his claim to the civil standard.

8. The Judge therefore dismissed Mr Burton's appeal, as recorded in an order dated 11 May 2023. Mr Burton appeals to this Court in respect of the Judge's findings that the MOJ is not liable in its capacity as the creditor and that Mr Burton had not proved any loss.

The relevant provisions

9. Section 62 of the TCEA provides:

> "(1) [the Schedule] applies where an enactment, writ or warrant confers power to use the procedure in that Schedule (taking control of goods and selling them to recover a sum of money).
>
> (2) The power conferred by a writ or warrant of control to recover a sum of money, and any power conferred to a writ or warrant of possession or delivery to take control of goods and sell them to recover a sum of money, is exercisable only by using that procedure."

10. Section 62(4)(b) of the TCEA provides that warrants of execution are renamed warrants of control and section 68 provides that warrants of control issued by a magistrates' court are to be endorsed by the person to whom it is directed as soon as possible after receiving it.

11. Section 63 of the TCEA provides that an individual may only act as an enforcement agent if they act under a certificate under section 64 (which provides for certificates to be issued by a judge of the county court), unless exempt (an individual acting in the course of his duty as a constable or Revenue officer).

12. Paragraph 1 of the Schedule defines the "debtor" as the person liable to pay the debt and the "creditor" as the person for whom the debt is recoverable.

13. Paragraph 2 provides that only an enforcement agent may take control of goods and sell them under an enforcement power.

14. Paragraph 10 provides that "[a]n enforcement agent may take control of goods only if they are goods of the debtor". This was the provision breached by Mr Allen.

15. Paragraph 66 applies where an enforcement agent breaches a provision of the Schedule, providing in 66(3) that the debtor may bring proceedings under the paragraph. Paragraph 66(4) provides, subject to rules of court, where proceedings may be brought: in relation to an enforcement power under a warrant issued by the magistrates' court (such as that in the present case), proceedings may be brought in either the High Court or the county court.

16. The key sub-paragraphs of paragraph 66, for present purposes, provide as far as relevant as follows:

> "(5) In the proceedings the court may-
>
> ….
>
> (b) order the enforcement agent or a related party to pay damages in respect of loss suffered by the debtor as a result of the breach….
>
> (6) A related party is either of the following (if different from the enforcement agent)-
>
> (a) the person on whom the enforcement power is conferred,
>
> (b) the creditor."
>
> ….
>
> (8) Sub-paragraph (5)(b) does not apply where the enforcement agent acted in the reasonable belief-
>
> (a) that he was not breaching a provision of this Schedule..
>
> …."

The liability of the MOJ as the creditor

17. As for the main issue in the appeal, the starting point must be that paragraph 66 of the Schedule expressly provides that the court may order that the creditor pay damages for losses suffered by the debtor as a result of a breach by the enforcement agent. That power is not expressed to be conditional on any act or omission of the creditor: the sole trigger of liability is a breach by the enforcement agent (who alone can take control of the goods). On the face of sub-paragraphs (1), (5) and (6) of paragraph 66, the creditor may be the subject of an order simply in his capacity as the person for whom the debt was being recovered by the enforcement agent.

18. The above reading is strongly reinforced, in my judgment, by the "reasonable belief" defence available under paragraph 66(8), providing that the power to order the enforcement agent or the creditor to pay damages does not apply where the enforcement agent acted in a reasonable belief that he was not breaching a provision of the Schedule. The fact that the defence benefits both the enforcement agent and the creditor, but only

arises by reason of the enforcement agent's reasonable belief, demonstrates that the creditor's liability is solely dependent on that of the enforcement agent, not any additional act or omission of the creditor (which might have been based on a reasonable belief).

19. Mr Burton pointed out that the above analysis accords with the guidance issued by the MOJ itself (in its capacity as the relevant government department) in Taking Control of Goods: National Standards (6 April 2014). The guidance, intended for all enforcement agents and major creditors who use their services, warns at paragraph 7 that:

> "Creditors should remember that enforcement agents are acting on their behalf and that ultimately they are responsible, and accountable, for the enforcement agents acting on their behalf."

20. Mr Burton further contended that imposing strict liability on the creditor for the default of an enforcement agent, reflected in the National Standards, is appropriate as a matter of policy. Debtors are often in a vulnerable position, and enforcement agents (who have powers to interfere with the human rights of the debtor, including power to force entry to premises) have private financial incentives, such that they should be monitored and supervised. In the case of a High Court writ of control, that role is performed by a High Court Enforcement Officer ("HCEO"), on whom the enforcement power is conferred and who is therefore potentially liable as a "related party": see *Bone v Williamson* [2024] EWCA Civ 4 at [84] and [85]. But in the case of a warrant of control, the person to whom the warrant is issued is either the creditor, or someone to whom the creditor delegates the enforcement role. It is the creditor, and the creditor alone, who is in a position to supervise the enforcement agent, either directly or through its delegate.

21. The MOJ nevertheless contended, both before the Judge, and on this appeal, that as the creditor, it could only be ordered to pay damages to Mr Burton if it had caused or contributed to the loss he suffered (such as by giving incorrect information to the enforcement agent). This is because, the MOJ submitted:

    i) the enforcement agent is not the agent of the creditor, but is an officer of the Court. Indeed, the creditor cannot be the enforcement agent's principal because the creditor does not have the power to take control of goods, and so cannot authorise another to perform that task: the enforcement agent acts independently of the creditor;

    ii) the creditor cannot be vicariously liable for the acts of a self-employed and certified enforcement agent who is self-employed;

    iii) the MOJ did not assume responsibility for Mr Allen; and

    iv) the test of "cause or contribute" presents no difficulty.

22. The Judge accepted the MOJ's above contentions, stating at [42] of her reserved judgment that there was no evidence that the MOJ caused or contributed to the losses (if any) suffered by Mr Burton by the actions of Mr Allen. In the same paragraph the Judge continued:

> "An enforcement agent is not the agent of the creditor because he is an officer of the court, acting, ultimately, on the instruction of the court: see ***CES Limited v Marston Legal Services Ltd.*** [2021] 1 QB 129 at paragraphs 80 and 122. The fact that in the present case the creditor is also the government department of which Her Majesty's Court and Tribunal Services forms part is not of relevance. In the present case Mr Burton seeks to recover damages against the MOJ in its capacity as creditor. In that capacity the MOJ did not, on the evidence, cause or contribute to any damage suffered by Mr Burton."

23. The immediate objection to the MOJ's contentions, and the Judge's reasons, is that they fail to recognise, let alone address, the express words of the statutory provisions (providing that an order may be made against the creditor) and their obvious effect, but instead seek to read words into paragraph 66(5) of the Schedule, to the effect that the creditor may be ordered to pay damages "where he has caused or contributed to the loss", creating a significant condition on the liability of the creditor which was not expressed by Parliament. It is unclear on what basis those words could be read into the statutory scheme, or why that formulation should be chosen. It is plainly insufficient that the test sought to be implied "presents no difficulty".

24. The MOJ's justification for the implication of the additional words, adopted at least in part by the Judge, seems to be that, as a matter of common law principles, the creditor would not be liable automatically for the actions of the enforcement agent, whether as a matter of agency or vicarious liability. The unarticulated argument seems to be that, absent automatic liability as a matter of common law, Parliament must be taken to have intended that the creditor would only be liable if he himself caused or contributed to a breach of the Schedule. However:

    i) the power to order damages against the creditor is a statutory power, independent of common law liability. There is no reason to believe that Parliament did not intend the creditor to be liable precisely as set out in paragraph 66(5) and (6);

    ii) in any event, the enforcement agent is taking control of goods and selling them "to recover a sum of money" (s.62(1) of the TCEA), and a creditor is the person "for whom the debt is recoverable". This provides the justification or explanation (if one is required) for holding the creditor liable for the default of the enforcement agent: whether or not strictly an agency relationship, the Schedule regards the enforcement agent as recovering the debt on behalf of the creditor;

    iii) it is correct that in *CES*, a decision of the Court of Appeal, Lord Leggatt JSC stressed, at [80] and [122], that an enforcement officer (and an enforcement agent) was "not simply an agent of the creditor", but an officer of the court acting at the court's direction and exercising its authority. But *CES* did not consider paragraph 66 of the Schedule, let alone find that the creditor was not liable for breaches by the enforcement agent absent causation or contribution.

25. Further, the suggested test of "caused or contributed" does, in my judgment, present considerable if not insuperable difficulties. Given that only an enforcement agent may take control of goods, it is unclear what the creditor could do by way of causing or

contributing to the loss of the debtor, other than in the general sense of initiating the process of enforcing the debt (which "but for" test would be satisfied in every case). The one example given by the MOJ of specific causation (or contribution) is if the creditor gives inaccurate information to the enforcement agent, leading to the wrongful seizure of goods by the enforcement agent. However, if the enforcement agent seized goods acting reasonably on information received from the creditor, it seems highly likely that the paragraph 66(8) defence would be engaged, so neither the enforcement agent nor the creditor could be ordered to pay damages. In other words, if "but for" causation is sufficient to satisfy the MOJ's test, it seems the creditor would always be liable. But if not, it is hard to envisage a situation in which the creditor would ever be liable. The proposed test accordingly does not appear to be workable.

26. It follows that, for the above reasons, I consider that there was power to order the MOJ to pay damages in respect of Mr Burton's losses due to the wrongful clamping of the Vehicle.

27. I would add that it was unfortunate, and surprising, that the MOJ was not able to produce the warrant of control in these proceedings. The MOJ suggested during oral argument on the appeal that the unseen warrant was not issued to the MOJ itself, but to Marston, Marston acting pursuant to a contract between the MOJ and Marston for the provision of approved enforcement agency services. The MOJ relied on this structure, and the terms of Marston's engagement, to further support its contention that the enforcement agent was not the MOJ's agent. For the reasons explained above, I do not consider that these matters affect the power of the court to order that the MOJ pay damages to Mr Burton. Indeed, the fact that a creditor may delegate the process of enforcement (and the appointment of an enforcement agent) to a third party does not undermine, and possibly adds to, the justification for holding the creditor liable if that process causes loss to the debtor.

Proof of loss and its quantum

28. In a witness statement dated 21 February 2021, Mr Burton explained his financial losses flowing from the clamping of the Vehicle as follows:

> "23. The last week…I have incurred very high taxi costs in order to attend work, shop or attend medical appointments….
>
> ….
>
> 26. As of the making of this statement I have lost fourteen days use and facility of the car for which I am seeking £25 per day in general damages. In special damages I claim £180 for the amount I have had to pay out since my car was clamped for public transport and cabs for myself and other members of my family…."

29. By the date the clamp was released it had been in place for 29 days, so Mr Burton's claim for general damages was £725. On this appeal he sensibly dropped a claim for insurance premiums during the period the Vehicle was clamped, so his special damages remained £180. His total claim was therefore £905.

30. The Judge first accepted that, as a matter of law, Mr Burton was entitled to both damages for loss of use of the Vehicle and also special damages (such as loss of earnings or sums spent on travel to mitigate that loss), stating as follows:

> 54… It was therefore submitted by Mr Royle that Mr Burton could not also recover general damages for the loss of use of the Vehicle on those days where he mitigated his loss by taking alternative means of transport. I am unable to accept the later submission; in my view it confuses two issues. The first is the right of Mr Burton to recover damages for the deprivation of use of the Vehicle (see for instance *Owners of Number 7 Steam Sand Pump Dredger v Owners of SS Holmes* [1897] AC 596 per Lord Herschell and *Beechwood Birmingham Limited v Hoyer Group Limited* [2010] EWCA Civ 647 at paragraph 33) and the second is the obligation to mitigate against any specific damages that might have arisen from the loss of use of the Vehicle, for instance a loss of earnings if the Vehicle had not been available to travel to work in. In the latter case, if Mr Burton could reasonably have used alternative means of transport, his duty to mitigate required him to do so, and thereby replace a claim for loss of earnings (which would have been reasonably foreseeable), with a claim for alternative transport costs.

31. The Judge then found, applying *Ladgen v O'Connor* [2002] UKHL 64 at [76] that the appropriate rate for damages to compensate Mr Burton for the loss of use of the Vehicle would have been the spot hire rate.

32. However, the Judge found that Mr Burton had failed to prove either element of his loss:

> 56….in his written statement Mr Burton simply stated that he was seeking £25 per day in general damages for the loss of the facility and use of the Vehicle. He did not state where or how this figure had been calculated, and certainly there was no evidence that this figure represented the spot hire rate for a replacement vehicle. Whilst therefore I am in principle in agreement with the submissions made on behalf of Mr Burton as to the correct approach to adopt to assess general damages, I am also in agreement with the conclusion of the judge that Mr Burton had failed to evidence his loss. In short, his evidence on this issue was woefully inadequate. I also note that the sum of £180 for alternative means of transport was totally unevidenced (and whilst one might not expect chapter and verse the absence of receipts is an evidential lacuna which in my view precludes the court from taking a broad brush approach) and the claim for insurance premiums was bound to fail. It follows that if it had been necessary to do so I would have upheld the judge's decision at first instance in this issue."

33. Mr Burton appealed the Judge's rejection of his case as to damages. The MOJ sought by way of Respondent's Notice, to challenge the Judge's rejection of its argument that Mr Burton was not entitled to both special damages for transport costs and general damages for loss of use of the Vehicle, arguing that the special damages mitigated the loss of the Vehicle on the days alternative transport was used.

34. In *Lagden v O'Connor* the question was whether the claimant who had lost the use of his car due to the negligence of the defendant could recover the higher costs of obtaining a replacement car through a credit hire company (being unable to afford hire rates without finance), or whether he was limited to the spot rate. The majority of the House of Lords held that the impecunious claimant could recover the higher costs. At [76] Lord Scott (who dissented in the result) stated that:

> "So, in car accident cases as in ship accident cases, the negligent driver must compensate the owner of the other car for his loss of use of the car while it is undergoing repair. If there is no more to the loss of use claim than that, the claim will be for general damages and a fair approach to quantum would be to award a sum based upon the sport rate hire charge for a comparable vehicle."

35. However, in *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, [2011] QB 357, Sir Mark Potter P (with whom Maurice Kay and Dyson LJJ agreed) stated that Lord Scott's dictum requires to be read in, and limited to the context of, a private motorist claiming in respect of a substitute vehicle hired by him during the period of repair. As for the measure of damages more generally in the case of private vehicles used for convenience, Sir Mark Potter P stated:

> "48.…albeit the court may be concerned with a degree of compensation for fares etc. by way of special damage in a case where the owner has been obliged to use public transport rather than his damaged vehicle, the primary element of the award is that of compensation for non-pecuniary loss, ie. the lack of advantage and inconvenience caused by not having the use of a car ready at hand and at all hours for personal and/or family use…
>
> 49. In that respect, perusal of the Current Law Year Books yields references to awards in county courts up and down the country of conventional weekly sums based not upon car hire rates but on a modest rising scale from £40 or £50 per week in 1995 to £100 per week in 2005 in respect of disruption and inconvenience caused to individual claimants for loss of use of their private motor car during a period of repair in cases where for reasons of impecuniosity or otherwise, no substitute vehicle has been hired by, or otherwise made available to, the claimant…"

36. The above reasoning in *Beechwood* (although strictly obiter given that the case concerned loss of a vehicle used by a company in the course of its business), is highly authoritative and persuasive, and Mr Trivedi, counsel for the MOJ, did not contend that it was incorrect. It follows that where a claimant has not hired a replacement vehicle (as in the case of Mr Burton), he is entitled to general damages for loss of use, together with special damages in respect of specific alternative transport costs. To that extent the Judge's initial approach was right and the MOJ's challenge by way of Respondent's Notice must fail. However, damages for loss of use should not (or not necessarily) be based on spot hire rates, but on a broad assessment of non-pecuniary loss for disruption and inconvenience. To that extent the Judge was wrong, both to require evidence of the spot hire rate and to refuse to award Mr Burton any general damages of loss of use of the Vehicle, a loss he had been found to have suffered.

37. Whilst it might have been open to the Judge to have adjusted the figure of £25 per day (£175 per week), it would not be proportionate to remit the issue for further consideration, and I would award Mr Burton that sum for 29 days, there being no alternative figure advanced.

38. As for Mr Burton's special damages claim, the Judge was wrong to find that his claim for £180 of transport costs was "unevidenced". Mr Burton gave sworn evidence that he had incurred this sum. That was not only direct admissible evidence of his loss, but was unchallenged. Whilst the MOJ could certainly have sought particulars of the journeys and disclosure of supporting documentation, and challenged the case advanced as a result, the lack of particularity does not undermine the fact that Mr Burton gave clear unchallenged evidence as to his loss. That evidence should have been accepted rather than dismissed out of hand.

Conclusion

39. I would allow the appeal and enter judgment for Mr Burton against the MOJ for £905 plus interest.

Lord Justice Arnold

40. I agree.

Lady Justice Asplin

41. I also agree.