

IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM KEIGHLEY COUNTY COURT  
(MR RECORDER BRADSHAW)

Royal Courts of Justice  
Strand, London, WC2A 2LL  
Date: Wednesday, 7th December 2011

Before:

LORD JUSTICE THORPE  
LADY JUSTICE BLACK  
and  
LORD JUSTICE RAFFERTY

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Between:

DOLAN Appellant

- and -

CORBY Respondent

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Mr Matthew Rudd (instructed by Waddington Webber Commercial Solicitors) appeared on behalf of the Appellant.

Mr Ian Miller (instructed by Petherbridge Bassra) appeared on behalf of the Respondent.

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Judgment

(As Approved by the Court)

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**Lady Justice Black:**

1. This appeal concerns orders made by Mr Recorder Bradshaw on 10 June 2011 under the Family Law Act 1996 in relation to the occupation of a property in Bingley. By his order the Recorder declared that Ms Dolan was entitled to occupy the property to the exclusion of Mr Corby and he terminated Mr Corby's rights of occupation. He also made an order that Mr Corby was not to enter or be within 100 yards of the property. The formal stamped order says "This order shall last until further order" but it is common ground between the parties that it was in fact to last for six months, as the Recorder indicated at the end of his judgment which he circulated in writing. The order is accordingly about to come to an end.
2. Mr Corby appeals against the order. My Lord Thorpe LJ considered his application for permission to appeal on paper and adjourned the case for an oral hearing on notice with appeal to follow if permission to appeal were to be granted. For my part I would grant permission, for reasons which will become apparent as I deal with the various grounds of appeal. I should record at the outset that we have been very much assisted in considering the appeal by the realistic and effective advocacy of both parties' counsel, for which we are most grateful.
3. Mr Corby, the appellant, and Ms Dolan, the respondent, have known each other for a long time. In 1980 they began living together in the Bingley property in relation to which they took a tenancy as joint tenants. In 2001/2002 there were problems with the tenancy and the parties were evicted temporarily but the problems were sorted out and they soon returned. One or the other of them has lived in the property continuously since 2002. It appears that the tenancy is a secure tenancy. However, on 6 August this year, during the currency of the Recorder's order and therefore whilst Mr Corby has been excluded, the landlord wrote to Ms Dolan setting out a number of respects in which he said that she had breached the tenancy agreement. That was followed by a notice to quit dated 6 September 2011. We have been told that there are possession proceedings in the County Court but that they have been adjourned to a hearing in the New Year.
4. I intend to say relatively little about the history of the parties' relationship over the years because it is apparent that they do not agree about it and the Recorder's findings of fact were not designed to resolve all the factual issues between them, so a clear and reliable picture is not available. I will confine myself to the matters that were expressly considered in the hearing before the Recorder.
5. First I want to give a short procedural history of the present proceedings. On 8 December 2010 Ms Dolan made an application to the County Court for a non molestation injunction and an order that she be entitled to reside in the property to the exclusion of Mr Corby, who she wanted to be forbidden to come within a specified distance of it. She obtained a non molestation order on a without notice basis from the District Judge that day. The Recorder set out in his judgment that Mr Corby had ceased living in the house by virtue of that order. He has in fact lived elsewhere, sleeping on the sofas of family and friends, for nearly a year now.
6. On 10 December 2010 the matter returned before the District Judge with both parties represented and directions were given for a hearing on 17 December 2010. Before that date arrived, Ms Dolan applied to commit Mr Corby for breach of the non molestation

injunction made on 8 December. On 17 December 2010 the District Judge renewed the non molestation injunction and gave directions with a view to the application for an occupation order, a committal application and the question of the further continuation of the injunction being heard on 8 February 2011. On 8 February the matter was adjourned again, there being insufficient court time, to be heard on 9 and 10 March. Directions were given with a view to medical evidence about Ms Dolan's state of health being available and also evidence with regard to the tenancy that it was thought Ms Dolan had acquired of another property. The order recites that failure to comply with these directions may result in the court drawing adverse inferences against Ms Dolan.

7. In March the hearing was once more adjourned. It seemed that on this occasion Ms Dolan's legal representatives were in difficulty. The judge who heard the matter that day set up the hearing in May which resulted in the orders now under appeal.
8. I turn then to the hearing before the Recorder. The parties were able to resolve the question of the non molestation injunction and the outstanding committal application by means of cross undertakings. The Recorder was left therefore with the dispute over the occupation of the Bingley property to determine. He heard evidence from both parties and gave a written judgment, as I have said. A schedule of findings sought by Ms Dolan was provided. Six of the twelve proposed findings were abandoned at the outset. The Recorder considered the remaining six together with other issues that the parties had agreed were relevant to his determination.
9. In the course of his judgment the Recorder made a number of assessments and findings. It may be helpful simply to list them. Firstly I will deal with what is said about the parties themselves: -
  - (1) The Recorder made observations about Ms Dolan as she appeared to him whilst giving evidence. Amongst his observations were that at times she appeared confused and unable to follow the questions she was asked and at other times she became tearful although she also seemed to have a remarkably good memory and a good insight into the reasons behind the questions.
  - (2) He found her to be "A vulnerable woman who finds herself unable to live with the respondent". He found that she was "a very disturbed lady in need of immediate psychiatric help". Elsewhere in his judgment he said she "clearly suffers from psychiatric problems". The Recorder did not have medical evidence about Ms Dolan's psychiatric state but we were told today that he did have a bundle of documents about her medical history which showed that she had had psychiatric help although no particular psychiatric condition had been diagnosed.
  - (3) He found she had been free from drugs since November 2009. Although he did not spell out the long history of drug taking prior to that it, was implicit in what he said that he was conscious of Ms Dolan's drug problem.
  - (4) Ms Dolan claimed that she was suffering from cancer and awaiting an operation. The Recorder made no finding as to whether or not that was so, there being a total lack of evidence in support of it and also an absence of any indication that she had sought treatment or was imminently going to do so. He certainly did

not approach her case as if she had a serious illness that made it more important for her to be in the Bingley property.

- (5) The Recorder set out that Ms Dolan had spent periods in prison including a period in prison for perjury which had involved impersonating her sister at court.
  - (6) He said that Mr Corby was large in stature compared to Ms Dolan and he formed the view that Mr Corby "could have a dominating disposition".
  - (7) He found that Mr Corby was registered disabled and suffered from spondylosis and problems with blood pressure which prevent him from working but would not prevent him from living on his own.
10. Secondly, the Recorder made findings about the allegations made by Ms Dolan against Mr Corby. It appears from his judgment that a number of the allegations made by Ms Dolan the Recorder did not find proved. He said that:
- "...as far as the allegations of violence and sexual abuse [are concerned], certainly before the matters listed in the schedule to which I will refer later, these are so generalised and without any support I am unable to come to any conclusions as to whether or not they took place."
- Later however he had said that he had formed the view that "the allegations of direct physical violence were not proved".
11. Other allegations he did find proved. He said that he found Mr Corby "did subject the Applicant to verbal abuse and frequently belittled her". He set out the respects in which he found this to be so by reference to the allegations on the schedule. His findings amounted to a finding that Mr Corby was abusive towards Ms Dolan on 2 December 2010 when he received a letter from the police, that on 6 December 2010 he threatened to "chuck her out of the fucking house" and on 7 December 2010 he was verbally abusive to her. He also found that Ms Dolan's "conduct towards him over the years must have been difficult to put up with, certainly in relation to her drug taking" but that this finished in November and then "it was simply a question of finding it difficult to live together from that period for over a year".
12. Thirdly, the Recorder made findings about who had occupied the property during the tenancy and about other accommodation that had been available to the parties. He found that from time to time Ms Dolan was not living at the property with Mr Corby but had other addresses. He found that she had recently had a tenancy of another property in Thornton which was available for immediate occupation albeit that it was unfurnished. Ms Dolan had given up that tenancy voluntarily not long before the hearing before the Recorder for no reason. The Recorder found that the Thornton property was no longer available to her although he did consider the history of it "an indication that the Applicant, if not the Respondent, could find other accommodation". In contrast he found that Mr Corby had lived at the Bingley property for the whole period until he was obliged to leave because of the order.

13. Fourthly, he made findings about the parties' needs and resources. He found both had very similar and ordinary needs for housing of some sort. Neither had savings or earnings but they were on benefits and would each receive help from the local authority.
14. The appellant complained in his grounds of appeal that the Recorder made the findings in relation to the three occasions of verbal abuse in December 2010 despite making any comment about his credibility and without explaining why he preferred the respondent's account to that of the appellant and particularly when there were serious doubts as to her credibility, for example because she had spent periods in prison including for perjury. I am not persuaded that there is any substance in this ground of appeal. The Recorder was discriminating in his approach to the allegations made by Ms Dolan finding some proved and not others. It has not been demonstrated that the relatively minor findings that he did make against Mr Corby were not open to him or were against the weight of the evidence.
15. It was also submitted that the Recorder's finding that Ms Dolan was in need of immediate psychiatric help was not supported by any medical evidence despite the directions given about this in February. Mr Corby argued that it was not within the expertise of the judge to reach the sort of views about the mental health of a party that the Recorder had reached which were a matter for the doctors. I am not persuaded by this ground of appeal either. The absence of medical evidence expressly directed to Ms Dolan's mental state was obviously relevant but the Recorder plainly made his own assessment of her as she gave evidence, as he was entitled to do. There are cases in which a judge can properly form a view as to the vulnerability and disturbance of a party in this way and it has not been shown that the Recorder's conclusions were inappropriate. He did have access to material showing that Ms Dolan had had psychiatric help at times and he was aware of her long history of serious drug use and was entitled to use this together with the information that he gathered from observing her giving evidence.
16. Mr Rudd invited particular attention to the Recorder's finding about the availability of alternative accommodation to the parties. Having found that there was an indication, judging from what happened in relation to the Thornton property, that Ms Dolan could find other accommodation, the Recorder then went on to conclude (see page 12 of the judgment) that Mr Corby was in a better position to obtain alternative property without any great harm coming to him.
17. It was submitted that there was no evidence that Mr Corby was in a better position than Ms Dolan and that it was in fact Ms Dolan who had actually found a suitable alternative property. I will return to this question later on.
18. The appellant submitted that there were other findings that could and should have been made by the Recorder which would have carried weight in his favour when the Recorder determined what to do. The findings that were identified were in fact not wholly unrelated to the findings that the Recorder did make but amplified or strengthened those findings. For example, Mr Rudd submitted that a finding should have been made that Ms Dolan made false allegations and falsely claimed that she was suffering from cancer and that it should have been recorded that she had only returned

to the Bingley property in October 2010, having lived there only intermittently over the years.

19. I turn from the findings of fact made by the Recorder to the main focus of the appeal. The main focus of the appeal was upon the way in which the Recorder approached the statutory framework within which he made his decision and his balancing of the various factors. The application before the Recorder was made under Section 33 of the Family Law Act 1996. This is concerned with the relatively short term resolution of accommodation problems. Schedule 7 of that Act contains provisions that enable the court to make more lasting decisions as to what should become of a tenancy such as this one, incorporating for example the power to order the tenancy effectively to be transferred into the sole name of one or other tenant. No such application has been made by either party yet although it may be that one will be forthcoming in due course.
20. These parties are associated for the purposes of Section 33. They are both entitled to occupy the house by virtue of the tenancy agreement relating to it, and it was their home and accordingly by virtue of Section 33(1) either could apply for an order regulating the occupation of the property. The orders available are set out in Section 33(3) and are various. In deciding whether to exercise its powers under that sub section and if so how, the court must have reference to Section 33(6) and Section 33(7). Section 33(6) says:

"In deciding whether to exercise its powers under subsection (3) and (if so) in what manner, the court shall have regard to all the circumstances including—

- (a) the housing needs and housing resources of each of the parties and of any relevant child;
- (b) the financial resources of each of the parties;
- (c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child; and
- (d) the conduct of the parties in relation to each other and otherwise."

Sub section (7) reads:

"If it appears to the court that the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if an order under this section containing one or more of the provisions mentioned in subsection (3) is not made, the court shall make the order unless it appears to it that—

- (a) the respondent or any relevant child is likely to suffer significant harm if the order is made; and
- (b) the harm likely to be suffered by the respondent or child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made."

21. The Recorder correctly quoted these provisions. In accordance with the authority of *Chalmers v Johns* [1999] 2 FCR 110 he should first have considered whether the evidence established that the applicant was likely to suffer significant harm attributable to the conduct of the respondent if an order were not made. If the answer to that was "yes" he would have known that under the terms of Section 33(7) he had to make an order unless the respondent was likely to suffer significant harm if the order was made and that harm would be as great as or greater than the harm attributable to the conduct of the respondent which was likely to be suffered by the applicant if the order was not made. If, however, he had answered "no" to the first question he would have known that he had a broad discretion under Section 33(6) which he had to exercise having regard to all the circumstances of the case including the matters set out in that sub section.
22. Mr Miller for Ms Dolan made the very sensible and inevitable concession that, as had been submitted on behalf of Mr Corby, the Recorder did not approach Section 33(7) and Section 33(6) separately in this way but conflated them and failed to identify whether significant harm had occurred which was attributable to the conduct of Mr Corby or to consider the balance of harm test in Section 33(7). That is not necessarily fatal to the Recorder's determination. Mr Miller's pragmatic approach on behalf of Ms Dolan was not to try to defend the Recorder's decision as an application of Section 33(7) but to argue that this Court should treat the matter as if the Recorder had concluded that Section 33(7) did not contain the answer and had gone on to consider all the circumstances in accordance with Section 33(6). He submitted that the Recorder addressed the factors that he needed to address in determining how to exercise his discretion in these circumstances and arrived at a decision which was well within that discretion. I will return later to why he said that.
23. Mr Rudd submitted that the order was not within the Recorder's discretion. An occupation order is a draconian order as the authorities establish, notably *G v G* [2003] FCR 53. There was insufficient in this case Mr Rudd submitted, to justify such an order. There were only three findings of verbal abuse over a five day period and it was submitted that was not significant harm under Section 33(7) nor sufficient alone or in combination with the other features of the case to support exercising the discretion under Section 33(6) by making an exclusion order. The conduct in which the Recorder found Mr Corby had engaged was not only not actual violence it was, it was argued, of a minor nature. It also had to be set in the context of Ms Dolan's conduct in making allegations against Mr Corby which were not proved, and claiming she was suffering from cancer when that was not established, as well as her history of drug taking going back over 30 years and the fact that she had not occupied the property as consistently as Mr Corby had. Furthermore Ms Dolan was the one who had found an alternative property which she had given up voluntarily for no reason and there was no basis on which to say that Mr Corby was in a better position to rehouse himself than she was.
24. For the respondent Mr Miller submitted that the factors that weighed with the Recorder in his decision can be identified from the judgment as a whole which reveals that the Recorder addressed the factors set out in the checklist of factors in Section 33(6) and had regard to all the relevant circumstances. He placed particular reliance on the findings that the Recorder made concerning the psychiatric state of Ms Dolan. They are to be found at various points in the judgment and whilst it was acknowledged that the Recorder could have dealt with them more fully in his overall analysis, Mr Miller

pointed out that they were summarised there with the Recorder finding that Mr Dolan clearly suffered from psychiatric problems which would be alleviated by being away from Mr Corby. He submitted that it would have been harmful to exclude Ms Dolan from the property given this vulnerability and her history of many years addiction to heroin. Indeed he submitted that the Recorder could and should have made a finding that excluding Ms Dolan from the house would cause her significant harm and that he could and should have put that into his balancing exercise where it would carry considerable weight.

25. He also submitted that there were other factors that weighed in favour of the decision the Recorder took. By the time he heard the case Mr Corby had been living away from the property for seven months which reduced the draconian nature of the order terminating his rights. It was also relevant that the Recorder had found on balance Mr Corby's conduct towards Ms Dolan had been more responsible in latter years for the situation in which they found themselves and that he had subjected her to verbal abuse and frequently belittled her.
26. There is little doubt in my mind that the Recorder did conflate Section 33(6) and Section 33(7) rather than considering them separately as he should have done. It is difficult to see how Section 33(7) could ever have been satisfied on these facts given that it requires not only that the applicant is likely to suffer significant harm if an order is not made but that she is likely to suffer significant harm attributable to conduct of the respondent. The Recorder found that Ms Dolan's psychiatric problems would be alleviated by being away from Mr Corby but any argument that this amounted to a finding that she was likely to suffer significant harm attributable to Mr Corby's conduct if an order were not to be made would be tortuous in the extreme.
27. I agree with Mr Miller however that the Recorder's judgment can properly be approached as an exercise of discretion under Section 33(6) and that his conflation of the two provisions does not necessarily vitiate that exercise of discretion. The Recorder plainly had regard to the factors in Section 33(6) which he examined during the course of his judgment. Amongst those factors, the vulnerability of Ms Dolan and her mental health problems were obviously very influential in the Recorder's thinking. That is apparent from the judgment. They are mentioned a number of times including in his concluding paragraphs. It was correct that they should carry weight in the final analysis. No finding of violence had been made by the Recorder against Mr Corby and the Recorder had that in mind. I do not read *Chalmers v Johns* or *G v G* as saying that an exclusion order can only be made where there is violence or a threat of violence. That would be to put a gloss on the statute which would be inappropriate. *Chalmers v Johns* and *G v G* stress that it must be recognised that an order requiring a respondent to vacate the family home and overriding his property rights is a grave or draconian order and one which would only be justified in exceptional circumstances, but exceptional circumstances can take many forms and are not confined to violent behaviour on the part of the respondent or the threat of violence and the important thing is for the judge to identify and weigh up all the relevant features of the case whatever their nature. Here the central feature was the psychiatric state of the applicant which was capable in my view of making the case exceptional. The Recorder had the benefit of seeing and assessing the parties, their strengths and their vulnerabilities and how each was likely to deal with the challenge of being without the house. Ms Dolan's psychiatric state carried great weight with

him. He recognised that the case was a difficult one with a fine balance, as indeed it is; but he concluded that Mr Corby was "in a better position ... to obtain an alternative property without any great harm coming to him". The fact that Ms Dolan had been able to get another tenancy was relevant but not determinative. The practicality was that by the time of the hearing before the Recorder that tenancy was no longer available and Ms Dolan would have had to obtain another just as Mr Corby would if he were to be excluded. The Recorder thought Mr Corby more able to deal with this because he was less vulnerable than Ms Dolan. He was entitled to reach that conclusion.

28. Exercising discretion under Section 33(6) is not a matter of considering the behaviour of the parties and awarding occupation of the property in question to the one who has behaved less inappropriately. All the circumstances must be considered, of which conduct is only one. The end of the relationship between these parties had given rise to a situation in which the Recorder had no choice but to exclude one of them from the house as it was clearly unworkable for them both to live there together, as Mr Corby had recognised by moving out after the non molestation order.
29. In those circumstances the Recorder had to determine which of the parties should remain there. His conclusion that it should be Ms Dolan was well within his discretion and sufficiently justified by his judgment read as a whole. I would therefore dismiss this appeal.

**Lord Justice Thorpe:**

30. I agree

**Lord Justice Rafferty:**

31. I also agree.

**Order:** Appeal dismissed