Steel Linings Limited, Mark Harvey v Bibby & Co.

Court of Appeal (Civil Division)

26 March 1993

1993 WL 964281
Before: Lord Justice Balcombe Lord Justice Simon Brown Mr Justice Peter Gibson

Friday 26th March 1993

On Appeal from the Colchester and Clacton County Court (His Honour Judge Brandt)

Representation

- Mr Simon Livesey , instructed by Messrs Hextall Erskine & Co. appeared for the Appellants (Defendants).
- Mr Nicholas Valios Q.C. and Mr Robin Howard , instructed by Messrs Kingsford Stacey, London Agents for Messrs Marian Small (Colchester, Essex), appeared for the Respondents (Plaintiffs).

Judgment

Lord Justice Simon Brown:

This is the judgment of the court on an appeal by the first defendants, a firm of certificated bailiffs, against an interlocutory injunction granted against them by His Honour Judge Brandt at the Colchester and Clacton County Court on 19th February 1993 whereby they were restrained from selling, and ordered, subject to a number of undertakings and conditions, to make available for collection by the first plaintiffs, goods which a fortnight earlier, on 5th February 1993, they had seized from the first plaintiff's premises whilst levying distress for unpaid national non-domestic rates.

The appeal raises questions of some importance both as to the proper construction and application of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 (the Regulations) and as to the powers of the County Court in relation to the manner and extent of the levying of distress for unpaid rates. In a sentence, the appellants' contention upon this appeal is that the County Court judge had no power to grant an injunction restraining the sale of the goods seized or to order the return of those goods. Subject only to limited rights in the County Court to order replevin - not here applicable - as well as to award damages for “special damage”, the statutory scheme is, the appellants argue, such that the magistrates' court alone has the jurisdiction to receive appeals in connection with distress for rates and alone has the power to require bailiffs to return distrained goods. In the alternative the appellants argue that upon the particular facts of this case the judge ought not in any event to have made the order he did.

Although there is a good deal of evidence before the court, much of it goes to the detailed circumstances of what happened whilst distress was being levied on 5th February, and who was to blame for the conflict which undoubtedly developed, circumstances not for present purposes relevant. The facts relevant to this appeal can, indeed, be quite shortly stated.
The first plaintiffs are manufacturers of raised steel floors, carrying on business from an industrial estate at Clacton-on-Sea. The second plaintiff is a director of the company.

On 10th July 1992, Tendring Borough Council, the relevant authority, obtained from the magistrates a liability order against the first plaintiffs in respect of unpaid national non-domestic rates for 1992/93 in the sum of £9869.
On 30th September 1992 Tendring instructed the first defendants to levy execution in that sum. On three occasions thereafter the second defendant - a certificated bailiff employed by the firm - called at the first plaintiffs' premises with a view to securing payment of the sum due. These visits were respectively on 15th October 1992 when the second defendant left a distress notice, 10th November 1992 when a cheque was promised, and 27th January 1993 when one of the first plaintiffs' employees said she would chase their accountant.

Before distress was levied, however, only one payment was made. That was on about 11th December 1992 in the sum of £2484, reducing the outstanding liability to £7385.

So it was that the first defendants determined to levy distress, a means of recovery expressly provided for by the Regulations.

On 5th February 1993 the defendants attended the first plaintiffs' premises. It is sufficient for present purposes to record that the distraint process gave rise to a great deal of hostility between the parties; it involved more bailiffs (at least six) and a substantially longer period of time (some 12 hours) than would ordinarily have been required and, in the event, it resulted in a more than usually large bill of charges from the defendant bailiffs, and the issue of county court proceedings by the plaintiffs.

The particulars of claim eventually served include, we note, claims by the first plaintiffs for damage to their property, and by the second plaintiff for damages for personal injury. The sole claim relevant to this appeal, however, is for what the plaintiffs contend was an excessive levy of distress. As to that there can be no doubt the defendants seized and removed a good deal of industrial equipment. This included three vehicles, a forklift truck, three large boxes of tools, and a valuable lathe. It is the plaintiffs' case that the minimum value of these goods amounts to £46,340.

Regulation 14 of the Regulations provides that:
“1. Where a liability order has been made, the authority which applied for the order may levy the appropriate amount by distress and sale of the goods of the debtor against whom the order was made.

2. The appropriate amount for the purposes of paragraph (1) is the aggregate of—
(a) an amount equal to any outstanding sum which is or forms part of the amount in respect of which the liability order was made, and
(b) a sum determined in accordance with Schedule 3 in respect of charges connected with the distress."
When distress was levied on 5th February, the outstanding sum due in respect of rates was, as stated, £7385. The bailiffs' charges for levying distress are provided by Schedule 3 to the Regulations to be their reasonable costs and fees. These charges were eventually billed in the total sum of £5910.

To complete the history, on the day following the distraint process the plaintiffs notified Tendring that on 31st December 1992 they had in fact vacated two of the three industrial units previously occupied. This reduced their outstanding liability for unpaid rates by £1028 - from £7385 to £6357. On 16th February, the first return date under the order of 11th February, the injunction was continued. On 18th February, the plaintiffs served their particulars of claim. On 19th February, following a full inter partes hearing, the judge made the order now under appeal. It provided that upon the first plaintiffs' cross undertaking in damages and further undertaking to issue an application for taxation of the defendants' charges pursuant to paragraph 3 of Schedule 3 to the Regulations, the first defendants be restrained from selling or otherwise disposing of the seized goods and
"… do within 48 hours of service upon them of
(a) a notice of payment into court of the sum of £3,000 to abide the event pending taxation of the 1st defendants' charges
(b) a notice of application for taxation fo the said charges pursuant to [the Regulations]
make the goods available for collection by the First Plaintiff."
Those, then, are the essential facts.
We turn next to Regulations 14(7) and 15 , those most directly pertinent to the issues raised upon the present appeal:
"14
(7) A distress shall not be deemed unlawful on account of any defect or want of form in the liability order, and no person making a distress shall be deemed a trespasser on that account; and no person making a distress shall be deemed a trespasser from the beginning on account of any subsequent irregularity in making the distress, but a person sustaining special damage by reason of the subsequent irregularity may recover full satisfaction for the special damage (and no more) by proceedings in trespass or otherwise.
15

(1) A person aggrieved by the levy of, or an attempt to levy, a distress may appeal to a magistrates' court.

(2) The appeal shall be instituted by making complaint to a justice of the peace, and requesting the issue of a summons directed to the authority which levied or attempted to levy the distress to appear before the court to answer to the matter by which he is aggrieved.

(3) If the court is satisfied that a levy was irregular, it may order the goods distrained to be discharged if they are in the possession of the authority; and it may by order award compensation in respect of any goods distrained and sold of an amount equal to the amount which, in the opinion of the court, would be awarded by way of special damages in respect of the goods if proceedings were brought in trespass or otherwise in connection with the irregularity under regulation 14(7).

(4) If the court is satisfied that an attempted levy was irregular, it may by order require the authority to desist from levying in the manner giving rise to the irregularity."

It is, we think, unnecessary to set out the enabling legislation. Suffice to note that this is to be found in section 62 of and Schedule 9 to the Local Government Finance Act 1988 and, incorporated under the provisions of paragraph 3(2)(b) and (3) of Schedule 9, Schedule 4 to that Act. The Regulations, indeed, closely follow the language of those enabling provisions. As sated, the defendants' primary contention is that those Regulations provide a self-contained code or scheme which restricts an aggrieved ratepayer to his rights of appeal to a magistrates' court, at least in regard to securing the return of his distrained goods.

Mr Livesey for the defendants points first to the reference in Regulation 14(7) to the right of a ratepayer who, during a distress, sustains special damage, to recover "full satisfaction for the special damage (and no more)", a provision, he submits, inconsistent with a right to seek injunctive relief in the county court. Next he points to the power expressly given to the magistrates' court by Regulation 15(3) to "order the goods restrained to be discharged if they are in the possession of the authority". Finally, by way of putting those particular provisions into their wider context within the Regulations, he reminds us that the ratepayer is given express rights to stop the levy or redeem his goods by making payment of "the appropriate amount" - under Regulation 14(3) if he pays before the goods are seized, under Regulation 14(4) if he pays before they are sold.

All that, submits Mr Livesey, should be regarded as excluding the existence of any parallel jurisdiction in the County Court to order the return of the ratepayer's goods.

Mr Valios Q.C., for the plaintiffs, submits to the contrary. As first developed, his argument was that neither Regulation 14(7) nor Regulation 15(3) has any application whatever to a case like this involving a complaint of excessive distraint. Many passages in Halsbury's Laws (4th edition) Volume 13, he points out, draw the clearest distinctions between respectively illegal distress, irregular distress, and excessive distress. The Regulations here in question refer only to "irregularity in making the distress", not to excessive distress. The real purpose of that argument was, we suspect, to try to distance the plaintiffs' claim here from the express limitation imposed upon it by these Regulations to the recovery of special damage only. But, whatever its purpose, we

entertain no doubt that the argument was misconceived and, as we conclude, unnecessary too. That, indeed, it is unnecessary, Mr Valios himself came to submit when drawing our attention to Smith v. Enright (1894) 69 The Law Times 724, a Queen's Bench Divisional Court decision holding that damages in replevin are not limited to the immediate pecuniary loss occasioned by the distress but extend to damages for annoyance and injury to credit and reputation in trade.

The second limb of Regulation 14(7) seems to us to be directed to the following matters. First, it relates to “any subsequent irregularity”, by which is meant an irregularity subsequent to the liability order dealt with in the first limb of the Regulation. Second, it provides that any such irregularity is not to make the distraining authority a trespasser ab initio . Third, it allows a person sustaining “special damage” by reason of that irregularity to recover full satisfaction for the “special damage” but for nothing else (so that no recovery is possible for the mere trespass alone). Fourth, “special damage” does not mean special damages in contradistinction to general damages, but has a wider meaning to cover all damages caused by the irregularity, including, it may be, annoyance and injury to credit and reputation in trade. Fifth, to recover that damage, proceedings may be brought in trespass or otherwise in the ordinary way in the courts. Sixth, “irregularity” is not limited to irregular distress but includes illegal and excessive distress. This is clear from the provisions of Regulation 15 itsel, which, by paragraph 1, creates a right of appeal in respect of any grievance arising out of the distraint process.
The mere fact, however, that by virtue of Regulation 15 it was open to the first plaintiffs to make complaint to the magistrates in regard to what they say was an excessive distraint is not sufficient to indicate that that was their exclusive avenue of redress to restrain the sale or to secure the return of their goods. The critical question raised on the appeal is whether they cannot also seek redress in the County Court.

To this question we now turn.

The starting point must be this: distress for rates being a statutory remedy, authorising what otherwise would be a trespass to land and a trespass to or interference with goods, the levying of excessive distress being not authorised by statute is plainly a wrongful act. It differs from the largely common law distress for rent in a number of respects, and as Lord Wright in Potts v. Hickman [1941] A.C.212 said at page 241:
“It is no doubt clear that a distress for rates is much more akin to an execution under a writ issued by the court than to a distress for rent or the similar distress for cattle damage feasant. Both these latter distraints are acts of self help, though the former at least is now closely regulated by statutes starting from the Statute of Marlborough, 1267.”

As this court held in Quinlan v. Hammersmith and Fulham London Borough Council [1989] R.A.42 , distress for rates is not subject to the Statute of Marlborough. But just as the seizure of an excessive amount under a writ of fieri facias amounts to an actionable wrong (see Gawler v. Chaplin (1848) 2 Exch.503 and Watson v. Murray & Co. [1955] 2 Q.B. 1), so an excessive

distress for rates is a wrongful act. Regulation 14(1) itself empowers the authority to levy only “the appropriate amount by distress and sale”.

That wrongful act in earlier times would have constituted the tort of trespass. Now it is the tort of wrongful interference with goods under the provisions of the Torts (Interference with Goods) Act 1977 .

Section 15 of the County Courts Act 1984 gives the County Court jurisdiction to hear and determine any action founded upon tort. By section 38 , moreover, the County Court is empowered in such proceedings to grant any final or interlocutory injunction. More specifically, section 4 of the Torts (Interference with Goods) Act 1977 cofers express power “to make an order providing for the delivery up of any goods which are or may become the subject matter of subsequent proceedings in the court, or as to which any question may arise in proceedings” - a power exercisable equally by the County Court as by the High Court.

There further exists in the County Court - by virtue of section 144 of and Schedule 1 to the 1984 Act - the power (to be exercised by the District Judge) to grant replevin. Not only, however, is it common ground before us that replevin is a remedy available only in cases of illegal distress - distress, that is, where there is no right to levy the rate and not, therefore, this case - but we note with approval the reference in the 16th Edition of Clerk & Lindsell on Torts, paragraph 22–87, to the Law Reform Committee's observation that the power to make interlocutory orders for delivery up of goods under section 4 of the 1977 Act may pave the way for its eventual abolition.

Why then should the Regulations operate to displace what would otherwise be the County Court's clear jurisdiction in the matter? There are, of course, cases where a right is given by statute that does not exist at common law and where such right is held enforceable only in the way provided by the statute: “The right and the remedy are given uno flatu , and the one cannot be disassociated from the other” - see Barraclough v. Brown [1897] A.C.615 . But that clearly is not the position here: the right here is the common law right in a ratepayer to the enjoyment of his own goods save only to the extent that these are lawfully seized by due process of distress.

Nor in our judgment can it possibly be suggested here that the Regulations by clear language expressly exclude ordinary remedies. Quite the contrary: Regulation 14(7) contemplates in terms the recovery of damages “by proceedings in trespass or otherwise”.

Given, therefore, that aggrieved ratepayers can bring a civil action in trespass or otherwise, why should they not in the ordinary way invoke where appropriate the court's injunctive powers? Merely to point to the option given to them by Regulation 15 provides no answer to that question. Recognising, indeed, the inevitable delay inherent in the complaint process specified by Regulation 15 - suggested by counsel to be of the order of two weeks - this on occasion would prove an ineffective means of redress. Unlike some forms of statutory distress which provide for a period after seizure of the goods before

a sale can be made (see for example section 61 of the Taxes Management Act 1970), a distraining authority is free to sell immediately it seizes the goods. The County Court's jurisdiction, in addition, is more flexible, accommodating, as Regulation 15 process does not, the possibility of returning at least some of the debtor's goods before any final determination of the dispute can properly be made.

In short, it is our clear conclusion that the arguments here overwhelmingly favour the plaintiffs' case: there can be no question of these Regulations operating to oust the County Court's general jurisdiction in the matter.
We turn then to the appellants' remaining grounds of appeal. First it is submitted that damages are an adequate remedy in this case so that injunctive relief should on that account have been refused. As to that it is sufficient to note, as the judge himself observed, that the goods seized here were the tools of the plaintiffs' trade urgently needed to fulfil customers' contracts on which they were already working. Finally, the appellants contend that the judge should in any event have put the plaintiffs upon altogether stricter terms as a condition of ordering the interlocutory return of their goods. Mr Livesey urges in this regard: first, that the plaintiffs have already, by their failure to make due payment of outstanding rates, proved financially unreliable and exposed themselves to the process of statutory distraint; second, that there has as yet been no decision in their favour either (a) upon the taxation of the disputed distraint charges, or (b) as to whether this was in fact an excessive distraint - i.e. whether in truth the value of the seized goods was disproportionate to the sums properly recoverable. It should be noted in this regard that to be proved excessive the value of the goods seized must be clearly disproportionate to the arrears and charges, taking into consideration the conditions under which a forced sale of the effects must take place; to avoid an excessive distress all that is required is that the distrainor should exercise a reasonable and honest discretion in estimating what the goods will realise at auction; he need not consider what value the ratepayer himself could have obtained for them or what they would be worth to a business successor.

Mr Livesey points too to the rule applying in replevin cases: that at the first stage of this two stage process, the plaintiff seeking return of his goods must give security not merely in the amount of the alleged debt for which distress was made but also for the estimated costs of the action (which he is then required to prosecute without delay). Albeit replevin is not available here - the defendants' alleged default being less fundamental then the illegality required to found this remedy - it would be odd if on that account the plaintiffs were by different civil proceedings able to escape putting up comparably stringent security.

In our judgment there is force in these submissions. But that notwithstanding, we conclude that the judge's order here was one properly within the ambit of his discretion. He was not bound to accept the charges now claimed by the defendants as being what would be found on taxation to be their reasonable costs and fees. Further, as the judge himself observed in giving judgment, the very fact that the levying of this distress had been on any view a tense and

hostile process might well be thought, irrespective who was to blame, to lend credence to the plaintiffs' contention that this was indeed a case of excessive distraint. And as to the limited extent of the security required to be put up by the plaintiffs, one must recognise that the defendants' charges as billed clearly reflect the length and hostility of the distress process and so are unlikely to be capable of proper taxation until the responsibility for these problems has first been decided as part of the determination of the action itself. Accordingly, whilst in a normal case we find it difficult to see how a judge could properly require payment into court of less than the amount alleged to be outstanding by way of rates and charges, we regard the circumstances of this case as far from normal. In the result we would not think it proper to interefere with the exercise of the discretion which the judge undoubtedly had.

That said, however, we would sound this note of warning to future debtors tempted to build upon this present decision. Only very exceptionally will it be appropriate to invoke the interlocutory jurisdiction of the County Court to secure the return of distrained goods. Defaulting ratepayers (or other debtors) will need to present a powerful *prima facie* case for saying that the distraint has indeed been in some respect unlawful. Where, as here, the allegation advanced is one of excessive distraint, debtors should expect a generally sceptical reaction to their own estimation of their goods' worth. In short, the civil courts will not allow themselves to become a ready means of escaping the proper processes and consequences of statutory distraint.
That, however, is but a cautionary word to those who would seek to read too much into this decision. On the facts of the present case we have found no error of principle in the judge's approach. This appeal is accordingly dismissed.

Order: Appeal dismissed with costs; application for leave to appeal to the House of Lords refused.