

[2017 Gib LR 79]

SOUTHPORT PROPERTIES LIMITED v. KOUARI

SUPREME COURT (Jack, J.): May 2nd, 2017

Civil Procedure—execution—writ of execution—addressee—writ to be addressed to Sheriff of Gibraltar—Courts Act 2003 (whereby enforcement officers substituted for sheriff in England and Wales) not applicable in Gibraltar

Civil Procedure—execution—reasonable force to enter premises—UK Tribunals, Courts and Enforcement Act 2007, enabling enforcement officers to use reasonable force to enter premises to take control of goods, not applicable in Gibraltar

Civil Procedure—execution—writ of execution—renaming of writ of fi. fa. as “writ of control” under UK Tribunals, Courts and Enforcement Act 2007 not followed in Gibraltar—change of name liable to cause confusion, as different substantive law of enforcement

The claimant sought possession of his property from the defendant, together with arrears of rent, mesne profits and costs.

Following an increase in his rent, the defendant had defaulted on making his rental payments. He ignored a notice to quit. The parties agreed a consent order to the effect, *inter alia*, that the defendant was to give possession of the property to the claimant by a particular date. He failed to do so and the claimant applied for the issue of a writ of possession and a writ of execution to recover £6,921.85 and interest.

The court was minded to order possession with arrears or mesne profits which were agreed at £2,250. The writ of possession was ordered to be suspended for one month.

Four issues arose: (a) the style to be used for Her Majesty the Queen in the form of writs of execution; (b) the addressee of the writs, given the changes in England and Wales brought about by the Courts Act 2003; (c) whether the powers of enforcement of judgments against goods were affected by changes in English law; and (d) whether writs of *feri facias* should be renamed as “writs of control” as had occurred in England under the Tribunals, Courts and Enforcement Act 2007, s.62(4).

Held, ruling as follows:

(1) The style to be used for Her Majesty the Queen, when acting in right of Gibraltar, should be the Queen of Gibraltar. Her full title was as set out in the writ in the Schedule to the judgment (para. 13).

(2) Writs of execution should continue to be addressed to the Sheriff of Gibraltar. In England and Wales, the enforcement of High Court writs had, until 2004, generally been entrusted to the sheriff of the county in which execution was to take place. That had been changed by the Courts Act 2003, which substituted enforcement officers for the sheriff. The law governing the enforcement of judgments was not part of the practice and procedure of the High Court. Sheriffs and their officers, and latterly enforcement officers, were not officers of the High Court and their rights and duties in executing judgments were governed by the general law, not by any procedural rules of the High Court. The Courts Act 2003 did not apply to Gibraltar. It did not apply expressly, nor was it automatically applied under s.12 of the Supreme Court Act 1960 (by which the Supreme Court was to have the powers of the High Court in England) because the changes it made were not to the powers of the High Court but to the general law of execution of judgments. Accordingly, writs of execution should continue to be addressed to the Sheriff of Gibraltar. (Section 6(2) of the 1960 Act automatically gave the Sheriff of Gibraltar the powers held by an English sheriff from time to time but the fact that sheriffs in England no longer had a role in the enforcement of judgments could not remove a power or duty which the Sheriff of Gibraltar had under Gibraltar law.) The Sheriff of Gibraltar was not, just as a sheriff in England was not, an officer of the court (paras. 14–17).

(3) Insofar as the Tribunals, Courts and Enforcement Act 2007 amended the law of enforcement, it did not apply in Gibraltar. It could not be implied that the power given to enforcement officers by Schedule 12, para. 17 of that Act to use reasonable force to enter premises to take control of goods, which was not a power of the English High Court but of the enforcement officer (subject to obtaining the necessary authorization), extended to Gibraltar (para. 20).

(4) The renaming of writs of *feri facias* as “writs of control” in the 2007 Act (s.62(4)) would not be followed in Gibraltar. Although a procedural change of name of this nature would normally apply automatically in Gibraltar, the change was liable to confuse. Practitioners and lay persons would be liable to assume that a writ of control carried with it the powers and procedures applicable to enforcement officers in England, whereas that would not be the case. The safest course would be to continue to use the old title of the writ, and the old form of a writ of *feri facias*. Keeping the former name and form would reflect the different substantive law of enforcement in Gibraltar, and would still be in substantial conformity with English practice and procedure. It followed that a combined writ of possession and control (as was now possible under the CPR) could not be issued but this would avoid problems in how the

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Sheriff of Gibraltar should word his return to the writ when the taking of possession of land and the seizure of goods occurred at different times (paras. 21–23).

Cases cited:

- (1) *Harrow L.B.C. v. Qasi*, [2003] UKHL 43; [2004] 1 A.C. 983; [2003] 4 All E.R. 461; [2003] 3 W.L.R. 792; [2004] 1 P. & C.R. 258; [2003] 2 FLR 973, considered.
- (2) *Jones v. Savery*, [1951] 1 All E.R. 820, referred to.
- (3) *Seruya Holdings Ltd. v. Halhoul*, 2016 Gib LR 71, referred to.
- (4) *Sheffield Corp. v. Luxford*, [1929] 2 K.B. 180; [1929] All E.R. Rep. 581; (1929), 93 JP 235; 98 L.J.K.B. 512; 141 L.T. 265; 45 T.L.R. 491, referred to.

Legislation construed:

Supreme Court Act 1960, s.6:

“(1) The Registrar shall be the Sheriff of Gibraltar and shall . . . execute all such writs, warrants, orders, commands and process of the court as he shall be required by the court to execute . . .

(2) In the exercise of his powers and duties as Sheriff of Gibraltar, the Registrar may exercise such powers and shall perform such duties as are from time to time exercised or performed by a sheriff in England in accordance with the law from time to time in force in England . . .”

s.12: “The court shall . . . possess and exercise all the jurisdiction, powers and authorities which are from time vested in and capable of being exercised by Her Majesty’s High Court of Justice in England.”

Courts Act 2003 (c.39), s.99:

“(1) Schedule 7 contains provisions about High Court writs of execution . . .

(2) Any rule of law requiring a writ of execution issued from the High Court to be directed to a sheriff is abolished.”

Tribunals, Courts and Enforcement Act 2007 (c.15), s.62(4):

“The following are renamed—

(a) writs of fieri facias, except writs of fieri facias de bonis ecclesiasticis, are renamed writs of control . . .”

Schedule 12, para. 17: “. . . [A]n enforcement agent may if necessary use reasonable force to enter premises or to do anything for which the entry is authorised.”

S. Chandiramani for the claimant;

J. Daswani for the defendant.

1 **JACK, J.:** By a claim form issued under CPR, Part 55 on November 12th, 2015, the claimant (“the landlord”) sought possession of 312/12 Main Street, Gibraltar, together with arrears of rent, mesne profits and

costs. These residential premises (“the maisonette”) are and were the defendant’s (“Mr. Kouari’s”) home. He first occupied them under a written tenancy agreement made on Friday, March 22nd, 1996 at a rent of £45 per week.

2 The tenancy as originally signed contained the terms:

“4. If the rent which is payable in advance shall be in arrears after it has become due and payable, whether legally demanded or not or if there shall be any breach of the terms of the tenancy hereby created, the landlords reserve the right to re-enter on any part of the premises and thereupon the tenancy hereby granted shall be determined.

...

6. If the tenant shall not yield up the flat at the expiration of the term hereby granted, then the tenancy shall be deemed to continue on exactly the same terms and conditions as heretofore, but it will then become a monthly tenancy determinable on either side by the service in a writing of one month’s notice not necessarily referable to the payment of rent.”

3 Subsequently, the rent was increased with Mr. Kouari’s consent, latterly to £250 per month with effect from December 2004. In November 2014, the landlord’s property manager purported to increase the rent to £450 per month with effect from January 2015. Mr. Kouari paid the rent of £250 for December 2014, but thereafter paid no further rent. He said that he could not afford the £450 per month.

4 By letter of Tuesday, April 14th, 2015, Attias & Levy, acting on the landlord’s behalf, gave or purported to give a notice to quit the maisonette within two months, in other words by Sunday, June 14th, 2015. The notice to quit was not in the standard form which provides for the notice to quit to take effect at the end of the next period of a periodic tenancy.

5 The matter came before me on January 24th, 2016. There seemed a number of issues between the parties. First, there was an issue as to whether the maisonette was erected on or before March 1st, 1959. If it was, then the tenancy agreement would be subject to Part II of the Housing Act 2007 and Mr. Kouari would be entitled to the protection against eviction given by that Act: see *Seruya Holdings Ltd. v. Halhoul* (3). Secondly, Mr. Kouari disputed that the purported rent increase with effect from January 2015 was effective.

6 Thirdly, there was an issue as to whether the notice to quit was effective. The notice did not take effect (if the periodic tenancy was monthly) on the 29th of a month (assuming a monthly tenancy started one week after March 22nd, 1996) or possibly on the last day of the month (if

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the change in the payment of the rent to the first of the month was significant) or, just conceivably, on a Friday (if the tenancy remained a tenancy from week to week, notwithstanding the change to a monthly rent). It might have been saved by the terms of cl. 6 of the tenancy agreement. However, if rent was paid weekly, but the term of the tenancy was monthly, then the clause would merely clarify that a notice to quit could expire on the 29th of a month, notwithstanding that the 29th was not a Friday (when the weekly rent would be due). Fourthly, there was an issue as to whether the landlord was entitled to possession anyway, based on Mr. Kouari's undisputed failure to pay at least the £250 per month rent from January 2015, or whether he had any right of set off for disrepair. (The maisonette was said to suffer from humidity and the landlord was alleged not to have carried out promised works.)

7 On March 16th, 2016, I gave directions for the trial of a preliminary issue as to whether the maisonette was subject to Part II of the 2007 Act. Subsequently, it became common ground that 312 Main Street was built in 1969, so that the maisonette was erected after 1959. The preliminary issue as regards the Housing Act 2007 therefore fell away.

8 In consequence, the parties made a consent order on May 23rd, 2016. The order and the schedule to it were not well worded, but the parties agreed when the matter came before me on April 27th, 2017 that the effect was that Mr. Kouari was required to give possession of the property on or before August 23rd, 2016, but that if he paid £5,000 towards the landlord's costs, the landlord would waive any arrears of rent.

9 In the event, Mr. Kouari did not vacate the maisonette by that date. The reason is that he has nowhere to go. He has applied to the Housing Department for government housing but been unsuccessful. The Moroccan community has been unable to assist. He has been unable to find private rentals. Unfortunately, Mr. Kouari has been unemployed and after six months has lost his right to further unemployment benefit. His situation is thus pretty desperate. He has not paid any rent to the landlord after August 23rd, 2016.

10 On March 15th, 2017, the landlord issued an application for the issue of a writ of possession, and for a writ of execution to recover £6,921.85 and interest. This application came before me on April 27th, 2017. After argument as to whether Mr. Kouari had any defence to the application, I concluded that there was no purpose adjourning the matter. The order of March 23rd, 2016 was poorly worded, in that it purported at one and the same time to give possession on August 23rd, 2016, and to discontinue the action. However, even if something could be made of the discontinuance, it would be a simple matter for the landlord to serve another *pro forma* claim form seeking possession.

11 In consequence, I indicated that I was minded to order possession with arrears or mesne profits, which were agreed at £2,250 (nine months at £250 per month). In the absence of any statutory power of suspension for a longer period, there is only a limited power to suspend a writ of possession: *Jones v. Savery* (2) (three-month suspension reduced to one month); *Sheffield Corp. v. Luxford* (3) (four or five weeks at most). In the circumstances, Mr. Chandiramani accepted that any writ should be suspended for a month.

12 This period of a month's suspension should hopefully give the Housing Allocation Committee sufficient time to consider a renewed application by Mr. Kouari for government housing. Whether he satisfies the Committee's scheme for allocation is, of course, a matter for the Committee, but Mr. Kouari (who did not appear at the hearing to be in the best of health) does not seem to have been at fault in becoming potentially homeless.

13 This leads to four issues. The first concerns the style to be used for Her Majesty the Queen in the form of writs of execution. The court has sought guidance from Mr. Michael Llamas, Q.C., H.M. Attorney-General for Gibraltar. He advises that Her Majesty, when acting in right of Gibraltar, should be styled as the Queen of Gibraltar. Her full title is as appears in the writ in the Schedule to this judgment.

14 The second question concerns the addressee of the writs. In England and Wales, the enforcement of High Court writs was, until 2004, generally entrusted to the sheriff of the county in which execution was to take place. (This was not invariable. In England, a writ of *fieri facias de bonis ecclesiasticis* was and is addressed to the bishop of the diocese in which a beneficed clergyman holds ecclesiastical property.) In 2004, High Court enforcement officers were substituted for the sheriff, who ceased to have an enforcement function: Courts Act 2003, s.99 and Schedule 7. Later, the Tribunals, Courts and Enforcement Act 2007 (albeit only with effect from April 6th, 2014) abolished the separate office of County Court bailiff. Thereafter, both bailiffs and High Court enforcement officers became enforcement officers: 2007 Act, s.62(2) and Schedule 13, paras. 77–82.

15 The law governing the enforcement of judgments is not part of the practice and procedure of the High Court. Sheriffs and their officers and latterly High Court enforcement officers, and enforcement officers *simpliciter*, were and are not officers of the High Court nor otherwise part of the High Court. Their rights and duties in executing judgments were and are governed by the general law, not by any procedural rules of the High Court. They were not subject to the supervision of the High Court in how they enforced judgments, except insofar as they committed actionable wrongs in the course of their execution work, when they could be sued under the ordinary civil jurisdiction of the courts. (The limited power for

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the court to make orders under para. 66(5) of Schedule 12 to the 2007 Act does not give a general supervisory power. It is merely a summary power to right wrongs.)

16 In my judgment, the 2003 Act does not apply to Gibraltar. It does not apply expressly. Nor is it automatically applied in Gibraltar under s.12 of the Supreme Court Act 1960 (Supreme Court to have powers of the High Court in England) because the changes it makes are not to the powers of the High Court but rather to the general law of execution of judgments. Accordingly, in my judgment, writs of execution should continue to be addressed to the Sheriff of Gibraltar. (Section 6(2) of the 1960 Act automatically gives the Sheriff of Gibraltar the powers held by an English sheriff from time to time but the fact that sheriffs in England no longer have a role in the enforcement of judgments cannot remove a power or duty which the Sheriff of Gibraltar has under Gibraltarian law.)

17 Whilst the Sheriff is also the Registrar of the Supreme Court, the offices are different: see s.6(1) of the 1960 Act. (Contrast s.4(1), which creates one office of Registrar of the Supreme Court, but gives the holder all the powers of a Master, Registrar, taxing officer, *etc.* of the High Court.) The Sheriff of Gibraltar is not, just as a sheriff in England was not, an officer of the court.

18 Thirdly, the change in English law also leads to a difficulty in relation to the enforcement of judgments against goods. Schedule 12 to the 2007 Act and the Taking Control of Goods Regulations 2013 made a number of changes to the law of enforcement. Some of the changes are these. Execution can now take place on any day (including Sundays and other *dies non*) between the hours—and only between the hours—of 6 a.m. and 9 p.m.: 2013 Regulations, regs. 12 and 13. Entry must be effected through a door or similar entry, and may not be obtained through an open window or skylight as thitherto: reg. 20. Detailed provisions are made for what were formerly walking possession agreements.

19 In addition to many minor changes, for the first time a power to effect forcible entry was given to an enforcement officer taking control of goods, albeit subject to conditions: 2007 Act, Schedule 12, para. 17. This is arguably a constitutional change in the relationship between citizen and state. As Lord Millett said in *Harrow L.B.C. v. Qasi* (1) ([2004] 1 A.C. 983, at paras. 86–87):

“86 It used to be an Englishman’s proud boast that ‘an Englishman’s home is his castle’. The idea was given expression in stirring language by William Pitt the Elder (Lord Chatham) . . .

‘The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may

enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!’

87 Although not unrelated to his rights of property, the poor man’s defiance of the King was not based on his title. The common law protects possession as well as title. A person who is in actual possession of land is entitled to remain in peaceful enjoyment of the property without disturbance by anyone except a person with a better right to possession. It does not matter that he has no title. A squatter can maintain a claim of trespass. His want of title does not justify the authorities in searching his premises without a search warrant.”

20 Whether or not this change is of a constitutional nature, an enforcement officer’s power of forcible entry is not a power of the English High Court; it is a power of the enforcement officer (subject to obtaining the necessary authorization). No implication can, in my judgment, be made that this power given to enforcement officers extends to Gibraltar. In my judgment, the 2007 Act, insofar as it amends the law of enforcement, does not apply in Gibraltar.

21 Fourthly, the 2007 Act renames as “writs of control” writs of *feri facias* (or more colloquially writs of *fi. fa.*), other than writs of *feri facias de bonis ecclesiasticis*: see s.62(4)(a). Normally a procedural change of name of this nature would automatically apply in Gibraltar. However, in my judgment, the change is liable to confuse. Practitioners and, even more so, lay persons are liable to assume that a writ of control carries with it the powers and procedures applicable to enforcement officers in England, whereas this is not the case.

22 The safest course in my judgment is to continue to use the old title of the writ, and the old form of a writ of *feri facias*. Keeping the former name and form is necessary to reflect the different substantive law of enforcement in Gibraltar: Supreme Court Rules 2000, r.6(3). The retention of the old title and form will still be in substantial conformity with English practice and procedure: Supreme Court Act 1960, s.15.

23 The old form is also written in better English. (Saying “You are now commanded,” as in the new writ of control, is not plain English, the proponents of which advise against the use of the passive form unless necessary. It is a form of bureaucratese which suppresses the patriotic use of the royal “We.”) It also follows that a combined writ of possession and control (as is now possible under the CPR) cannot be issued but this avoids problems with how the Sheriff of Gibraltar or his deputies should word their return to the writ when the taking of possession of land and the seizure of goods occur at different times.

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24 Attached in the Schedule to this judgment is the form of writ of *fi. fa.* which should issue in the event that the landlord's solicitors file an appropriate *praecipe*.

Ruling accordingly.

SCHEDULE: Writ of *fi. fa.*

[Title of action, as above]

ELIZABETH THE SECOND, by the Grace of God, of Gibraltar and of Our other realms and territories, Queen, Head of the Commonwealth, Defender of the Faith

TO the Sheriff of Gibraltar, greeting

WHEREAS in the above-named action it was on 2nd day of May 2017 ordered in this Court that the Defendant, Mohamed Kouari, do pay the Claimant, Southport Properties Ltd, £2,250.00:

WE COMMAND you that of the goods, chattels and other property of Mohamed Kouari in Gibraltar authorised by law to be seized in execution you cause to be made the sum of £2,250.00 and also interest thereon from 2nd day of May 2017 at 8 per cent per annum until payment together with sheriff's poundage, officers' fees, costs of levying and all other legal, incidental expenses and that immediately after execution of this writ you pay Southport Properties Ltd in pursuance of the said order the amount levied in respect of the said sums and interest.

AND WE ALSO COMMAND you that you indorse on this writ immediately after execution thereof a statement of the manner in which you have executed it and send a copy of the statement to Southport Properties Ltd.

WITNESS Anthony Dudley, Chief Justice of Gibraltar the _____ day of May 2017

This writ was issued by Attias & Levy of First Floor Suites, 39 Irish Town, Gibraltar, solicitors for the claimant.

The defendant resides at 312/12 Main Street in the City of Gibraltar.
