

IN THE WARRINGTON COUNTY COURT

Claim No. 8PL00468

Law Courts  
Legh Street  
Warrington  
Cheshire

Friday, 14<sup>th</sup> November 2008

Before:

HIS HONOUR JUDGE PLATTS

Between:

ALLIANCE & LEICESTER

Claimant/Applicant

-v-

MS DIANE REYNOLDS

Defendant/Respondent

Counsel for the Claimant:

MISS SARAH BADRAWY

Solicitor for the Defendant:

MR. NICHOLAS D.C. DAVIS

JUDGMENT APPROVED BY THE COURT

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## JUDGMENT

- A
1. THE JUDGE: This is an application for permission to appeal and, if appropriate, the hearing of the appeal itself, against an order of District Judge Gilham made on 15<sup>th</sup> August 2008 when, on the application (I think) of the defendant to set aside judgment, she made an order not only setting aside judgment but striking out the claimant's claim as it had been an abuse of the process of the court.
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2. The circumstances are certainly, in my experience, somewhat unusual. This action was commenced on 6<sup>th</sup> February 2008 in Plymouth County Court, and is based upon a mortgage granted by the claimant to the defendant on 7<sup>th</sup> December 1990 in respect of the property of 21 Dingle Grove in Liverpool, to secure a loan then advanced of £18,500.
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3. The defendant defaulted on that loan, and the claimant brought proceedings in the Liverpool County Court for possession and for a judgment on the loan. Those proceedings came before District Judge Knopf (as he then was) on 12<sup>th</sup> November 2001. He ordered the claimant to be given possession of the property on or before 4<sup>th</sup> January. He ordered that the defendant make a payment to the claimant of £27,051, that being the outstanding mortgage debt. He ordered the costs of the action be added to the mortgage, and he made an order for an early payment of £2,705. It is conceded today by the claimant appellants that that amounted to an order for possession together with a money judgment of the amount outstanding of the mortgage debt at that time, including the amount outstanding of the loan together with any arrears which had accrued to that debt.
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4. What happened then was that the claimant took possession on 19<sup>th</sup> March 2002, and on 7<sup>th</sup> June 2002, sold the property for a sum of £10,000. The costs of sale are alleged to have been something over £7,000 (I believe it was £7,132.33), leaving net proceeds of sale of £2,827.67, which monies were applied to discharge the sums outstanding upon the mortgage.
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5. Unfortunately, then, nothing was done until, as I have said, on 6<sup>th</sup> February 2008, these proceedings were issued in the Plymouth County Court claiming the sums outstanding on the very same mortgage, but giving credit for the net proceeds of sale, to which I have referred, and any payments since the date of sale amounting to £1,420. The total now claimed is termed, 'shortfall,' that being the amount outstanding on the mortgage less the net sale proceeds, and is £20,814.93. As I have said, credit has been given against that of the subsequent payments of £1,420.
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6. On 28<sup>th</sup> February 2008, the claimant obtained judgment in default of the defence in respect of the whole sum claimed (£29,429.39), which sum, of course, included interest. On 6<sup>th</sup> March 2008, on the application of the claimant, District Judge Walker made an interim charging order in respect of the defendant's current interest in a property at 6 Virginia Gardens in Great Sankey. Those applications were all supported by witness statements from the claimant's solicitor, Paul Hapscoe(?) at the time.
7. The matters then came to the attention of the defendant, who sought legal advice. This application to set aside judgment was made on 24<sup>th</sup> April 2008. The matter was transferred to the defendant's home court, Warrington County Court, for consideration of that application.

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8. As I have said, it came before District Judge Gilham on 15<sup>th</sup> August. She decided not only that judgment should be set aside but that, in the circumstances (although I have not seen the judgment, it is common ground), on the basis that these proceedings were effectively a duplication of proceedings which had been started in Liverpool in 2001, these proceedings were an abuse of the process of the court and therefore the action should be struck out. It is that decision which comes before me now, on the application for permission to appeal.

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9. I have had the benefit of reading skeleton arguments, both on behalf of the claimant and of the defendant. I observe, for the matter of record, that Miss Badrawy, who appears on behalf of the claimant, did not file the skeleton argument which was put in support of the claim and has not sought (quite rightly, in my judgment) to defend some of the suggestions that are made in it.

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10. Indeed, it seems to me (as Miss Badrawy rightly pointed out) that in paragraph 4 of that skeleton, where it says, "A line of decisions from both the House of Lords and Court of Appeal establish that it is permissible to bring separate proceedings for a recovery of mortgage shortfall," and then refers to the two cases of *Wilkinson* and *Bartlett*, that that does somewhat mislead the position, because those authorities are not proper authority for the position that the claimant is entitled to relief in the circumstances as here, where they have had an earlier money judgment.

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11. The way it is put by Miss Badrawy is, in fact, the only way that it could be put, in my judgment, on behalf of the claimant, and it is this; that when the earlier judgment was obtained in the Liverpool County Court, it was not either in the knowledge or the contemplation of either the parties or the court that there would be a sale and then a shortfall which might give rise to a separate right of action. That only became apparent in 2002, when the shortfall came about. That shortfall gives rise to a separate right of action (Miss Badrawy accepts that it is not a separate cause of action) which was not contemplated at the time of the initial proceedings and therefore, it is an entitlement for the claimant to bring that notwithstanding they still have the benefit of the earlier money judgment. That dealt just with arrears, not effectively with the shortfall.

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12. Mr Davis, who has acted on behalf of the defendant in this case, has helpfully referred me to the judgment of Lord Justice Longmore in *Bristol & West Plc v Bartlett*, and in particular paragraph 28. I have read the whole paragraph, and it seems to me that the last sentence sums up the position. He says this:

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"We consider, however, that the relevant cause of action is the cause of action for the debt, and following *Re McHenry*, there is no fresh cause of action arising on the ascertainment of the deficiency."

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13. It seems to me that encompasses what the defendant's position is and, it seems to me, what was probably in the mind of District Judge Gilham when she made the order she did; that effectively, the cause of action that the claimant relied upon in Liverpool in 2001 was a debt for a total sum then crystallised at £27,051. That was a cause of action which they succeeded on and got judgment in respect of. It seems to me that what has happened subsequently does not give any further cause of action to the claimant, and because it gives no further cause of action, I find it very difficult to see how it can give any further right of action to give rise to what, in my judgment, are essentially duplicitous proceedings.

- A 14. It seems to me that to argue that a shortfall gives rise to a further right to bring an action ignores the fact that the net sale proceeds of sale go to reduce the debt which is outstanding on the original judgment. Therefore, the shortfall is catered for within that existing debt and should not be (and is not, in my judgment) a proper subject for separate proceedings in this case.
- B 15. In reality, what has happened, as Mr Hapscoe, I think, said in one of his witness statements, is the claimant had originally overlooked the earlier order that they had when issuing these proceedings. It only came to light when the defendant raised the issue. It having come to light, it seems to me, the claimant has realised difficulty it may be in enforcing that original judgment, now some seven years old.
- C 16. However, that is a difficulty of their own making, and I do not think it would be right or proper for the court to allow separate proceedings in order to allow them to overcome that difficulty. The reality is that there was a judgment against the defendant based upon this mortgage for a money sum. That judgment has not been fully satisfied, it is right. But it has been partially satisfied by the sale of the property. However, the fact that that property has been sold with a shortfall does not give rise at all, in my judgment, to a separate cause of action.
- D 17. I do think that Section 70 of the County Courts Act has some relevance. That merely provides that any judgment or order should be final as between the parties. It seems that must apply to judgment in November 2001, and I think it is, therefore, an abuse of the process of the court for the claimant to seek to re-litigate this matter and this action.
- E 18. I have considered whether or not, in those circumstances, permission to appeal should be granted. Having considered the matter with some care, despite the helpful arguments put forward on behalf of the claimant, it seems to me that realistically, the arguments have no real prospect of success. In the circumstances, I do not think it is a case where permission to appeal should be granted. If it was, clearly, the appeal would be dismissed in any event. I refuse permission to appeal for those reasons.
- F THE JUDGE: Yes?
- MR. DAVIS: Your Honour, I would ask for the costs of today.
- THE JUDGE: Yes.
- MR. DAVIS: You should have a costs schedule. Was that served?
- G THE JUDGE: I have seen it, yes.
- MR. DAVIS: I have got a—
- THE JUDGE: Have you seen it, Miss Badrawy?
- H MISS BADRAWY: Yes, I have.
- THE JUDGE: Sorry if I keep getting your name wrong.
- MISS BADRAWY: No, that is quite all right.

A THE JUDGE: Yes, I have got it here.

MR. DAVIS: Your Honour, I have prepared for the (*inaudible*) a short bundle because we are under a CFA on this. If I take you to the costs schedule, first of all, although, technically, it is a permission hearing—

B THE JUDGE: Yes.

MR. DAVIS: —my understanding under Part 52 is that because the two are combined today, I am entitled to ask for costs.

THE JUDGE: Yes.

C MR. DAVIS: I have set out the costs there.

THE JUDGE: Yes, all right. I will hear from Miss Badrawy.

MR. DAVIS: Sorry, your Honour. There is only one other issue which is, as I say, that we are under CFA. I have got a small bundle with the notes of funding and the risk assessment, which I think is supposed to be filed.

D THE JUDGE: Right. Well, I will hear what is said first.

MISS BADRAWY: The observations I would make on the schedule of costs are that, I think, first and foremost (without any disrespect to Mr Davis), he is a grade A fee earner, charging at £185 per hour. I wonder whether a submission would be well founded to say that a lower-grade fee earner could have dealt with this matter and the preparation of this matter for today's hearing.

E THE JUDGE: Right.

F MISS BADRAWY: So, I query the rate charged at, because Mr Davis has completed all of the work in relation to this. In relation to this hearing, preparation has been made of a skeleton argument.

THE JUDGE: Yes.

G MISS BADRAWY: However, no further statements, or anything of that nature, have been forwarded. So I would query the length of time that has been used in relation to this matter, there being attendances on respondent of 1.8 hours. I query, if that means the respondent as in Ms Reynolds, whether or not time of 1.8 hours would have been necessary and reasonable bearing in mind that the observations made in the skeleton argument are all founded in law. Of course, Mr Davis has dealt with this case previously, so it would not have been a case where he would need to review the file or the findings of the district judge, because he was present at the hearing on 15<sup>th</sup> August.

H THE JUDGE: Yes.

A MISS BADRAWY: Of course, it is not a detailed schedule. There is no criticism of that, of course, but attendances on opponent also, and others; I am not entirely sure what they relate to.

THE JUDGE: Yes.

B MISS BADRAWY: The work done on documents is preparation for the hearing and skeleton, 6.2 hours. The skeleton itself, of course, refers to the facts in relation to the hearings and also the chronology. I query whether 6.2 hours is reasonable.

THE JUDGE: Yes. The problem was that the notice of appeal was not very full, was it?

MISS BADRAWY: I know, yes.

C THE JUDGE: So, it was quite helpful for the court to be given the chronology in that form at that time.

MISS BADRAWY: Those are the observations I make.

D THE JUDGE: All right. You do not challenge the entitlement to costs? I think he is entitled to costs, given it is the appeal itself.

MR. DAVIS: Yes. I cannot challenge.

THE JUDGE: All right.

E 19. I do not think the amount claimed is disproportionate to what was at stake for the respondent or for the matters involved. I also do not think it is inappropriate for a grade A fee earner to deal with this matter, given the potential difficulties in law which are raised by the appellant in the notice of appeal and the skeleton argument, and which do require some specialist knowledge. In my judgment, there is nothing unreasonable in the amounts claimed, either in the amount of work done or the rates charged. I am going to allow the base costs, as charged at £2,391.13.

F MISS BADRAWY: Your Honour, I am instructed to invite the court to order that any costs, or the costs, of course, that you have found liable, should be offset against any sums due under the money judgment.

G THE JUDGE: Before we get to that, we have got an uplift to deal with first, have we not?

MISS BADRAWY: Yes, certainly.

THE JUDGE: Is there any objection about the uplift, do you know?

H MISS BADRAWY: No, certainly not that I am aware of.

THE JUDGE: What is the uplift?

MR. DAVIS: Your Honour, the uplift in the CFA is 100 per cent, because this is a case which falls on a matter of law and is complex.

A THE JUDGE: Right.

MR. DAVIS: We can see that from the number of authorities.

THE JUDGE: Do you challenge that?

B MISS BADRAWY: Well, only on the basis that the base costs are sought on the basis that time needed to be spent on the documents and research, *et cetera*, so whether or not it should be claimed twice, that would be a...

THE JUDGE: For that reason, it should not be?

MISS BADRAWY: No.

C THE JUDGE: However, given that permission to appeal has been refused, there is no real prospect of success, I suppose you say, "Well, the risks to the claimant were not that high." I suppose that is the argument, is it not?

MISS BADRAWY: Perhaps so, yes.

D THE JUDGE: Do you say anything about that? You are saying to your client, "I want 100 per cent uplift," but you are saying to the court, "This has no real prospect of success."

MR. DAVIS: Your Honour, we came today to argue the appeal rather than no real prospect of success.

E THE JUDGE: Yes.

MR. DAVIS: We felt it was quite strong but, as always when you are arguing a technical point of law, you have a significant element of risk—

THE JUDGE: Where there is no authority directly on the point, as well.

F MR. DAVIS: Where there is no authority directly on the point. Exactly, your Honour.

THE JUDGE: All right. I am going to allow 100 per cent. So, it will be £4,782.26?

MISS BADRAWY: Yes, that is what I have.

G THE JUDGE: Now, you apply that that be set off as against the—

MISS BADRAWY: The money judgment.

THE JUDGE: —the money judgment.

H MISS BADRAWY: Yes.

THE JUDGE: I will hear Mr Davis. What do you say to that?

MR. DAVIS: Your Honour, I oppose that. There are two issues. First of all, the claimant is a large financial institution. It has been represented throughout by solicitors. It

A commenced these proceedings without considering whether or not it already held a money judgment.

THE JUDGE: Yes.

B MR. DAVIS: When that was pointed out (it arose as a question that we asked), they progressed with it and they have taken it to appeal. It is similar, in my submission, to an order made on almost an interlocutory basis that you would open and say... Take the example of a personal injury claim, where liability may be admitted and you know that there will be recovery at the end of the day. If the claimant has an adverse costs order because it breaches a direction against an unless order, for example, the defendant is entitled to payment of those sums as assessed and does not need to wait until later and have them set off.

C THE JUDGE: Yes.

MR. DAVIS: There is a further point, your Honour. I am just trying to find the provision. It is in one of the schedules to the CPR, and I think it is schedule 2, CCR order 20 or 22.

D THE JUDGE: The County Court ones?

MR. DAVIS: Under the old County Court Rules, if I can find it quickly. Here we go: CCR 22.11, in the *White Book* at page 2043.

THE JUDGE: Yes.

E MR. DAVIS: This is a provision about the set off of costs judgments:

“An application under Section 72 of the Act [*which is the section that deals with this*] for permission to set off any sums including costs payable(?) under several judgments obtained in the County Court shall be made in accordance with this rule.”

F That is what this application made today is. Subparagraph 2 deals with where the judgments are obtained in the same county court.

THE JUDGE: Yes.

G MR. DAVIS: Paragraph 3:

“Where the judgment or orders have been obtained in different County Courts, the application may be made to either of them on notice. Notice shall be given to the other court.”

H THE JUDGE: Right.

MR. DAVIS: Well, your Honour, while I appreciate my learned friend may wish to make this application, I think it has to be made in accordance with this rule, and notice has to be given to the other court.

A THE JUDGE: Liverpool County Court. Yes.

MR. DAVIS: Liverpool County Court. There is a provision, actually, in paragraph 6 also dealing with where the order is made, but that is afterwards. The point is that the other court ought to be on notice.

B THE JUDGE: Because it might affect any enforcement proceedings in that court. Yes.

MR. DAVIS: Your Honour, in any event, I say that this is not a case where one should look at a set-off. The claimant has a stale judgment. It has brought proceedings, it has caused the respondent/the defendant to incur costs and, in my submission, those costs should be paid. The claimant should be left to try and enforce its old judgment. These are two separate issues.

C THE JUDGE: Yes. Do you want to come back on that?

MISS BADRAWY: Of course, I note Mr Davis' point about the requirement of an application to be made.

D THE JUDGE: Yes.

MISS BADRAWY: In relation to the current money judgment, I appreciate that, of course, the claimant will now have to seek permission to enforce that money judgment.

THE JUDGE: Yes.

E MISS BADRAWY: So I accept the point made by Mr Davis that we would have to wait and see, essentially, as to whether or not that could be brought.

THE JUDGE: Yes.

MISS BADRAWY: I have made the application that I can, your Honour.

F THE JUDGE: Well, do you want to withdraw it, in those circumstances, or do you want to—

MISS BADRAWY: Yes, because—

G THE JUDGE: I think you probably—

MISS BADRAWY: —it may well be that a further application is made to—

THE JUDGE: Yes.

H MISS BADRAWY: —this court and to Liverpool County Court by those who instruct me, so I would rather withdraw it now.

THE JUDGE: Right. I will make this observation: I will allow you to withdraw the application, so what I say is not binding, but I would have been against you. I think, in the circumstances of this case, it seems that the defendant has been put to expense in defending this appeal which had no real prospect of success. I do not see why she

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should not recover those costs without them being set off against what has been rightly described as a stale judgment. That is my view, but it is not binding because the application was withdrawn.

MISS BADRAWY: I am grateful. Thank you.

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THE JUDGE: If you want to relay that back to your clients, I am sure they will be interested to hear it.

MISS BADRAWY: Yes.

THE JUDGE: Very good. So, that deals with everything, does it? Thank you.

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MR. DAVIS: Thank you.

MISS BADRAWY: Thank you.

THE JUDGE: Thank you both very much.

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MISS BADRAWY: I will complete an order...

*(Quiet discussions)*

THE JUDGE: Yes, it is pretty straightforward, I think, in the circumstances. Thank you very much for your help.

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MISS BADRAWY: Thank you.

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