Neutral Citation Number: [2020] EWCA Civ 1660

Case No: A3/2015/2002

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION (CARDIFF DISTRICT REGISTRY)
Claim No: A30CF 117 and 120

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 December 2020

Before:

LORD JUSTICE DAVID RICHARDS

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Between:

NRAM LIMITED	**Claimant/ Respondent**
- and -	
(1) PAUL EVANS **(2) SUSANNAH EVANS**	**Defendants/ Appellants**

- -
- -

The Appellants (in person)
Nicholas Broomfield (instructed by **Walker Morris LLP**) for the **Respondent**

Hearing dates: 3 December 2020

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Approved Judgment

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Lord Justice David Richards :

1. This is an application for a stay of an order for costs made by this court as long ago as 19 July 2017. The order was made against Paul Evans and Susannah Evans (the Appellants) following the dismissal of their appeal against an order made on 29 May 2015 by HH Judge Jarman QC, sitting as a Judge of the High Court. The Appellants were ordered to pay 95% of the Respondent's costs of the appeal on the standard basis, to be assessed if not agreed. I will refer to this as the Costs Order and to the liability for costs created by it as the Costs Liability.

2. The issue decided by Judge Jarman was whether a loan made to the Appellants by the Respondent's predecessor was secured by a mortgage against the Appellants' home (the property). The mortgage had been removed from the Land Registry in August 2014 following the submission of an e-DS1. The Respondent brought the proceedings for re-registration of the mortgage on the grounds that the e-DS1 had been submitted in error. The Appellants resisted the claim but Judge Jarman held in favour of the Respondent and made his order dated 29 May 2015.

3. The Appellants appealed to this Court, which dismissed the appeal and made the Costs Order: see [2017] EWCA Civ 1013, [2018] 1 WLR 639. It also made an order for the payment on account of £30,000, with which the Appellants complied on 1 March 2018, after the Supreme Court had refused their application for permission to appeal on 15 February 2018. The mortgage was re-registered at the Land Registry in March 2018.

4. The Respondent applied for an assessment of its costs on 14 May 2018. The assessment had not taken place when, on 9 November 2018, the property was sold. The total net proceeds of sale were paid to NRAM and its mortgage was duly discharged, and a Form DS1 filed at the Land Registry.

5. On 21 November 2018, the Supreme Court Costs Office (SCCO) carried out a provisional assessment of the Respondent's costs but it was not accepted by the Appellants who applied for a review of the entire bill of costs. On 27 December 2018, a detailed assessment was listed for a one-day hearing on 3 April 2019.

6. By an email dated 7 March 2019 the Appellants informed the SCCO that they believed there had been a change of circumstances and that a hearing of only half a day would be required. On 17 March 2019, Master Haworth adjourned the detailed assessment and required the appellants to clarify their position in relation to (i) the change of circumstances, (ii) the items in the bill of costs that they intended to challenge and (iii) a realistic time estimate. On 4 April 2019, Master Haworth ordered that unless the Appellants provided this information by 19 April 2019, the provisional assessment was confirmed, with liberty to either party to apply to vary or discharge the order within seven days after service (the Unless Order).

7. The Appellants denied receiving the Unless Order until 22 May 2019. On 19 June 2019 they issued an application to set aside the Unless Order (the Set Aside Application). The grounds advanced in support of this application, in a witness statement made by the Appellants, was that their liability under the Costs Order fell within the definition of "mortgage debt" in the mortgage and that, as a debt secured by the mortgage, it was discharged when the mortgage was discharged in November

2018. They said that an assessment would therefore serve no purpose and that the Unless Order should be set aside, as it would not have been made if the SCCO had been aware of the true position.

8. The Set Aside Application was heard by Master Haworth on 18 October 2019. After hearing the Appellants in person and counsel for the Respondent, the Master dismissed the application, save that the time limits in the Unless Order were extended, and ordered the Appellants to pay the Respondent's costs, summarily assessed at £4,000 plus VAT.

9. In response to the Appellants' submission that the discharge of the mortgage discharged the Costs Liability, counsel for the Respondent had submitted in his skeleton argument for the hearing before Master Haworth: "Even though the costs awarded by the Court of Appeal may come within the definition of the *'mortgage debt'*, on discharge of the mortgage, the shortfall is still payable, including the costs order. All that is lost is security for the debt – the debt itself remains."

10. In his judgment, Master Haworth said of the Appellants' submission:

> "The position, it seems to me, is not as outlined by Mr Evans. He is correct in stating that the terms and conditions of his mortgage characterised the costs of the Court of Appeal as a mortgage debt. As a result those costs should be added to the mortgage debt. That said, I find that the mortgage debt or elements of the mortgage debt remain once the mortgage was released in November 2018. Clearly, the mortgage had to be released to effect the sale of the property. In reality, to my mind the mortgage debt includes costs, those costs remain to be discharged by Mr and Mrs Evans."

11. The next procedural step was that the Appellants issued the present application in this Court. I will come shortly to the relief sought and the grounds on which it is sought.

12. On 20 January 2020, the Appellants filed an Appellant's Notice in the High Court, seeking permission to appeal against Master Howarth's order. The substantive parts of the grounds of appeal were that "the costs *[i.e. those payable under the Costs Order]* were in fact a discharged "mortgage debt" and/or "contract" between the claimant and defendant that was subsequently discharged by the claimant" and that the Costs Liability was "a secured debt that was subsequently discharged by the claimant in law and in equity" and there was no evidence before Master Haworth of "a personal liability for the defendant to pay costs to the defendant *[presumably, a misprint for the claimant]* following the sale of his property and discharge of his mortgage debt by the claimant". This is the same submission that had been made to the Master, that the legal effect of discharging the mortgage as security for the mortgage debt was that the personal liability of the Appellants for any liability falling within the definition of "mortgage debt" (including the Costs Liability) was also discharged.

13. It does not appear that any progress has been made with the Appellants' application for permission to appeal against Master Howarth's order. Mr Evans told me in the course of oral submissions that he had ordered a transcript of the Master's judgment at the end of 2019 or in early 2020 but had experienced difficulties in obtaining it.

Whatever the reasons for the delay, a transcript approved by the Master was sent to Mr Evans on 9 November 2020 and he supplied a copy of it to the court in the course of the hearing.

14. The Appellants' application to this court seeks a "stay of execution and other relief by CPR 40.8A paragraphs 4 and 5 of the Order dated 19 July 2017". In their witness statement in support of the application, the Appellants expanded on this relief. They wished the court to add to the Costs Order the words "but permanently stayed following the Respondent discharge and reissue by deed of their 95% costs of the appeal". They also sought an order for the repayment of the sum of £30,000 paid on account of costs. The Respondent filed a witness statement in opposition to the application.

15. I dealt with the application on the papers, dismissing it by an order made on 8 July 2020. I did so on two grounds. First, the Appellants were advancing the same submission as had been made to, and rejected by, Master Haworth, and any challenge should be way of appeal against his order. Second, and in any event, I stated that I would have refused the application on its merits because "it is clear that the redemption of the charge and the cancellation of the Land Registry entries in respect of it did not have the effect of releasing the applicants from such part of their liabilities secured by the charge as was not paid on redemption of the charge. Any shortfall remained payable to the respondent."

16. The Appellants exercised their right to renew their application at an oral hearing. This took place remotely. Mr Evans spoke on behalf of both Appellants, with the express consent of Mrs Evans who personally confirmed to me at the start of the hearing that she wished Mr Evans to speak for her. The Respondent was represented by Mr Nicholas Broomfield of counsel.

17. Mr Evans based the application on two main submissions. First, the effect of the discharge of the mortgage on the sale of the property was also to discharge the Appellants from all personal liability for any debt or liability that fell within the definition of mortgage debt and was therefore secured by the mortgage. Second, the Costs Liability was in any event time-barred under section 20 of the Limitation Act 1980. Further, the Appellants were not seeking the same relief from this court as they had sought by the Set Aside Application nor were the grounds advanced in support of the applications the same, so that the application for a stay to this court was not an abuse of process.

18. I will take each of these points in turn.

19. The first submission, that discharge of the mortgage discharges personal liability for all debts secured by the mortgage, rests on a misapprehension. There is a fundamental distinction between a personal obligation to pay a debt or other liability and any security (by way of mortgage, charge or otherwise) for that obligation. If the property is sold and the security is thereby realised, the payment of the net proceeds of sale to the mortgagee will reduce the debt owed by the debtor but it will not release the personal obligation of the debtor in respect of any unpaid part of the debt or liability. This has long been the law and it was restated by this court in *Bristol and West plc v Bartlett* [2002] EWCA Civ 1181, [2003] 1 WLR 284: see in particular [12] and [17]-[19]. In ordinary day-to-day language, people often speak of taking out a mortgage to

buy a house or a flat, but this is inaccurate in terms of legal analysis. It is the loan that goes towards paying for the house. The borrower is personally liable to repay the loan and interest on it, while the mortgage on the house provides security for the borrower's liability. The liability of the borrower is separate from the mortgage of the house, although the personal covenant to repay the loan and pay the interest may be contained in the mortgage document. Unless the debt is fully paid out of the proceeds of the mortgaged property, the discharge of the mortgage will not discharge liability for the unpaid part of the debt.

20. Mr Evans submitted that the Costs Order did not impose a personal liability on the Appellants but had the effect only of providing that the costs were secured by the mortgage and were payable out of the proceeds of sale of the property to the extent available. He submitted that it required additional express words to make it a personal liability of the Appellants. This submission is unsustainable. By the order dated 17 July 2017, this court made an entirely conventional order for the Appellants to pay 95% of the Respondent's costs of the appeal, to be assessed on the standard basis. Without more, it imposed a personal liability on the Appellants. It would have required express words to confine the effect of the order in the way suggested by Mr Evans.

21. In their written submissions, the Appellants also relied on the approach to costs taken by the Respondent before Judge Jarman. It did not seek from Judge Jarman an order for the costs of the action. Its counsel told the judge that it was relying on its contractual right under the mortgage to treat its costs, which would not therefore be subject to assessment on a standard basis, as secured by the mortgage. In the absence of a personal covenant in the mortgage or elsewhere by the Appellants to pay such costs, they would be recoverable only from the proceeds of its security and not from the Appellants personally. By contrast, the Respondent sought and obtained from this court the Costs Order against the Appellants, by virtue of which they are personally liable for the costs, assessed on the standard basis.

22. Mr Evans' alternative submission, that the Costs Liability is time-barred, is based on section 20(1) of the Limitation Act 1980, which provides:

> "No action shall be brought to recover –
>
> (a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal); or
>
> (b) proceeds of the sale or land;
>
> after the expiration of twelve years from the date on which the right to receive the money accrued.

23. Assuming that the Costs Liability falls within section 20 (as "any principal sum of money secured" by the mortgage), Mr Evans submitted that it became time-barred 12 years after the creation of the mortgage in 2004. That period ended in 2016, and the Costs Order was not made until July 2017, but Mr Evans was not deflected from his submission by the consideration that, if he were right, the Costs Liability was time-barred before it existed. Mr Evans' submission misinterprets the closing words of section 20. The period of 12 years is calculated "from the date on which *the right to*

receive the money accrued". That date could not be before the Costs Order was made and, as it seems to me, would probably be the date on which the assessment of the costs becomes binding. On any basis, the limitation period of either 12 years, if section 20 applies, or 6 years, if section 24 applies, has not expired.

24. It is, in my judgment, clear that there is no substance or merit in the grounds advanced by the Appellants in support of their application before this court and it should be dismissed on that basis.

25. There remains the question whether the application is an abuse of process because it is advanced on the same basis as the Set Aside Application which Master Howath rejected. Leaving aside the submission based on section 20 of the Limitation Act, which did not form part of the Appellants' case before Master Howarth (nor before this court until their written submissions filed in October this year), I am in no doubt that both this application and the Set Aside Application were based on the same argument, that discharge of the mortgage discharged the Appellants' personal liability under the Costs Order. That issue was decided against the Appellants by Master Haworth and the correct way to challenge his decision is by seeking permission to appeal to the High Court, not by applying to this court for a permanent stay of the Costs Order.

26. In the course of his submissions, Mr Evans accepted my suggestion that he might in the alternative seek a stay of the assessment pending determination of the Appellants' existing application to the High Court for permission to appeal against the Master's order. I think the proper forum for such an application would have been the Master and is now the High Court, but if I had considered a temporary stay to be justified on the merits, I would not have refused it on this procedural basis.

As there is no arguable basis for the orders sought by the Appellants from this court, I dismiss the Appellants' application.