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Green light given to lender to enforce stale possession order by Court of Appeal

Amber Homeloans Limited v. Darbyshire
B5/2015/1624

Article by David Bowden

Green light given to lender to enforce stale possession order by Court of Appeal

The Court of Appeal has refused permission for a 2nd appeal. It has upheld rulings by Judge Butler, District Judge Anson and Deputy District Judge Fairclough in Preston County Court. Those judges gave the lender permission to issue a warrant of possession to enforce a possession order that had been made more than 6 years previously. Although there had been an apparent period of inactivity on the court file in the last 2 years, on full examination the lender had made further concessions giving the borrowers time to pay which they had failed to comply with.

Amber Homeloans Limited v Mr & Mrs Darbyshire
B5/2015/1624 26 July 2016
Court of Appeal, Civil Division (David Richards and Lewison LJJ)

What are the facts?
In December 2007 Mr & Mrs Darbyshire ('the borrowers') borrowed £235,000 on a 5 year fixed term loan with interest only payable secured by a mortgage on their family home in Preston. They immediately fell into arrears and made no payment for the first 8 months. In the light of the arrears on 14 August 2008 the lender obtained a possession order which was never appealed.

Over the next 4 years from 2008 to 2012, the lender applied 7 times to enforce its possession order but 3 of these applications were withdrawn and 4 proceeded to a hearing. On each occasion the possession order was suspended to give the borrowers a chance to maintain payments and eliminate arrears. The county court gave the borrowers as much time as reasonably possible over a reasonable period to pay off the arrears. Finally in 2012 an order was made suspending enforcement on terms as to instalment payments. Again this was not complied with by the borrowers.

What do the court rules say about stale possession orders?
This is dealt with in Civil Procedure Rules 1998 ('CPR') part 83.2. This provides as follows:

> "***Writs and warrants of control, writs of execution, warrants of delivery and warrants of possession – permission to issue certain writs or warrants***
> ***83.2*** *(1) This rule applies to—.....(d) warrants of possession.*
> *(2) A writ or warrant to which this rule applies is referred to in this rule as a 'relevant writ or warrant'.*
> *(3) A relevant writ or warrant must not be issued without the permission of the court where—*
> *(a) six years or more have elapsed since the date of the judgment or order;*"

So a lender seeking to enforce a stale possession order – that is an order made by a court 6 or more years ago – must first obtain permission of the court before attempting to issue a warrant of possession. In addition CPR part 83 is quite prescriptive about these applications and CPR 83.2(4) provides that this information must be given to a court:

> "*(4) An application for permission may be made in accordance with Part 23 and must—*
> *(a) identify the judgment or order to which the application relates;*
> *(b) if the judgment or order is for the payment of money, state the amount originally due and, if different, the amount due at the date the application notice is filed;*
> *(c) where the case falls within paragraph (3)(a), state the reasons for the delay in enforcing the judgment or order; .....*
> *(f) give such other information as is necessary to satisfy the court that the applicant is entitled to proceed to execution on the judgment or order, and that the person against whom it is sought to issue execution is liable to execution on it*."

What happened when the lender tried to enforce its stale possession order?
The matter initially came before District Judge Anson in Preston County Court as a 'without notice' application by the lender. There is nothing improper or unusual about that. The District Judge decided that the lender should be given permission to issue a warrant of possession. The order was served on the borrowers and it gave them notice of their right to apply within 7 days to discharge it.

What happened before the District Judge at the hearing to set aside?
The borrowers duly made an application to set this order aside. This was heard by Deputy District Judge Fairclough in January 2015 and the hearing took 1 day. The Judge at the end of the hearing dismissed the borrowers' application. Permission to appeal that order was sought by the Appellants and granted in February 2015 and the execution of the warrant of possession was stayed pending the determination of the appeal.

What ruling did HHJ Butler give?
The appeal was heard by HHJ Butler in May 2015. This was a full hearing following which Judge Butler dismissed the appeal. Again this appeal took the best part of 1 day to hear.

What were the issues the Court of Appeal was asked to address?
Mr & Mrs Darbyshire had 6 grounds of appeal before the Court of Appeal. These were:

- Interpretation of CPR 83.2,
- Failure to deal with expiry of loan term,
- New 6 year period,
- Error of Law,
- Unfair curtailment of submissions, and
- Legal representative gave evidence

What does the respondent lender say?
As this was an oral permission hearing, the lender was not required to respond to the borrowers' application or be represented at the hearing. It accordingly made no submissions other than relying on the 3 judges below in the county court who all ruled that in its favour.

Are there any prior authorities of any relevance?
These authorities are highly relevant:

Duer v Frazer **[2001] 1 WLR 919 (**Evans-Lombe J)
A court would only extend time beyond the six-year period provided for by RSC Order 46 rule 2 where it was demonstrably just so to do. The burden of proof to establish that it was just to do so rests on the judgment creditor. Whilst every application turned on its own facts, the court would have regard to the reasons given for not issuing during the initial six-year period and to any prejudice suffered by the judgment debtor as a result of the delay. This would include any change of position by him. The claimant had not satisfied the court that the interests of justice required it to exercise its discretion.

National Westminster Bank plc v Powney **[1991] Ch 339** (Court of Appeal)
An application to issue, or to extend the time for, execution under a judgment was not within the meaning of s38 of the Limitation Act 1980. An application by a bank for the renewal of an existing warrant or the issue of a new one would not come within the provisions in s24(1) prohibiting the bringing of an action on a judgment after the expiry of 6 years from the date on which the judgment became enforceable. In view of the time that had elapsed since the issue of the warrant, the bank was entitled under Order 26 rule 5(1)(a) to the issue of a new warrant with the leave of the court and the Court of Appeal would grant such leave under RSC order 56 rule 10(3).

Society of Lloyds v Longtin **[2005] EWHC 2471 (Comm)** (Morison J)
The issue was whether there were facts which took the case out of the general rule that execution would not be allowed after 6 years. Here there were facts which took the case out of the ordinary. At the very outset, the judgement debtor must have known that the creditor remained intent on enforcing its rights against him. There could be no prejudice to him. The creditor had remained active in seeking to have recognised and enforced the many judgments which it had obtained. In the course of that task they had to be allowed time to consider their position and to adopt stances which reasonably appeared to them to be the best way of proceeding. A period of inexcusable delay of some 6 months at most did not disentitle the creditor to the relief it sought and permission to issue a writ of execution would be affirmed.

Why did Lord Justice Lewison refuse permission for a second appeal?
Any proposed 2nd appeal must meet the test in CPR part 52.13(2) namely that either *'(a) the appeal would raise an important point of principle or practice or (b) there is some other compelling reason for the Court of Appeal to hear it.*' Lord Justice Lewison refused permission to appeal on the papers stating that Grounds 4 to 6 raised no important point of principle or practice and did not demonstrate any compelling reason why permission to appeal should be granted. As to Grounds 1 to 3, whilst he saw points of principle he saw no realistic prospect of success in this case.

Lewison LJ drew attention to the power of the court to postpone or suspend a warrant of possession and noted that such a postponement had indeed been ordered in this case. He said this was not the same situation as *Duer v Frazer* which was a case of completed intransigence by the creditor.

What happened at the oral permission hearing before Lord Justice David Richards?
The grounds of appeal, skeleton argument and speaking note were prepared by the borrowers' son, who is a barrister. Owing to other commitments he was unable to represent his parents at the hearing. Mrs Darbyshire read from a speaking note he had prepared.

What reasons did Lord Justice David Richards give for refusing permission for a 2nd appeal?
On the 1st and main ground relating to CPR 83.2, David Richards LJ ruled that the lender's application for permission to issue a warrant after 6 years referred to the 7 applications for enforcement of the possession order. As DDJ Fairclough observed, DJ Anson would have the court file before him and would be able to look up and see that these applications were all made within the first 4 years. The borrowers' point made is that there is no explanation as to what happened in the last 2 years. They

submit that an application which provides no explanation for that period is demonstrably inadequate on such an application and should not have been granted.

David Richards LJ referred to *Duer v Frazer* **[2001] 1 WLR 919** but said that in that case there had been complete inactivity over 6 years. He ruled that it was plainly a matter for the court granting an extension that it should take into account what happened over the entire period and it was not realistically arguable that the court is deprived of a power.

He said that when the matter came before DDJ Fairclough in January 2015 on the application to set aside, he had a great deal more evidence before him from both the borrowers and the lender than that which was before DJ Anson when he made the 'without notice' order. When the application was made to set aside that order, it is not simply to see whether the order should have been made or not. The court exercises a new judgement and were that not the case, the court would be going through a pointless exercise. The material before DDJ Fairclough showed that he had a great deal of evidence of what occurred between 2012-2014 being the period the borrowers alleged was a period of inactivity by the lender.

Finally David Richards LJ said that he had looked at that evidence for himself. He noted there were a great deal of arrears and as between the borrowers and the lender there were proposals for payment of the loan which were often accepted by the lender but not adhered to by the borrowers. He said there was ample material before DDJ Fairclough to justify permitting an enforcement order out of time and said a ground of appeal of CPR 83.2 did not have any real prospect of success. He ruled that the other grounds of appeal were hopeless.

What about the application to gag the press from reporting this case?
At the end of the hearing Mrs Darbyshire asked that **'***If this case is to be reported can I ask that the proceedings just refer to us as "the party"?*' David Richards LJ asked the reason and was told: '*I don't know. It says so on my son's note here.*' He gave this application short shrift saying that '*Proceedings are in open court. What is said here can be reported. There can be reporting restrictions for cases involving children. I refuse your request.*'

What lessons can lenders learn from this case?
This case is a useful reminder of CPR 83.2 that permission of the court is required to enforce an order (not just a possession order) made more than 6 years previously. The Court of Appeal in *Powney* held that enforcement was not the bringing of an action to which the Limitation Act 1980 applies. It should be noted that CPR part 83 was intended to be a bringing together of all the previous rules (be they in the RSC 1965 or CCR 1981) relating to writs and warrants but clearly there were also some changes made when the *Woolf* reforms were implemented in 1998.

There may be many lenders constrained by provisions in, for example, the Mortgage Conduct of Business Rules who have taken a softer approach to enforcement of possession orders no doubt influenced also by a property market which remains buoyant. Nevertheless where a possession order was made more than 6 years ago, permission of the court is needed before a warrant of possession can be issued. This must comply as a minimum with the requirements in CPR 83.2(4). If there has been a period of inactivity (or that may be the impression to a judge from examining a court file) then that should be dealt with fully yet succinctly. Here the application was made only **4 days** after the expiry of the 6 year period and clearly that small delay has influenced the 5 judges in the 3 different levels of court that have considered this case.

Lenders should take heed of *Longtin* which is a clear recent re-statement of the general rule that execution will not usually be allowed after 6 years. *Longtin* was determined in the context of a commercial dispute involving a Lloyd's name. It is likely that a court would take a more restrictive approach in a consumer case where it felt the CPR was there partly as a consumer protection measure. It is also worth noting that in October 2013 (surprisingly giving its palm-tree justice approach) the Financial Ombudsman Service dismissed the borrowers' complaint alleging that the loan had been mis-sold and they were provided with bad advice about the loan from the lender.

26th July 2016