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Court of Appeal makes respondent's costs order even where appellant won on one issue

Julie McMullon v Secure the Bridge Limited
[2016] EWCA Civ 563

Article by David Bowden

The Court of Appeal has handed down its reserved judgment on the costs due on this appeal. A respondent made a generous offer before an appeal had even started to accept the principal sum and to waive interest and costs. This offer was not accepted. The Appellant was predominantly unsuccessful at an appeal it winning only on a technical point about the rate of interest which applied which occupied a minority of the court's time. The Court of Appeal ordered the unsuccessful appellant to pay 60% of the respondent's costs of the appeal and all its costs below.

Julie McMullon v. Secure the Bridge Limited
[2016] EWCA Civ 563 23 June 2016
Court of Appeal, Civil Division (Sir James Munby PFD, Underhill LJ & Hildyard J)

What were the issues on the appeal?
Mr Recorder Cadwallader in Bradford and Leeds County Courts on 28th January 2014 and 17th March 2014 dismissed the claim that Ms McMullon ('the borrower') had brought against Secure the Bridge Limited ('the lender'). The borrower appealed to the Court of Appeal on 2 grounds:

- The judge below was wrong to find that there was not an unfair relationship under s140A of the Consumer Credit Act 1974 ('the CCA') between the 2 parties, and
- The judge below erred in finding nothing wrong about the lender increasing the interest rate on default.

On 10 June 2015 the Court of Appeal delivered its judgement **[2015] EWCA Civ 884.**

Who won on the unfair relationship point?
The Court of Appeal dismissed the borrower's appeal against the unfair relationship finding.

Who won on the interest rate point?
The Court of Appeal ruled that the CCA prevented interest from being increased on default. On this issue it had to reverse the finding made by the Recorder below. An addendum was then added to this judgement a few weeks after it had initially been handed down.

Originally the Court of Appeal ruled that the lender should be able to recover interest at the rate prescribed by the County Courts (Interest on Judgment Debts) Order 1991 (**SI 1991/1184**). However it was pointed out to the Court of Appeal that whilst CCA s130A provides for post-judgment interest, it stipulates that any right to recover interest is conditional upon the giving of notices to the debtor both (a) after the giving of judgment, and (b) thereafter at intervals of not more than six months. Both sides agreed that this had not happened. The Court of Appeal had to rule that post-judgment interest was not payable.

How was this case funded?
The lender was funding its own costs. The borrower was represented by solicitors and counsel who acted for her on a 'no win, no fee' basis. The borrower's lawyers claimed a 100% success fee if the borrower 'won' her claim. The borrower had 'after the event' insurance to cover the lender's costs if she lost her claim or appeal.

What offers were made to settle this appeal?
The appeal was lodged with the Court of Appeal on 7 April 2014 within the 21 deadline. Permission to appeal was granted on the papers on 30 June 2014. However before any appeal was lodged the lender wrote directly to the borrower offering to accept £25,000 being the loan amount and to waive all interest and costs. This letter dated 6 March 2015 was headed 'Without prejudice save as to costs' ('the offer').

The borrower's solicitors responded to this offer with a letter dated 19 March 2015 expressing surprise that the lender had contacted the borrower directly and asking for further communications to go through solicitors only. The offer was neither accepted nor rejected.

What did the successful Respondent say about costs?
The Respondent made 3 submissions:

- She won on the interest rate point and should get 50% of the costs of the case in the Court of Appeal and County Court,

- Any costs the borrower is ordered to pay should be set-off any costs the lender is ordered to pay her, and
- The offer should be disregarded because:
  - when it was sent appeal costs had already been incurred,
  - it made no offer to pay appeal costs, and
  - it did not comply with CPR part 36.

What did the unsuccessful Appellant say about costs?
The lender said overall it had won and in principle it was entitled to its costs. The lender said the 'unfair relationship' issue occupied the bulk of the argument. The lender said that it should be entitled to 75% of its costs of the appeal and all of its costs below. The lender said it was highly relevant to costs that:

- the borrower had not responded to its offer letter in a meaningful way, and
- failed to achieve a better outcome at the appeal.

Does it matter that an offer does not comply with CPR part 36?
No.

The Court of Appeal was clear that such an offer can be taken into account when the court exercises its general discretion under CPR part 44.2. In *Fox v Foundation Piling Ltd* **[2011] EWCA Civ 790**, **[2011] 6 Costs LR 961** Jackson LJ said:

> '*Secondly, parties are quite entitled to make* Calderbank *offers outside the framework of Part 36. Where a party makes such an offer and then achieves a more advantageous result, the court's discretion is wider. Nevertheless it may well be appropriate to order the party which has optimistically rejected the* Calderbank *offer to pay all costs since the date when hat offer expired. This was what the court ordered in* Stokes.'

What ruling did the Court of Appeal give on costs?
It ordered the borrower to pay 60% of the lender's costs of the appeal. As the borrower lost at trial, she will have to pay 100% of the lender's costs of the trial. It said the offer the lender made was '*undoubtedly generous'* and could have averted an appeal.

Do you have any comments on the ruling?
There are 3 things that stand out.

Firstly the borrower's submission that by the date of the offer letter appeal costs had been incurred seems to be wrong because the offer letter was sent to the borrower after the Recorder had given his judgment on liability but before he had given judgment on consequential matters including costs. The case was not even an appeal when the offer letter was sent.

Secondly, the borrower has had a very lucky escape in not being ordered to pay all the lender's costs of the appeal. In *Trustees of Stokes Pension Fund v Weston Power Distribution (South West) Plc* **[2005] EWCA Civ 854; [2005] 1 WLR 3595**, the defendants made a *Calderbank* offer of £35,000 which the claimants rejected but they obtained damages of only £25,600 in proceedings. The Court of Appeal held that the claimants should have accepted the defendants' offer and that whilst it was outside CPR part 36 it fell within CPR 44.3 (4) (c). The Court of Appeal, exercising afresh the discretion under that rule, ordered the claimants to pay the defendants' costs from the date when the *Calderbank* offer expired.

Thirdly the Civil Procedure Rules Committee has rejected calls for CPR part 36 to be abolished and to revert to a simpler *Calderbank* offer process instead.

27th June 2016