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Litigant who appeals intricate point on smalls claims track case does not act unreasonably and has no costs liability

Peter Mills Dammermann v. Lanyon Bowdler LLP
[2017] EWCA Civ 269

Article by David Bowden

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Peter Mills Dammermann v. Lanyon Bowdler LLP - [2017] EWCA Civ 269

Executive speed read summary
Following default under a mortgage, a lender appointed LPA receivers to sell the property. Those receivers paid their solicitor's bill and debited the fees to the mortgage account. The borrower brought a county court claim to challenge those fees which was allocated to the small claims track. No costs are allowed on that track (including on appeals) unless a litigant has 'behaved unreasonably'. The claim was dismissed by a district judge. The borrower's first appeal to a circuit judge was dismissed and he made an order for costs of the appeal against him. On 2nd appeal, this costs order was overturned by the Court of Appeal. The Court of Appeal found the terms of the mortgage to be gave a somewhat false impression and was in some ways artificial or contrived. It ruled that to pursue an appeal which involved an 'obscure point' where the position still remained 'curious' was not unreasonable. However a pre-appeal offer to settle for £1000 had been rejected. However this rejection did not of itself constitute unreasonable behaviour but the judge below was right to take it into consideration when applying the unreasonableness test. The circuit judge's adverse costs order would be set aside and no order as to costs would be made for costs incurred in the Court of Appeal.

Peter Mills Dammermann v. Lanyon Bowdler LLP
[2017] EWCA Civ 269 12 April 2017
Court of Appeal (Longmore LJ and McFarlane LJ)

What are the facts?
In February 2002 Mr Dammermann took out a legal mortgage with United Trust Bank. He defaulted on payments and the lender appointed a receiver under the Law of Property Act 1925 to sell the property. The LPA receivers appointed solicitors on the sale. The solicitors sent their bill to the LPA receivers which was paid and debited to the mortgage account. Mr Dammermann brought a claim in Telford County Court to challenge the level of the solicitor's charges.

What did the judge in the County Court rule?
On 14 August 2015, Deputy District Judge Holden held that there was neither an agency nor any contractual relationship between Mr Dammermann and the solicitor's firm. He ruled that Mr Dammermann had no standing to make a claim. He ruled that the contract for solicitor's services was between the LPA receivers and the solicitors alone. His claim was dismissed with no costs order.

What ruling did HH Judge Main QC make on the 1st appeal?
On 21 September 2015, HHJ Main QC granted Mr Dammermann permission to appeal on the papers. A skeleton argument in response from the solicitors was served on 16 October 2015. The appeal was heard on 14 December 2015 and was dismissed in a '*relatively detailed judgment'* delivered *ex tempore* by Judge Main. He referred to the case law in the respondent's skeleton argument and ruled that this was 'not an agency contract properly so called as known at common law. The principles that would apply to a common law agency contract, do not apply I find on the facts of this case.' The appeal judge found that '*the primary case presented by Mr Dammermann is simply not right*.'

What costs order did HH Judge Main QC make on the 1st appeal?
The respondents applied for their costs of the appeal and their counsel drew the appeal judge's attention to CPR part 27.14 which limits an award of costs on the small claims track unless a party has '*behaved unreasonably'.* After hearing submissions the appeal judge awarded costs of the appeal against Mr Dammermann.

The appeal judge ruled that Mr Dammermann had '*persisted in an argument'* which after consideration of the other side's skeleton argument '*he could have backed off this appeal'*. The appeal judge ruled that it was '*is obvious from that skeleton argument that he was barking up the wrong tree, he had confused himself, he was applying principles of general agency law which could not apply and did not apply'*. For this reason the appeal judge found that Mr Dammermann had '*behaved unreasonably'*. The appeal judge summarily assessed costs but made some reductions in relation to '*potential overcharging'*.

Are there any other prior authorities of relevance?
These authorities are relevant in this case:

Ridehalgh v. Horsefield **[1994] EWCA Civ 40** (Court of Appeal– Bingham MR, Rose and Waite LJJ)

Conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable.

Edenwest v. CMC Cameron McKenna **[2012] EWHC 1258 (Ch)** (High Court, Hildyard J)
The question in every case is whether the specific contract was one which the receiver intended or must be taken to have made on behalf of the [mortgagor] or on his own behalf.

Akhtar v. Boland **[2014] EWCA Civ 943** (Court of Appeal – Gloster, Floyd & Burnton LJJ)
The court's power make a costs order is constrained by the CPR. CPR 27.14 extends to the costs of an appeal. There is no basis for construing that as inapplicable to an appeal. If it did not extend to appeals, it would follow that there would be power to make a costs order even on appeals in cases the allocation of which to the small claims track was undisputed and indisputable. CPR 52.9A confers power on the Court to limit the costs of an appeal but it does not confer power to award costs where there is a provision of the CPR precluding a costs order.

What does the Civil Procedure Rules 1998 say?
CPR part 27 covers the small claims track and part 27.17 deals with '*Costs on the small claims track'* and provides as follows:

'27.14 *(1) This rule applies to any case which has been allocated to the small claims track unless paragraph (5) applies.*
(2) The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except –
(a) the fixed costs attributable to issuing the claim which –
(i) are payable under Part 45; or
(ii) would be payable under Part 45 if that Part applied to the claim;
…
(c) any court fees paid by that other party;
(d) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
…
(g) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably; and
….and
(i) in an appeal, the cost of any approved transcript reasonably incurred.
(3) A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test.'

What were the issues the Court of Appeal had to decide?
Lord Justice Vos on 12 July 2016 granted permission to appeal on the papers under CPR Part 52.7 on the basis that the appeal raised an important point of practice:

- the need to establish '*unreasonable behaviour'* under CPR part 27 in a small claims, and
- the judge may have been in error in taking account of the rejected settlement offer, and

What submissions did the appellant make?
The appellant made these 3 submissions:

- The unreasonableness of his behaviour must be seen in the light of the fact that the very same judge had granted him permission to appeal on the basis of the case that he went on to argue at the full appeal hearing,
- The point of law which decided against him was obscure because whilst the mortgage deed said the receivers were acting as his agents the judge found the solicitors were not, and
- The judge was wrong to take his rejection of the £1,000 offer into account.

What submissions did the respondent make?
The respondent made these 2 submissions:

- Mr Dammermann received the other side's skeleton argument over 6 weeks before the 1st appeal hearing and should have understood that there was no prospect of his appeal succeeding, and
- Whilst a court cannot base a finding of unreasonable behaviour solely on the rejection of an offer in settlement, the court may take such a rejection into account when applying the unreasonableness test.

The respondent also sought to uphold the ruling below on the ground that the 1st appeal judge had categorised Mr Dammermann's appeal as '*totally without merit'* because he said that Mr Dammermann was '*barking up the wrong tree'*.

What did the Court of Appeal rule on whether the appellant had behaved unreasonably?
The Court of Appeal ruled that Mr Dammermann had not behaved unreasonably.

In a joint judgment written by Lords Justices Longmore and McFarlane they say that the point on which Mr Dammermann lost was '*not an entirely straightforward point'* noting that the mortgage deed did '*not mean what it appears to say*'. The go further in their criticism observing that the description in the mortgage deed was '*apt to give a somewhat false impression'* and was a device '*designed to insulate the mortgage from liability for the receiver's acts*' and was '*in some ways artificial or contrived*'. Although the District Judge had ruled against Mr Dammermann that '*did not prevent Judge Main from granting permission to appea*l' and even after service of the other side's skeleton argument '*the position still remained a curious one'*. The Court of Appeal ruled that because Judge Main had granted permission to appeal this was a matter which he '*should have taken into account in assessing whether Mr Dammermann had behaved unreasonably'*.

The Court of Appeal did not agree that the appeal was '*totally without merit'* because Judge Main only came to his conclusion after he had '*conducted a careful legal analysis of this somewhat obscure point*'. Concluding on this issue they said Judge Main '*was in error in failing to take account of the nature of the somewhat intricate point of law upon which the appeal turned'* and that Mr Dammermann's 2nd appeal '*must succeed'*.

What did the Court of Appeal rule on whether it was unreasonable to pursue this appeal?
The Court of Appeal did not want to give general guidance as to what was or was not '*unreasonable behaviour*' because all such cases '*must be highly fact-sensitive'*. However it endorsed what it had said over 20 years ago in *Ridehalgh* but cautioned that it '*would not wish to incorporate all the learning about wasted costs orders into decisions under CPR Part 27.14 (2)(g)*' but it thought what Bingham MR had said '*should give sufficient guidance on the word "*unreasonably*" to district judges and circuit judges dealing with cases allocated to the Small Claims Track'*. The meaning of '*unreasonably*' could '*not be different when applied to litigants in person in small claims cases'*.

Going further the Court of Appeal added that it '*would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs'*. It noted that although the CPR could have provided that on appeal the normal rules as to costs should prevail but Part 27.14(2) '*applies in terms to costs relating to an appeal*' and so '*an appellate court should therefore be wary of ordering costs on appeal to be paid if they were not ordered below'* unless circumstances on appeal were '*truly different'*.

What did the Court of Appeal rule on the relevance of the settlement offers?
The Court of Appeal ruled against Mr Dammermann on this point. It said that it was '*not persuaded that the judge was in error in the manner in which he approached Mr Dammermann's rejection of the settlement offer of £1,000'*. Although it noted that Judge Main did not base his decision on unreasonable behaviour, it said that he under CPR part 27.14(3) not only '*to take it into account'* but also '*he was justified in doing so'*. The rejected Mr Dammermann's submission that he was prepared to settle for a higher figure saying this was '*obviously, irrelevant to this consideration*' and was '*on it is own, is incapable of satisfying the test in Part 27.14(2)(g)*'.

What was the ruling on re-determining costs?
In granting permission Lord Justice Vos ordered that there was to be '*no order for the costs of this appeal*'. Judge Main's order that Mr Dammermann pay the costs of the 1st appeal was set aside and replaced with an order of '*no order for costs'*.

12 April 2017

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