

JERSEY / JUDGMENT

Viberts -v- Powell [2016]

JRC 205 (10 November 2016)

[2016] JRC 205

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judgment

the commissioner: 1. On 25 th January, 2011, (Viberts-v-Powell

[2011] JRC 021 , ("the 2011 judgment") the Royal Court (Commissioner Sir Philip Bailhache with Jurats Liddiard and Fisher) gave judgment in favour of the plaintiffs ("Viberts") against the defendant ("Mrs Powell") for the sum of £21,794.81 in respect of outstanding legal fees. The Court also awarded costs against Mrs Powell on the standard basis ("the costs order"). These were subsequently taxed on 16 th October, 2012, in the sum of £32,020.49. Viberts had to pay court stamps of £840 in respect of the taxation process with the result that the total certified amount due on taxation was £32,860.49. 2. However, the Act of Court of 25 th January, 2011, provided that the costs order should not be enforced without leave of the court. By summons dated 19 th August, 2013, Viberts sought leave to enforce the costs order. That summons erroneously refers to the sum of £31,547.11 instead of the sum of £32,860.49 and we gave leave during the course of the hearing for the summons to be amended to show the correct sum. 3. It was that summons which eventually came before the court for hearing on 25 th October, 2016.

Background

4. For a considerable period, Mrs Powell was engaged in matrimonial proceedings with her former husband. She engaged, over the period of the proceedings, a number of different legal firms. Sometimes those retainers lasted only for a few months. From December 2008 to April 2009 Viberts acted for her pursuant to a legal aid certificate. That retainer came to an end when Mrs Powell instructed Sinels in April 2009 on a private fee-paying basis. 5. Viberts raised an account for £25,407.11. This account was not paid and on 16 th June, 2009, a summons was issued seeking payment. That was the matter which eventually came before the Royal Court and gave rise to the 2011 judgment. The court gave judgment in the reduced sum of £21,794.81, together with interest at the court rate ("the judgment debt"). As already mentioned, the court also ordered Mrs Powell to pay Viberts' costs on the standard basis and for such costs to carry interest at the court rate from the date of the

judgment.

However, as already mentioned, the costs order was not to be enforced without the leave of the court. 6. We should add that there is a discrepancy between the Act and the 2011 judgment as to the interest on the judgment debt. The last sentence of paragraph 25 of the judgment refers to interest running from the date of the summons (i.e. 16 th June, 2009). However the Act states that interest is to run from 1 st October, 2010. The matter is not directly before us but, in case it is of assistance to the parties, our view would be that, although the Act could have been amended under the slip rule if Viberts had sought to correct it promptly, it is now far too late to do so and interest must be calculated in accordance with the Act (which is the official record of the court's decision) rather than the

judgment.

7. As to the reasons for the court deciding that the costs order should not be enforced without leave, the transcript shows Sir Philip Bailhache saying as follows:- ". I would like to be assured before any order for costs is enforced that the defendant is in a position to pay them, so that is my order. The order for costs is there on the record but it must not be enforced without leave of the court". 8. On 10 th May, 2011, Viberts registered the judgment debt in the Public Registry. Accordingly they have had security over Mrs Powell's immovable property in Jersey since then in respect of the judgment debt. The present position 9. On 18 th September, 2015, Acorn Finance Limited obtained judgment in the Royal Court against Mrs Powell for the sum of £223,846.34 together with interest and costs in respect of the amount due under a loan agreement dated 20 th December, 2012. Her application for leave to appeal against that judgment was dismissed by the Court of Appeal on th March, 2016. 10. Mrs Powell's property was adjudged renounced on 22 nd April, 2016, and a dégrèvement was fixed for 6 th June. Mrs Powell subsequently applied for a remise de biens on 3 rd June, with the consequence that the dégrèvement was stayed. The application for a remise appears to have been adjourned on various occasions but was ultimately heard on 19 th October, 2016, with judgment being reserved. We were informed by Advocate Palmer that the court has asked for further evidence relating to an offer which was said to have been made for Mrs Powell's immovable property in Jersey together with evidence that her two sons had renounced any beneficial interest they might have in a property in Winchester ("the Winchester property"). 11. We were shown the report which the Jurats provided for the court following the application for a remise . The report shows that Mrs Powell has two main assets. The first is the Jersey property in which she lives. The Jurats obtained valuations from three different estate agents; one was for £1,250,000, the second was for £1,150,000 and the third was for £950,000. 12. The second main asset is the Winchester property. That is valued at between £1,100,000 and £1,200,000. Mrs Powell has a mortgage on the Winchester property with the Bank of Scotland. The amount due as at 22 nd July, 2016, was £422,020 with interest continuing to accrue. On those figures there is an equity in the Winchester property (before selling costs) of some £678,000 (subject to minor adjustment if interest has continued to accrue) if one takes a value of £1,100,000 and £778,000 if one takes

a value of £1,200,000. 13. Creditors secured on the Jersey property were put by the Jurats (calculated as at 22 nd January, 2017,) at £964,606. However, Advocate Blakeley conceded that this overstated the position slightly because Viberts were recorded as having security for a total claim of £63,580, whereas in fact they have only registered the judgment debt itself, so it is only that sum together with interest which is secured. Viberts have not registered the costs order and indeed could not do so in view of the prohibition on enforcement without leave. Schedule 7 to the Jurats' report shows that as at 7 th June, 2016, interest on the costs order amounted to £4,287.68, making a total amount due under the costs order at that time of £36,308.17. Interest will have continued to accrue since then and for ease of calculation, we will assume a figure of some £37,000 as a provision for the amount which will be due under the costs order as at 22 nd January, 2017. The consequence is that, in very round terms, the level of secured creditors is overstated in the Jurats' report by some £37,000. Unsecured claims were put at approximately £34,000 (although this sum will of course increase by a corresponding £37,000 reflecting the overstatement in the secured debts). This application 14. Advocate Blakeley submitted that, now that Mrs Powell's assets were to be realised (whether by remise or dégrèvement), it was only fair for Viberts to be put in the same position as any other creditor. Leave should therefore be given so they could prove the costs order in the remise (if one was granted) or take such other steps as might be open to them. 15. Advocate Palmer, on the other hand, submitted that it would be unfair for leave to be granted for the following reasons:- (i) Mrs Powell believes that the 2011 judgment and the costs order were unfair and were wrongly granted. (ii) She is similarly concerned about the taxation process. She had not been well enough to participate in the process and did not accept that the outcome was fair and reasonable. (iii) Viberts had chosen to wait until April 2013 before seeking leave to enforce the costs order despite the fact that the taxation process had been completed by 16 th October, 2012. The hearing of the leave application had originally been fixed for 1 st October, 2013. It was accepted that that hearing had been adjourned at Mrs Powell's request on the grounds of her health, but Viberts had made no effort to bring the matter back for adjudication until now. This delay had resulted in prejudice to Mrs Powell because of the accrual of interest. (iv) The main objective of Viberts appeared to be to obtain security by registering the costs order. But that could not be achieved because of the provisions of Article 8 of the Loi

- (1839) sur les Remises de Biens ("the 1839 Law") which provides that no Act of Court obtained in the ten days before an application for a remise gives any preference over other creditors. There would therefore be no advantage for Viberts in obtaining leave to enforce the costs order. (v) Mrs Powell's financial position remained precarious. If one took only the Jersey assets, there was a deficit if the property could only realise £950,000 and only a modest surplus if it could be sold for £1,100,000. Commissioner Bailhache had wished to ensure that Mrs Powell would be in a position to pay the costs order before giving leave for its enforcement. That was not clearly the position. Discussion 16. The type of order made by the Royal Court in this case was the subject of observation by the Court of Appeal in *Flynn v Reid*

[2012] (2) JLR 226. Having asserted the general proposition that costs orders should be made against legally aided litigants on the same principles as non-legally aided litigants, Beloff JA said this at para 43:- "... the court may itself encourage clemency. Awards made may not be enforced. Indeed, the court has the power to attach to an award of costs a proviso that it is not to be enforced without leave of the court, something done on at least one occasion by this court (see *Costs Orders Against Legally Aided Parties*, 9 *Jersey Law Review* at 2-6 (2005)). (In England this is sometimes called a "football pools order" which recognised the possibility that the indigent litigant may by some future good fortune acquire sufficient means to discharge his cost obligation). ..." 17. The thinking behind a football pools order was that, although the unsuccessful litigant should be ordered to pay the costs (so that a liability arose), it would be unduly harsh to allow the order to be enforced at that time in view of the litigant's lack of resources. However, should the litigant in future be in a position to pay, leave could be granted for enforcement. It seems to us from the transcript that that was also the thinking of Commissioner Bailhache when he made the present order. 18. We do not know what information about Mrs Powell's financial position was before the court on 25 th January, 2011, but it is clear that the Commissioner was uncertain whether she was in a position to pay any costs. He said that he would 'like to be assured ... that the defendant is in a position to pay them' before any order was enforced. 19. We now have much greater information about Mrs Powell's financial position. It is for another division of this court to decide whether a remise should be granted but, on the face of it, there would seem to be strong grounds in favour of such an order being made because there is at least a real possibility of a surplus arising, which would otherwise accrue to the creditor who takes in a *dégrèvement*. If one takes into account the Winchester property as well as the Jersey property, the projection by the Jurats referred to earlier suggests that Mrs Powell would be left with £568,000 after payment of all her creditors (including the costs order) if a sale were to be achieved by 22 nd January, 2017. 20. In those circumstances, we can see no ground whatsoever for holding that, even though she is indebted to Viberts in the amount of the costs order (i.e. £37,000), they should still not be paid. Every other creditor will be paid in such circumstances and there is no good reason to treat Viberts differently from all the other creditors. The only effect of denying Viberts' application would be that Mrs Powell would be left with an additional £37,000 at the expense of Viberts. Furthermore, the above surplus of £568,000 assumes a sale price of the Jersey property of £950,000. We were told that the court hearing the remise application was advised by Mrs Powell of offers received of £1,100,000 and £1,175,000 to demonstrate that the value to be attributed to the Jersey property was greater than the figure of £950,000 taken by the Jurats. If a sale price of £1,100,000 were to be achieved, it would result in an additional £150,000 (less additional selling costs) to her, so that she would have an overall equity in the order of £718,000 (£568,000 + £150,000). Indeed, the figures prepared by Advocate Palmer for the hearing of the remise application on 19 th October suggest an even greater figure. She submitted that, on the basis of a sale price of £1,100,000 for the Jersey property, there would be a surplus of £136,619 in the Jersey assets (after payment of the costs order). If one then adds in the

minimum equity in the Winchester property of £678,000, this would give Mrs Powell total net assets of £814,619 even after payment of the costs order. If the court refuses leave, she will be left with £851,619, i.e. an additional £37,000. 21. We see no justice in Viberts being denied the ability to recover what they are owed in such circumstances. For our purposes, we think it right to take into account all Mrs Powell's assets in deciding whether it is reasonable to grant leave. But even if one takes into account only the Jersey assets, there would still be a surplus for Mrs Powell after payment of all her debts (including the costs order) if the property were to be sold for, say, £1,100,000. Even if it can only be sold for £950,000, we do not see why Viberts alone of all her creditors should be prevented from proving their claim and obtaining such dividend or partial payment as they can achieve. 22. Turning to the specific points raised by Advocate Palmer, we would comment as follows:- (i) We appreciate that Mrs Powell is unhappy about the 2011 judgment and the costs order but it is not open to this court to go behind the decision of the Royal Court in 2011. That court held that she was indebted to Viberts in the amount of the judgment and that she was liable to pay their costs. (ii) It is true that Mrs Powell did not participate in the taxation process. However, the Judicial Greffier ruled that, on the basis that she was unable to do so, the taxing officer would tax the bill of costs as if there had been an objection by her to every entry. Accordingly, we do not think that Mrs Powell has suffered any prejudice as a result of not participating in the taxation process. In any event, her remedy was to appeal the taxation if she was unhappy with it and this she has not done. (iii) Far from criticising Viberts for the delay which they have allowed Mrs Powell, we can well understand that they did not wish to press her unduly. It seems to be Advocate Palmer's suggestion that, if a creditor delays enforcing a claim, this is a matter of criticism which should be taken into account by the court. Such criticism, if valid, could equally be applied to Acorn and the mortgage company in the present case, as they could arguably have acted more speedily to seek recovery of their loans. We do not think it is a matter for valid criticism. We would very much regret it if banks were to hasten to enforce their claims in respect of immovable property for fear of somehow being penalised if they delay. On the contrary, we think banks are to be encouraged where possible to give debtors time to organise their affairs so as to meet their liabilities. The fact that interest continues to accrue during this period is merely a consequence of the debtor not paying his or her liability. (iv) We do not accept that the only objective of the current application is to enable Viberts to obtain security over the Jersey immovable property in respect of the costs order. As Advocate Palmer conceded during the course of argument, the prohibition on enforcing the costs order does not just prohibit Viberts from obtaining security in respect of that order. Such an order does not prevent a debtor from voluntarily paying a creditor but it prevents the creditor from taking any steps whatsoever to enforce (i.e. collect) the debt which is owed. Thus the current order prevents Viberts from lodging a claim in any *désastre*, *remise* or other form of bankruptcy procedure. We acknowledge the point made by Advocate Palmer concerning the effect of Article 8 of the 1839 Law and that will be a matter for Viberts to consider in due course. However, that is not the important point. Viberts need the leave of the court if they are to participate in any proceedings leading to

the realisation of Mrs Powell's property. (v) We have already dealt with Mrs Powell's financial position. In our judgment, she is in a position now to meet the costs order and we see no reason to deny Viberts the ability to seek to recover the debt which the Royal Court held in January 2011 that Mrs Powell owed them. 23. In summary, in circumstances where, on the information presently available, Mrs Powell's assets exceed her liabilities by between £718,000 and £814,619 even after allowance for payment of the costs order, we do not think it right to distinguish Viberts from all the other creditors and prevent them from seeking to recover the amount payable under the costs order and we therefore grant leave to Viberts to enforce that order. Authorities Viberts-v-Powell

[2011] JRC 021 . Loi (1839) sur les Remises de Biens . Flynn v Reid

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