JUDGMENT : Mr Justice Coulson: TCC. 15th September 2008

Introduction

1. This is an extremely unusual dispute. Even now, as I give judgment, I remain in some doubt as to how and why such a dispute has been allowed to get this far and I question the underlying tactical considerations, which I cannot begin to fathom, that could be said to justify the extensive costs that these applications have engendered.

2. Mr Martin Dawes *("Mr Dawes")* is the owner of Dinmore Manor in Herefordshire. He engaged Treasure & Son Limited *("Treasure")* to carry out extensive works of refurbishment and restitution at the property. The parties fell out and their disputes were referred to an adjudicator, Mr Paul Greenwood. In a written decision, dated 21st August 2007, he decided that Mr Dawes should pay Treasure £1,018,828.12 plus VAT, interest and his own fees and expenses.

3. Mr Dawes did not pay and Treasure issued enforcement proceedings in the TCC. In a judgment handed down on 25th October 2007, Akenhead J upheld the decision and ordered Mr Dawes to pay a total of £1,222,818.05, together with certain other sums by way of interest. By early November 2007, the parties were agreed that the judgment debt stood at £1,239,310.12 *("the judgment debt")*.

4. On 7th November 2007, the judgment debt was paid into Treasure's bank account. On checking, Treasure discovered that the sum had come from the account of Hayley Dawes, Mr Dawes' daughter. The fact that the payment originated from her rather than from Mr Dawes himself was apparently a source of concern to Treasure, who sought, they say without success, an explanation from Mr Dawes.

5. The issue as to whether or not it can be said, as Mr Dawes maintains, that he has paid the judgment debt is a live issue in the arbitration proceedings which are currently ongoing between the parties. Indeed, in the arbitration, Treasure have pleaded that the judgment debt has not been properly discharged *at all*. In addition, Treasure's consultants have made wild (and it seems to me wholly unwarranted) allegations of fraud against Mr Dawes and his advisers arising out of the payment on 7th November. Before me, Mr Taylor very properly accepts that those allegations should never have been made.

6. On 16th July 2008, Treasure issued proceedings under CPR Part 8, seeking a determination of various issues relating to the central question of whether or not the judgment debt had been paid. Mr Dawes' advisers considered that those Part 8 proceedings were misconceived in law because they did not set out the declarations sought (if any), and instead asked for 'a determination' of certain issues. Mr Dawes sought to strike out those Part 8 proceedings and, on 4th August 2008, issued his own Part 8 proceedings, seeking a declaration that he had paid the judgment debt. Today is the hearing of the substantive matters in those Part 8 proceedings.

7. Mr Dawes' case is that the money was lent to him by his son Paul and his daughter Hayley. He maintains that the money that was transferred from his daughter's account on 7th November last year was his own money, having been loaned to him by his son and daughter. In the alternative, although it is not a matter in respect of which Mr Dawes seeks an express declaration from the court, it is plain on the evidence that a case can be advanced on his behalf that the sums were paid for and on his account by Hayley, with either his prior authority or his subsequent ratification. It is Treasure's complaint that, despite having been given opportunities to do so, Mr Dawes has never clearly explained the basis of his case, either as to direct payment or payment made on his behalf.

8. Thus, there is a dispute between the parties as to whether the judgment debt of £1.2 million-odd has been paid by Mr Dawes and/or for and on his account. However, given that the money has in fact been paid and, as we shall see, in part utilised by Treasure to discharge various outgoings, it might be wondered why this matters at all. In the evidence, Treasure identified a number of concerns about what has happened, and these are said to include the following:
   (a) Because Hayley Dawes had no involvement in the works or in the adjudication, it is not clear whether she paid the sums on Mr Dawes' behalf;
   (b) It is similarly not clear whether the judgment debt had been discharged and whether, in effect, Treasure were compelled to accept payment from a third party;
   (c) There was doubt over whether Hayley Dawes, or her trustee in bankruptcy if she went bankrupt, could recover the payment in an action for money had and received. It would appear that this would only be possible if she claimed that the money had been paid by mistake. It was said that a similar doubt existed in relation to any sums paid by Paul Dawes;
   (d) In the arbitration, Mr Dawes alleges that Treasure have been overpaid and he, therefore, seeks repayment of some or all of the sum paid under the judgment debt. It is said in the evidence that this is "confusing" for Treasure, who say that they would "like the position regularised". As I have said, Treasure themselves maintain that the debt has *not* been discharged.
   (e) It is said that significant VAT questions may arise if the sum has to be repaid and that uncertainty over the source of the money may complicate matters further.

9. I am also told that Treasure's concerns are such that, "*on advice from accountants",* they have not utilised the payment made on 7th November and that much of it remains in a separate bank account awaiting resolution of this issue. Despite raising the point, I have not seen and am not aware of the detail of this alleged accountants' advice.

10. It is difficult not to conclude that those concerns are, on analysis, very unrealistic and in a rather nebulous form, and it is fair to contrast them with Treasure's actual position in relation to the judgment debt, which is that (a) they have pleaded in the arbitration that the judgment debt has not been discharged and that those who are contending to the contrary are guilty of fraud; and (b) Treasure have actually used in excess of £190,000 of the judgment debt to pay the adjudicator's fees and VAT. They have not, therefore, simply let the money sit in a separate account. Nor have they repaid the money to Hayley Dawes.

11. In those circumstances, I am inclined to agree with the submissions advanced by Mr Braslavsky QC on behalf of Mr Dawes that Treasure are indeed seeking to have it three ways by:

(i) holding onto all of the money;

(ii) using some of the money; and

(iii) alleging that there has not been a valid discharge of the judgment debt.

Procedural Issues

12. Not only is there a dispute between the parties as to the substance of the issues, but there is also a procedural dispute between them as well. Treasure seek to re-amend their Part 8 claim by adding in Hayley and Paul Dawes as parties, because, they say, their concerns will not be met unless any declarations bind them too. Thus, it was said on behalf of Treasure that, provided they could demonstrate a real and triable issue, the remainder of the application should be adjourned so that Paul and Hayley Dawes could be joined in as parties and any declarations subsequently made could then be made binding on them too.

13. As I made plain at the outset, I am not in favour of adjourning this hearing. First, it has been fixed for some time. Secondly, it seems to me that the sooner this matter is resolved by the court, the better. Thirdly, it seems to me that, depending on the outcome of the issues, it is perfectly possible to find a way of ensuring that Hayley and Paul are effectively bound by the conclusions of the court.

The Law

14. The differences between the parties as to the relevant legal principles are confined to the possibility that these sums were paid not directly by Mr Dawes but for and on his account. It seems to me that the relevant principles are these:

(a) A payment made by a person without compulsion, intending to discharge another's debt, will not discharge that debt unless he acted with that other's authority or if that other subsequently ratifies the payment: see ***Crantrave Limited v Lloyds Bank plc*** [2002] All ER (Comm) 89 at 94, Pill LJ.

(b) A voluntary payment by a stranger, A, which purports to pay the debts of B to B's creditor, C, will only be effective to discharge B if the payment is made as B's agent, for and on account of B, and with B's prior authority or subsequent ratification: see ***Simpson v Eggington*** (1855) 10 Exch 845 at 847 and ***Smith v Cox*** [1942] 2 KB 558.

15. The decision in ***Smith v Cox*** is a good example of the difficulties that can be created by the payment of a debt by a third party. There the plaintiff, Mr Smith, refused to pay rent to the elderly landlady, Ms Rolf, because of her failure to carry out repairs. The rent was paid out of his own pocket by her agent, the defendant, Mr Cox, who trusted to recoup himself out of the rent when it was eventually paid by the plaintiff. When the defendant failed to obtain the rent, he put the claimant into distraint and recovered £180, which was the rent due, less deductions for repairs. The plaintiff sued for damages, contending that the distraint was unlawful because the rent had been paid by the defendant. He admitted that the rent was paid without his knowledge and not at his request. The judge found in favour of the defendant, holding that there was no evidence that:

"… the defendant acted or purported to act or regarded himself as acting as the agent of the plaintiff. The view which I take of this transaction is that the defendant did no more than advance out of his own pocket to an elderly impecunious landlord money which he did not wish her to be without for any length of time and so he took the risk of recouping himself later on. That being so, this action must fail because it is based on the allegation that there was an illegal distress, on the ground that the plaintiff had paid his rent or that somebody had paid it for him."

Was the Sum Paid by Mr Dawes With His Own Money?

16. The following is a summary of the relevant loan agreements between Mr Dawes and his son and daughter.

(a) On 27th October 2003, Hayley agreed to lend Mr Dawes a sum of up to a maximum of £5 million.

(b) On the same day, Paul Dawes entered into a separate agreement with Mr Dawes in similar terms and for a similar amount.

(c) On 22nd January 2008, further loans were recorded as between Hayley Dawes and Mr Dawes. According to the document, it was agreed that various sums would be paid by Hayley Dawes *"on behalf of"* Mr Dawes. That included the sum of £739,310.12 loaned in November 2007.

(d) On the same date, Paul Dawes agreement to pay various sums on behalf of Mr Dawes was also recorded. These sums included, in November 2007, a sum of £500,000.

17. The two sums agreed to be paid on behalf of Mr Dawes by Paul and Hayley in November 2007, namely £500,000 and £739,310.12, when totalled together come to the judgment debt of £1,239,310.12. It seems clear from these sums, subsequently recorded in these agreements, formed the basis of the payment of the judgment debt.

18. It was Mr Braslavsky QC's primary case that here the debt was discharged by Mr Dawes via a third party loan, but that the money that was paid was his own. He said it was no different to a payment by a bank or an insurer. He said that this was not a case of discharge of a debt by a third party, but the payment of money actually owned by the debtor, in this case Mr Dawes.

19. I accept that there is a difference between payment by a third party on behalf of a debtor, on the one hand, and payment by the debtor of his own money, via a third party loan, on the other; and I accept that, in the latter case, that may count as payment by the debtor direct. However, I do not believe that, on the evidence before me, I can find that in this case, the judgment debt was discharged by Mr Dawes' own money. As at November 2007, it appears that the loan agreements of October 2003 had been discharged and the two sums of £5 million had long since been paid to Martin Dawes. It does not, therefore, seem to me that those earlier loan agreements or those payments have anything to do with the discharge of the judgment debt in November 2007.

20. That leaves the two sums that I have already indicated which, when added together, come to the amount of the judgment debt. As at November 2007, there was no formal loan agreement in place in respect of these sums; as noted above, the two loan agreements to which I have referred are dated 22nd January 2008. Therefore, it appears that, at most, there was an oral agreement in November 2007, pursuant to which it was agreed that Hayley and Paul would make these payments to discharge the judgment debt. There is nothing in the evidence to indicate that, when it was paid, the money that they used to do so already belonged to Mr Dawes. The only relevant evidence, namely the loan agreements themselves, indicates unequivocally that the two constituent parts of the judgment debt would be paid "on behalf of Mr Dawes". It seems to me that, in those circumstances, I cannot find that the money when it was paid was money that was owned by Mr Dawes.

21. Of course, even if I was wrong about that and the sums had been paid by Mr Dawes direct from money that was his, I still ought to go on and deal with the position in relation to third parties, given the evidence that I have seen and the arguments that I have heard.

Was the Sum Paid For and On Account of Mr Dawes?

22. The principal question in relation to this part of the case is whether the judgment sum of £1,239,310.12 was paid by Hayley Dawes and/or Paul Dawes as agents for their father, for and on account of their father and with his prior authority or subsequent ratification. I am in no doubt, on the basis of the evidence before me, that it was. There are a number of reasons for that.

23. First, I am bound to conclude that that is the only sensible and realistic conclusion to be drawn from the evidence. After all, as at November, those acting for Mr Dawes asked Treasure to identify precisely the sum that was due following the judgment of Akenhead J. That having been done, arrangements were made for the sum to be paid into Treasure's account. That sum was paid by way of the transfer that, as we have seen, originated from Hayley Dawes' own account. Given the close family ties and that evidence, it seems to me that it would be absurd to say that that money was not paid for and on account of Hayley Dawes' father.

24. Secondly, although the loan agreements were not formalised until after payment, when they were eventually formalised in January 2008, they made clear that the sums were paid by both Hayley and Paul "on behalf of" Mr Dawes. Again, therefore, it seems to me that no sensible conclusion is possible other than that these sums were indeed paid for and on behalf of Mr Dawes.

25. Thirdly, it seems to me that the situation that exists here is at the completely opposite end of the scale to the situation in ***Smith v Cox***. There, sums were paid by a third party without the knowledge of (so it seems) either the creditor of the debtor. Here, the sums have been paid from Hayley Dawes' account with the full knowledge of both Treasure and Mr Dawes. Mr Dawes was aware of the payment. He clearly approved it being made and, even if he did not, the evidence demonstrates beyond doubt that he subsequently ratified it. Treasure knew that the sums came from Hayley's account and, as I have indicated, they have utilised something like £200,000 worth of the money to pay fees and VAT. In those circumstances, it seems to me that the mischief at which this rule is aimed, and of which ***Smith v Cox*** is an example, simply does not arise here.

26. I set out in paragraph 8 above what I described as the rather unrealistic concerns that Treasure have identified. Going through each, I find that:

    (a) Hayley Dawes clearly paid the sums on behalf of her father.

    (b) The judgment debt has been discharged. It is not a question of Treasure being compelled to accept payment from a third party. They had a claim which has been discharged by a third party for on and on account of Mr Dawes.

    (c) There is no evidence to suggest that Hayley or Paul Dawes could or would require the sum to be repaid because of, for example, some sort of mistake. I regard that as being wholly unrealistic and, as I have said, I contrast it with Treasure's position, which is positively to argue that the sum has not been paid.

    (d) If the arbitration continues and the arbitrator concludes that Treasure have been overpaid, then sums will be due back to Mr Dawes. Any award made by the arbitrator can only relate to Mr Dawes because he is the party to the building contract and he is the party to the arbitration. It cannot be made in relation to Hayley Dawes or Paul Dawes. Accordingly, there is no confusion and no position that requires to be 'regularised'.

    (e) It seems to me that VAT is irrelevant. If the sums that are due to be paid back by Treasure (if any) following the conclusion of the arbitration attract VAT, then it will be payable in the normal way. There can be no question of any confusion as a result of the sum having been paid by Hayley Dawes, because the sum has

been paid for and on account of the debtor. The VAT position will be that applicable to Mr Dawes, and the property to which the works were carried out.

Conclusions

27. I am in no doubt that the money has been paid for and on behalf of Mr Dawes for the reasons that I have given. However, it is said that there are a number of complications which arise from this finding and which may need to be worked out. It seems to me that, in the first instance, those complications ought to be the subject of discussion between the parties. They include:

(a) The form of the order which the court should now make. Although, as I have indicated, the answer on the substantive issue is that the sums have been paid for and on behalf of Mr Dawes, Mr Braslavsky QC made the point that that was not the declaration that Mr Dawes sought in his Part 8 claim, and that Treasure's application was not for a declaration at all. Accordingly, although I am in no doubt that this is the answer to the underlying dispute between the parties, they will have to give some thought as to how the order should be drawn up.

(b) As I have indicated, it is wholly unrealistic to suggest that this answer will not be binding in one way or another on Hayley and Paul Dawes. However, in my view, the parties ought also to resolve that issue by agreement. It seems to me that this can be easily done; Hayley and Paul should be asked to confirm that the position is as set out in this judgment and that, therefore, those sums will not be sought back from Treasure. If that confirmation is forthcoming, then of course they do not need to be parties to these proceedings. If, on the other hand, it is not, then it may mean that Treasure will be entitled to make a further application to the court.

28. The remaining question, therefore, is one of costs, on which I will hear the parties. I ought to say that, so it seems to me, the position should not have been allowed to get this far and, whilst I accept some of the criticisms made by Mr Braslavsky QC of the case advanced by Treasure, I also consider that an earlier and clearer statement of Mr Dawes' position may have meant that these two sets of proceedings were unnecessary.

Mr Michael Taylor (instructed by George Davies Solicitors LLP) appeared on behalf of the Claimant (Treasure).
Mr Nicholas Braslavsky QC and Mr Andrew Singer (instructed by Mishcon de Reya) appeared on behalf of the Defendant (Dawes).