CA on appeal from the Plymouth County Court sitting at Exeter (His Honour Judge Overend) before Ward LJ, Tuckey LJ. 26th July 2002.

JUDGMENT : LORD JUSTICE WARD:

1. The court finds itself in an unfortunate position. This is an application by Mr and Mrs Veitch for permission to appeal against the order made by His Honour Judge Overend on 17th August 2001, when he granted the defendants, the former solicitors of the applicants, permission to appeal against an order made by District Judge Wainwright on 29th June 2001 and then, having granted that permission, dismissed Mr and Mrs Veitch's action against their former solicitors for damages for their professional negligence, finding that they had no realistic prospect of succeeding in their claim.

2. I say that this is unfortunate because I am prepared to accept without question that, due to an honest and genuine oversight, Mr Jones QC, who has appeared before us today and who appeared before His Honour Judge Overend in the court below, genuinely advanced the case for the solicitors on the basis of the original claim being put by Mr Veitch in person. Everybody (and that includes, it may be, Mr and Veitch) appears to have overlooked the fact that at a previous time in the long history of this matter, namely going back to an appearance before His Honour Judge Cotterill on 2nd December 1998, the case was then being advanced by Mr Veitch on the basis of an amended particulars of claim. There is indeed an order made on 2nd December permitting that amendment. Sadly, however, everybody had overlooked it and, unfortunately, it may have become significant.

3. I will not take great time in describing the unhappy facts of this litigation. It is sufficient to say that Mr and Mrs Veitch had acquired two properties in order to transform them into a smart hotel. They needed finance for that purpose and Barclays Bank provided it. The bank took charges on both properties and allowed them various bridging facilities. It was always the intention, no doubt, to establish that borrowing on a proper basis, and that was done in November 1990, when the bank and Mr and Mrs Veitch entered into a business loan agreement. We have that in the bundle at various places, but I take it from bundle II, at p.693B. It was a term of that loan that £335,000 would be lent and drawn down, repayable over 25 years, on the usual terms that, in the event of failure to make any payment of principal or interest in respect of the loan, the whole of the capital would become due and owing and it would follow that the charges, which were all money charges, could be enforced.

4. I must deal in more detail with what happened but, abridging the facts slightly, the bank alleged in March 1994 that there had been default and they called in the amount of the monies due and, in due time, commenced an action for possession. Mr and Mrs Veitch instructed the defendants. There is an outstanding issue as to whether Mr Veitch ever was the client. His claim appears to depend upon it but, for what may be utterly foolish reasons, he seems now to be denying that he is the client and that he ever retained the solicitors at the material times. I say "foolish" because, if there was not the retainer of the solicitors, his prospect of establishing a case for breach of tortious duty seems hopelessly thin. However, I am not concerned with that aspect of it today.

5. The solicitors took some expert advice at the instigation of Mr and Mrs Veitch. They instructed counsel. It seems to have been thought that there was no proper defence to the claim for possession and the upshot of it was that on 11th November 1994 an order was made by consent in these terms:

   "... UPON the Defendants [Mr and Mrs Veitch] agreeing to waive all claims whether joint or several arising out of any cause of action which has arisen to date against the Plaintiff [Barclays Bank]

   BY CONSENT IT IS ORDERED THAT

   1.The Defendants do give up possession of the properties known as Mill Cottage, Dunsford, Devon and Mill House, Dunsford, Devon within 28 days, such order being stayed on the conditions that:-

   (i)The Defendant do pay to the Plaintiff on or before 5 January 1995 the sum of £29,500 in full settlement of the sums outstanding inclusive of interest on the Defendant's current account.

   (ii)The Defendants do pay to the Plaintiff on or before 12 December 1994 and on or before the 12th day of each successive month the sum of £2,817.38 together with such further amounts as may be payable in the event that the Plaintiff's Base Rate shall be increased ..."

6. There was liberty to apply.

7. After several failures to meet those conditions and applications for suspension, the bank was eventually granted a full possession order and the property was repossessed, I think, some time much later in 1995. The business apparently faltered on until about April 1995.

8. Mr Veitch, who has now apparently separated from his wife, Mrs Veitch, was first to bring a claim. That claim said very little about precisely what the negligence was, where the breaches occurred and what loss he had suffered. Losses, he said, were very difficult to assess. Mrs Veitch's claim (probably drawn for her by Mr Veitch) was a little more specific in that she did, in paragraph 7, make assertions about the solicitors' failings. I will read part of her claim:

> *"5. On the 11 November 1994 at Exeter County Court, my solicitor, Mr Avery, produced an affidavit by Mr CD Dunstan dated 9 November 1994. I know now from my ex-husband, Mr Veitch, the facts within the affidavit are false. Just after this the defendant's agents, Stephen & Scown, the solicitors name was Mr B Martin, suggested to Mr Avery, my solicitor, a settlement. A request to the Judge for more time was granted. Eventually an agreement was struck, the financial terms and conditions were set out in the body of a consent order dated 11 November 1994. The possession proceedings against me were suspended on the conditions laid out in the consent order. Under this procedure the original terms and conditions of the commercial mortgage apply.*
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> *6. On the 14 November 1994 my ex-husband, Mr Veitch, tried without success to obtain from our Barclays Bank branch (defendant's) temporary chequebooks and a paying in book for our current account. To set up a direct debit from our current account into our mortgage account with the agreed sum in the consent order plus re-establishing our merchant bank credit card facilities. The Barclays Bank assistant informed Mr Veitch that Mr CD Dunstan, our bank manager, refused access to these facilities.*
>
> *7. I claim:*
>
> *(a)Mr Avery as my solicitor failed to notice and/or prove inaccuracies within the particulars of claim, supporting affidavits and bank statements.*
>
> *(b)Mr Avery as my solicitor failed to apply for Discovery and/or affidavit evidence ...*
>
> *(c)Mr Avery as my solicitor failed to file and serve defence and counter claim ...*
>
> *(d)My Avery as my solicitor failed to inform me that the consent order he had entered me into on the 11 November 1994 was within the framework of a section 36 `Administration of Justice Act'."*

9. And, pertinently:

> *"(e)Mr Avery as my solicitor failed to explain a consent order within the framework of a section 36 upheld the terms and conditions of my commercial mortgage dated 23 November 1990.*
>
> *(f)Mr avery as my solicitor failed to ensure that the plaintiffs, Barclays Bank PLC, adhered to the consent order dated 11 November 1994."*

10. I do not think the other parts are necessarily that material.

11. After a chequered history which has brought this case to the Court of Appeal on one occasion already, application was made by the defendants for summary judgment, as I have indicated. The district judge refused it, believing that a trial was essential. On the appeal to Judge Overend, summary judgment was entered.

12. The judge heard submissions from the applicants in person. They included submissions made to him by Mrs Veitch on her own behalf in which she set out (at page 31 of the transcript) the way in which the consent order was structured and referred to their reluctance to accept it unless the bank accounts were returned to them because (summarising what she was endeavouring to say) without a proper business current account it was virtually impossible to continue trading. Business is done using credit cards and, without proper banking facilities, life was impossible for them.

13. The judge dealt with the matter principally on the basis of the main attack of Mr Jones: that even if everything were accepted to be correct (which was the only way to proceed for the purposes of the summary judgment application), nonetheless it was impossible for the claimants to succeed. They could not prove loss flowing from any negligence they might establish.

14. The judge recorded the submissions on p.9 of his judgment in these terms*: "The points that are made by Mr Jones in relation to the claim of Mr Veitch are that the elements which are complained of, namely, that*

Barclays Bank would not set up a current account, or a mortgage account, or notify Mr Veitch in advance of any mortgage increases were all matters over which Mr Avery had absolutely no control whatsoever. And so, it not being alleged in the document or, indeed, in the oral submissions of Mr Veitch, that Mr Avery had caused or permitted those failures to abide by any agreement by Barclays Bank, it could not be said that Mr Avery was responsible for them. Mr Jones also makes the point that it is not pleaded, nor does it appear to be the case, that Mr Avery was retained to enforce those parts of the agreement. Finally, it is said by Mr Jones that in any event whatever the position up until that point in time, the true cause of any losses suffered by Mr Veitch arose out of the fact that no payments were made under the consent order, other than the single payment to which I have already referred. So therefore the claim is bound to fail on the general ground of causation, and not for any breaches of any duties of care owed by Mr Avery."

15. When the judge dealt with Mrs Veitch's case he referred to paragraph 7(f) of the claim which she made, i.e. that the solicitor failed to ensure that the bank adhered to the consent order, and said this: *"Mr Jones makes the same points in relation to that as he did in relation to Mr Veitch's claim."*

16. So the judge disposed of the matter in this way: *"Mr Jones argues that nothing could have been easier than for the Veitches, if they could not obtain a current account, for example from Barclays Bank, to have produced cash or to have paid in some other means. It did not mean that they were prevented from making payments under the terms of the consent order. On the basis of Mrs Veitch's address to the court it would appear that the business did in fact continue to trade until the 10th of October 1995. A court faced with that evidence would be extremely hard pressed to find that any loss or damage could possibly be said to have flowed from the alleged breaches of the duties of care, even on a most sympathetic view to the way they were pleaded."*

17. He concluded that Mr Jones's arguments were totally correct and, on the primary issue of causation, there was no real prospect of success.

18. When the matter first came before this court it was pointed out to me that, at that hearing way back in 1998, reference was made to an amendment to Mr Veitch's claim. We now have the transcript of the proceedings before Judge Cotterill and it is indeed clear that the amendment was before the judge on that occasion. That amendment included these new assertions:

"1.Mr Avery failed to prove there was no default:

The reasons being:-

(a)Failed to notice and/or prove the bank statements received were false

(b)Failed to apply for Discovery and/or Affidavit evidence from the Bank

2. Failure to lodge Defence and Counterclaim (clarification) and made settlement which was not in our best interests

(a)Failed to advise that under Section 36 the mortgage could be upheld and would therefore be paid by way of direct debit from current account

(b)Failed to take up the issue of false evidence in Affidavits and the amended Particulars of Claim

(c)Failed to claim for the wrongful issue of Demand

df)Failed to take expert's (Mr Perring) advice

(e)Failed to take my instructions to pay £200,000 off mortgage

(f)Failed to inform the Plaintiff's agents of our offer

gi)Told us that it was a `good deal' but the monthly payment to be made was as if our mortgage was put back in place

3. Mr Avery, having entered us into the Consent Order, failed to ensure the oral agreement of the bank account (which could not go on the Consent Order) was upheld."

19. The problem is glaringly obvious. In this case (in which the claims were consolidated by various orders, to which I need not refer) the case of husband and wife, though separately pleaded, had to stand or fall together, and it would be unrealistic to treat them differently. Here the judge was disposing of Mr Veitch's claim on grounds, inter alia, that matters were not pleaded, it not being pleaded that Mr Avery was retained to enforce the agreement. But here is an amendment in which, in paragraph 3, points are being pleaded that the solicitor failed to ensure that the oral agreement of the bank account was upheld. That has been expanded in the oral submissions. What the Veitches

complain of appears to be this. They were suffering trading difficulties. By reason of the bank's action they could not conduct their business using credit cards, upon which this grand scale of business depended, and, without a business bank account which they could operate freely, it was commercially impossible for them to continue to trade out of the difficulties which, as it seems to me, they were obviously facing. If the judge did not have that pleading before him, he could not rule upon it and it should be sent back.

20. Given the history of this case, I started by inviting Mr Jones to persuade me why it should not be sent back. He made the immediate and obvious response that to send it back would be disproportionate, given the horror of time and cost that has already been wasted in this matter, and that we should grapple with the point ourselves. If he had been able to establish a knock-out blow, for my part I was prepared to do that, even though it denied Mr and Mrs Veitch the right to have a decision of the judge below which we could properly consider as an appellate court. It is not usually the function of this court to hear the matter de novo, and that really is what we were being asked to do.

21. Dealing just with paragraph 3 of that amended pleading, Mr Jones submits that it amounts to no more than an allegation of a negligent failure to record the full terms of an agreement between the client and the bank to allow for a new business account to be opened. Mr Jones submits that no loss flows from that failure. The most that could be said is that the solicitors would owe no more than the bank, and it is difficult to see what the bank would have to pay for breach of any agreement to open the account.

22. That, however, is not how the matter actually operated. We have a letter from the solicitors to the bank solicitors dated 14th November 1994 in which they refer to the discussions at court and say that they: *"... write to set out what we believe to be our joint concerns regarding this matter. It seems clear that a considerable part of the problems between our respective clients has been a lack or inadequacy of communication which has at the least exacerbated the situation.*

In our discussions it was agreed that there should be put in place an unambiguous framework so that all parties know exactly what is required and when. This should include the provision of a payment book to record the payments into the mortgage account.

On another, but related, matter we asked for the Bank to consider the setting up of a checking account to enable trading to be carried out more conveniently. This account will not carry an overdraft facility and could, if the Bank so wishes, be kept in credit with an agreed cash cushion.

We note that you will raise these matters with your client and we await your reply."

23. There is no indication on the papers before us whether they received that reply or any reply.

24. The problem, it seems to me, which that letter creates is that on the one hand it may be said to be evidence consistent with there being no agreement of the kind that Mr and Mrs Veitch allege. But for the purpose of strike out one has to assume that there was; and if there was an agreement between the bank and the Veitches to allow Mr and Mrs Veitch to open a business bank account, then it seems to me that it would follow, as an inference the court could make, that the bank would have done so when it was pointed out to them that they had agreed to do it: see the terms of the consent containing the term to that effect. If the bank had to acknowledge what was written on the face of the court order, it seems arguable at least that Barclays Bank would have honoured it.

25. It follows from that that the Veitches would have had some opportunity to trade out of their difficulties. Instead, they were confronted with a position where it was said that, to mitigate any possible loss that may have flowed, they should have gone to the next bank in the high street and opened an account there. But I am not convinced that this court can, on the strike out, assume that that mitigation was possible. Mr and Mrs Veitch tell us that it was in fact impossible, and I am bound to say that that may well prove to be correct.

26. In the end, therefore, I am left today in a position of uncertainty as to whether or not this breach would lead to a substantial claim for damages, assuming it to have been proved. I can see the argument that Mr and Mrs Veitch may at least have been able to survive for a short while before the

inevitable disaster struck them, and some damage may flow from that. I do not feel confident enough about Mr Jones's submissions to say that we should at this stage, in a fairly summary disposal this afternoon, permit the strike out of this claim. I think that it should be properly looked at and considered in the court below and if necessary (although this is not an invitation) the Court of Appeal can look at it again.

27. I have not adverted to another substantial argument made by Mr and Mrs Veitch today that it was negligent of the solicitors not to appreciate that they had a good defence to the claim. That argument runs something along the following lines. When the bank began the business loan arrangement it was on terms that they should make payments of £4,300 per month. The bank statements produced to us seem to indicate that payments were indeed being made and credited to Mr and Mrs Veitch's Barclays commercial mortgage account, crediting that account with £4,300 in October, November, December and January. There is then an entry for 27th March, but immediately a cross debit of the same amount in respect of what seems to have been noted as an unpaid standing order from the current account. What Mr Veitch tells us is that some time in December 1990 (or it may have been January 1991) the bank manager of the day agreed with them that the payments could be suspended and would not be reinstated until further notice. He says that that notice was never given; therefore there was no obligation to pay; therefore there could be no complaint of default; therefore there could be no proper action for possession. He says that his solicitor was well aware of that. I am not going to go into the detail of whether that has any realistic prospect of success. I can see some formidable difficulties for Mr and Mrs Veitch, not least of which is that that case is not at all well pleaded. If it has merit, it has to be properly put before the court.

28. All in all, I am left in a sense of deep disquiet. In my judgment the justice of the case does now demand that the wrong way in which it was approached in the court below (which is certainly no fault of Judge Overend's) should be redressed. I am fully aware of the strength of the submission that this is a second appeal and that no immediately obvious point of practice or principle leaps from the page. But if the wrong case was being addressed by the judge, then that is a compelling enough reason for it to be sent back in order that he give thought to the matter on the correct pleaded case. I would therefore grant the permission and, having granted it, grant the appeal.

29. But I want to add a very serious postscript to this judgment. The pleaded case is a total, complete, utter shambles. It is a mess. The defendants are entitled to know once and for all precisely the following:

(1)Whether or not Mr Veitch asserts that he retained the solicitors for any time, short or small, and particularly, perhaps, retained them to act on his behalf in the court proceedings of 11th November. His pleaded case that they were his solicitors is at variance with his oral assertions to the judges in the court below that they did not act for him. It is now time he made up his mind whether they did or whether they did not.

(2)If it is being alleged that the solicitors failed to plead a proper defence to the claim for possession, then it is high time that he spells out what that defence actually is in intelligible language, so that ordinary mortals like me can understand it; and, if there is a defence, why it is suggested that the solicitors were negligent in failing to recognise it, given that (a) his own expert may not have seen it, and (b) his own counsel did not appear to see it. Why should poor Mr Avery, humble solicitor that he presumably is, have been able to detect some point of abstruse devious cunning which even now I am grappling to understand.

(3)Each and every failure needs to be identified: what they ought to have done and why it was negligent of them not to have done it, and, imperatively, what loss it is suggested flows from the breach. There is some one giving Mr and Mrs Veitch advice and she should write down in large capital letters and underline it four times, *"The problem in this case may yet be causation"*.

30. Unless and until those matters are clarified, this case will continue to be a complete muddle. It must go back but, in the time it takes for this matter to get back to the court for further directions to be given as to its prosecution, if Mr and Mrs Veitch are going further to amend their pleadings in order

fully and properly to state what finally, after years and years, they say their case is, then it must be done quickly, because I doubt whether any judge will tolerate any further amendments of these pleadings. If they could receive the help of solicitors and counsel, it would be no bad thing; it would be a very good thing indeed.

31. I leave it entirely to the defendants to decide whether or not to renew an application for summary judgment. They might care to consider whether this short cut is causing more problems than it is worth and whether or not simply getting on with the trial of the action might not be the quickest way finally to resolve this hideous case.

32. I add a further note of warning to Mr and Mr Veitch. They come here telling this court that they expect their negligent solicitor to restore them to the position they would have been in if the bank had not repossessed their properties. That, I venture to think, is an utterly unrealistic case which has no prospect of succeeding. Their damages, if anything, are likely to be very modest. But I am not satisfied that there is no claim whatsoever and for that reason I send it back.

33. Mr Veitch is, I am afraid, so obsessed with the idea that Barclays Bank have been fraudulent and he is so devoted to the notion that the police are investigating matters, yet after seven years have done nothing at all about it, that he perhaps has lost sight of the wood for the trees. He might, with some sound advice, reflect whether he is aiming at the wrong target in seeking to place the blame for the whole of his misfortune on the solicitors, when, if there was any wrongdoing, his case, extreme as it is, might be directed more at the bank. He also might like to reflect with hand on heart whether, given the unfavourable trading conditions existing in this time of depression, he could ever have succeeded with this business venture and whether he is not simply another calamity of the depression, along with many, many others who overstretched themselves in difficult days.

34. If I had any hope whatever that Mr Veitch would moderate his views, I would encourage some form of mediation. This court has a mediation service. If he wished to explore it, this court could assist him and he need only write to the court office to enable that to be done. But I fear that may be rather a vain hope as a way of putting to bed a very unhappy chapter, which is not likely in the end to produce anything like the relief he and his unhappy wife would wish.

35. It is a matter for them whether they remain acting in person. It is a matter for Mrs Veitch to consider whether she wishes her former husband to continue to act on her behalf, as he has tended to do, and it is a matter for her to decide what future she independently requires this litigation to have because, if they lose, at the end of it all these costs will be made against both of them.

36. Those are words of doom which they may be well to heed. To assist them in that I will direct that a copy of this judgment be provided to them at public expense and, of course, also provided to the defendants.

37. But I would allow the appeal and send the matter back to the court below.

LORD JUSTICE TUCKEY:

38. I agree with everything that Lord Justice Ward has said.

39. The judge concluded that Mr Veitch's claim had no real prospect of success on the basis of Mr Veitch's original particulars of claim. He did not consider it on the basis of the amended particulars of claim which included, among other things, an allegation that there was no default on the commercial mortgage and that when the bank's claim for possession was compromised on 11th November 1994 the bank had agreed to open a current account to enable the hotel to continue trading. The pleading alleged that the solicitor had failed to take the default point in defence of the bank's claim and failed to ensure that the agreement about the current account was honoured. Because the judge considered the case on the basis of the case as it had been rather than as it was and this was an application for summary judgment, I have no doubt that this court can consider the matter, even though this is a second appeal, on the basis that these are compelling reasons for doing so. I would grant permission to appeal on this basis.

40. The question which has concerned me is whether we should nevertheless deal with the case and dispose of it on the basis that the amended claim is bound to fail in any event. I have come to the conclusion that we should not for the reasons given by Lord Justice Ward. The point about default was not considered by the judge at all. We have heard argument about it and, though I say nothing about its prospect of success because there are undoubtedly formidable arguments against Mr and Mrs Veitch on this point, I do not think it would be right for us to decide it in this court here and now.

41. As to the point about the current account, the judge did consider a complaint about this made orally by Mr Veitch and Mr Jones made submissions to the judge about it. However, the complaint was not in any way focused in the way that my Lord has elaborated and the judge dealt with it simply by accepting Mr Jones's submission that the solicitor was not responsible for the bank's failure to open the account. But that was not a sufficient answer to the point and for the reasons given by Lord Justice Ward I do not think that we should attempt to answer it in this court.

42. For those reasons I would allow this appeal, emphasising, as my Lord has done, that I think that Mr and Mrs Veitch have only one further chance to put their case clearly and that no court, particularly this court, will entertain the case again on the basis that in some way what is written down as their last word on the case does not really represent it.

Order: permission to appeal granted, appeal allowed and matter remitted back to the court below; transcript of judgment provided to claimants and defendants at public expense.

The Applicant Claimants Mr and Mrs Veitch appeared in person.
Mr G Jones QC (instructed by Messrs Morgan Cole, Cardiff) appeared on behalf of the Respondent Defendants