CA on appeal from Wandsworth County Court (Mr Recorder Ross Martine) before Sedley LJ, Neuberger LJ. 15th June 2004.

JUDGMENT : LORD JUSTICE SEDLEY:

1. As long ago as April 1992 Mr Barnett issued proceedings against Mr Lewis in the Wandsworth County Court for £10,435.49. The only particulars given were a list of invoice sums, but it is common ground that they were fees for stabling and training racehorses.

2. On 18 June 1992 the plaintiff and defendant signed a manuscript agreement, drawn up the previous day, and captioned with the same number (9200836) as the summons in the case (which for some reason differed from that on the particulars of claim). It read:
"We, Windmill Racing Stables, the plaintiff herein and GG Lewis the defendant hereby agree and confirm terms of settlement as follows:
1) The plaintiff [this is a patent area for 'defendant'] will transfer ownership of the 3 year old filly 'Reach Me Not' and the 8 year old bay gelding 'Ever Sharp' to the plaintiff.
2) The defendant will pay to the plaintiff the sum of £2,000 within 6 months of the date hereof.
3) The plaintiff will accept the said horses and the said sum of £2,000 in full settlement of its claim and costs in this action, and also including all other training, stabling or other fees of any nature for the said horses and the horse, Aragon Mist, up to 22 June 1992.
4) The plaintiff shall continue to train, stable and care for the horse, Aragon Mist, from 22 June 1992 at a weekly fee of £100 and that subject to the transfer of ownership of the said horses, 'Reach Me Not' and 'Ever Sharp', and the payment of the said sum of £2,000 and any weekly fees of £100 outstanding the defendant shall be at liberty to remove his horse, Aragon Mist, from the plaintiff's custody at will.
5) The plaintiff and the defendant will both notify the Wandsworth County Court forthwith that this action has been settled on terms agreed between the parties.
6) It is agreed that a copy of this signed agreement shall be lodged with the court."

   It is signed on behalf of the plaintiff on 18 June 1992, and by the defendant on the same date.

3. On the same day the plaintiff made up for the defendant a document on the stables' printed invoice form, with the word "invoice" replaced by the words "credit note", on which the following has been typed:
"CREDIT NOTE RE: SALE OF
'EVER SHARP'
'REACH ME NOT' £8,440.49.
PLEASE NOTE: This leaves a balance of account of £2,000."

4. Mr Lewis has consistently said that he completed his part of this agreement by paying £2,000 in cash to a man named Andrew Wakefield who was, or was held out as being, Mr Barnett's business partner. Mr Barnett has (arguably somewhat less consistently) denied that Mr Wakefield was his partner.

5. In February and August 1995 Mr Barnett's claim was amended and then re-amended to add a series of further invoiced sums dating from November 1991 and April 1992, bringing the total of the claim up to £12,440.49, to which was now added interest at 15 per cent to the date of the amendment and 8 per cent thereafter. Against the claim, credit was given for £2,000 paid on account which, Mr Barnett tells us today, was not the sum referred to in the agreement but a sum paid much earlier in 1992.

6. To this amended claim Mr Lewis put in a manuscript defence that set out in narrative form a plea which a lawyer would recognise at once as a plea of accord and satisfaction: that is, that he had reached an agreement with Mr Barnett to settle the claim and that he had carried out his part of the agreement in full. What Mr Lewis did not plead, because he manifestly did not appreciate it, was that, even if it were to be found that he had not paid the £2,000 or transferred the horses, his failure now represented a breach of the agreement by which the case had been settled and did not reopen the original claim.

7. The re-amended claim came on for trial before Mr Recorder Ross Martin on 7 March 1997. Unfortunately, but not in those days unusually, no tape recording was made of his judgment. All we have are two manuscript notes taken by the plaintiff's solicitor's clerk and by or on behalf of the

defendant, who was in person. The Recorder gave judgment for the plaintiff for the full sum claimed, with £5,552.55 interest, the whole to be pay paid within 14 days and interest to continue at 8 per cent until payment, together with costs.

8. It is apparent from the judgment that counsel for the plaintiff had proceeded without opposition on the assumption that the non-payment of the agreed sum of £2,000 would reopen the original claim. It is understandable that the defendant did not appreciate that this might not be so; less understandable perhaps that the Recorder did not apparently even question whether it was so.

9. It is convenient at this stage to deal with this question since it is a pure question of law. In my judgment, the principal object and effect of the manuscript agreement of 18 June 1992 are that, in return for the immediate discontinuance by the plaintiff of the pleaded claim and the withdrawal of any other outstanding claims against the defendant, the defendant will give the plaintiff two named horses and £2,000. A further term makes contractual arrangements for the care of a third horse. The result is in my view clear: the proceedings are at an end, and in their place a new set of contractual arrangements is brought into being. If a failure to honour the terms had been intended to permit the proceedings to be revived, the conventional means would have been to stay the proceedings for the purpose of carrying the terms into effect; but while clause 3 of the agreement by itself might have been consistent with such an intention, clause 5 is emphatically not. From 18 June 1992 onward, a failure by either party to honour the terms of the agreement gave rise to a fresh cause of action on the agreement: it could not, in my judgment, revive the original claim. The credit note issued the same day by Mr Barnett indeed appears to acknowledge as much. I will return in due course to the effect of this conclusion of law on the present appeal.

10. Mr Lewis did not pay the judgment debt, and in 2001 or 2002, High Court proceedings were issued by Mr Barnett to enforce the judgment. A charging order was made on Mr and Mrs Lewis' home in Streatham, and in November 2002, Master Price made a possession order in Mr Barnett's favour. Following a series of applications which it is not necessary to describe here, but which are set out with great clarity in the judgment of Deputy Master di Mambro of 3 December 2003, Patten J on 30 July 2003 gave Mr Barnett leave to issue a writ of possession but later suspended it in order to give Mr Lewis the opportunity to seek permission to appeal against the original judgment.

11. The pursuit of permission to appeal was complicated not only by the lapse of many years but by the radical change introduced during those years in the procedural rules governing appeals. The essential ground on which Mr Lewis now sought permission to appeal was that, in the course of the High Court enforcement proceedings in 2001-2002, he had become aware for the first time of other proceedings which revealed the existence of a partnership between Mr Barnett and Mr Wakefield, and which possibly included a dispute about the £2,000 which Mr Lewis had always said that he had paid to Mr Wakefield.

12. On 11 December 2003 Mr Lewis came in person before Ward LJ. Mr Barnett was represented by counsel, who it seems was without full instructions. Ward LJ took the view that the proposed appeal, as presented to him, stood no chance unless it was supported by fresh evidence. He directed that Mr Lewis was to have six weeks in which to produce such evidence, and that Mr Barnett was to disclose the court documents in proceedings in which, as it now appeared, a Mr Piper had established that Mr Barnett was in partnership with Mr Wakefield in running the stables, and which had apparently led to the taking of a partnership account between the two men. On this footing, Ward LJ, sitting as a judge of the Chancery Division, granted permission to appeal the Recorder's order out of time and transferred the appeal to this court. He set time limits for pursuing the appeal, stayed execution of the possession order and gave directions designed to procure an intelligible transcript of the Recorder's judgment.

13. On 2 March 2004, the application came back before Ward LJ and Keene LJ. This time Mr Barnett was in person and Mr Lewis was represented by counsel from the Pro Bono Unit. Mr Barnett asserted, and the court accepted, that the notes of the judgment showed that the Recorder had found not only that there was no partnership between Mr Barnett and Mr Wakefield but that Mr Lewis had not paid the sum of £2,000 at all. In this situation the court discharged the order for disclosure of the proceedings

involving Mr Wakefield and Mr Piper, and gave a last respite of a week for any fresh evidence of payment to Mr Wakefield to be filed, failing which the appeal was to stand dismissed.

14. In particular, Ward LJ said on this occasion:

"5 ... Consequently Mr Barnett volunteered disclosure to the court and to Mr Elliott of the papers in the Barnett/Wakefield proceedings in the County Court from which it was abundantly plain, from even a cursory examination, that the issues there before the court began from and, effectively, related to the Piper litigation. We have seen the accounts; they are trading accounts of the Windmill Racing Stables, and there is no reference anywhere to Mr Lewis at all so far as we can see and there is certainly no reference to a payment of £2,000 received by Mr Wakefield from Mr Barnett in or about 10 July 1992, which is a period covered by the accounts prepared by accountants and eventually approved by the County Court judge.

6. I am now satisfied therefore that further discovery is not justified ..."

15. On 13 May 2004, Mr Lewis came back before the court, this time consisting of Ward LJ and Sir William Aldous. Both parties were now in person and Mr Lewis had no fresh evidence, only further argument to advance. Mr Barnett asked the court in these circumstances to give the appeal its quietus. But Ward LJ said this:

" I directed that that application should be listed because it is important for the continuing conduct of this litigation, both in this court and in the Chancery Division where enforcement proceedings are taking place, that if the appeal is to be knocked out here and now then it is better it be knocked out today than that the matter stand over for the full court which will hear the appeal on a date in the middle of June. When directing the matter be heard today I also informed the parties that the court would consider whether or not to set aside the permission I granted in December. I did that because I indicated that had I been aware of the full tenor of the judgment I would not likely have extended time and I may not have given permission at all.

4. I have reflected about that and it is necessary to clarify it and for that reason I express my current views on the subject. Although the crucial finding of fact is as to the payment of £2,000 the subsidiary finding of fact as to Mr Wakefield's authority is not insignificant and, for the reasons I have already explained, could well have had a bearing upon the judge's conclusion on the main issue. It would be wrong for me to remove that consideration from the full Court of Appeal when they deal with the matter in June. Thus I have concluded that it would be wrong to set aside permission which I granted in June and allow the full court to deal with it. Likewise, as I have explained to Mr Barnett and as he accepted, it is better that we adjourn his application to strike out the fresh evidence application to the full court to give the full court the opportunity to deal with ***Ladd v Marshall*** *and the other points that can be taken against Mr Lewis' present application.*

5. I conclude with these further observations. This is and remains a troubling matter. Its importance to Mr Lewis is manifest. He stands to lose his home if the enforcement proceedings run their ordinary course. He is extremely upset and his outbursts in court have demonstrated the degree of that upset. But with the benefit my Lord Sir William Aldous' help, we have again considered the issue carefully and a new point has emerged; its value will be for the Court of Appeal to consider."

16. The new point was the one which I have already discussed. Ward LJ, with Sir William Aldous' agreement, went no further -- since it was not appropriate to do so -- than to hold that the point was arguable. For the reasons I have given, it was in my judgment not only arguable: it was unanswerable. The problem is that it was not taken at trial. What this court in the event did was decline to strike out the appeal for which permission had been given the previous December, but adjourned to today, the date fixed for hearing the substantive appeal, Mr Barnett's application to shut out the adduction by Mr Lewis of any fresh evidence. If the application succeeds, the appeal would, in Mr Barnett's submission, be at an end.

17. The situation before us today is that there is still no fresh evidence. The initial order of this court for the production of the documents in the Piper/Wakefield litigation, which remain the only potential source of such evidence, was revoked, as I have described, on the second hearing before this court. Yet if, as the passage I have cited from Ward LJ's most recent judgment suggests, the veracity of Mr Barnett's denial of a business partnership with Mr Wakefield might have had a bearing on the Recorder's rejection of Mr Lewis' testimony that he had paid the £2,000 to Mr Wakefield, these documents are indeed relevant and the initial order for their production was justified.

18. I note too that the account given by Ward LJ on 2 March 2004 of his reading of the documents produced by Mr Barnett -- an account which I have cited -- does not go to this question. It goes only to the possible receipt by Mr Barnett himself of the £2,000 from Mr Lewis.

19. I am troubled also by something more fundamental than this in relation to the Recorder's judgment. As I said earlier, this court on 2 March 2004 accepted Mr Barnett's assertion that the notes of the judgment showed that the Recorder had found that Mr Lewis had never paid the £2,000 at all. That seemed to me a surprising finding since the most that could be established by evidence was (a) that Mr Barnett had not received it, and (b) that if Mr Wakefield had received it, it had not been on Mr Barnett's behalf. And when one looks at the notes, this, in my judgment, is all that the Recorder did find. The note taken by Mr Barnett's representative reads:

"1st did plaintiff in fact receive 2K or 3K from Mr Wakefield.
2nd If did not would Mr Wakefield payment discharge.
1. No evidence plaintiff paid either of settlement sums."

The note taken by or for the defendant is very similar, though slightly more opaque.

20. These passages do not record a finding that Mr Lewis, who was the defendant not the plaintiff, did not pay the money. They are, in note form, a finding that the plaintiff, that is to say Mr Barnett, was not paid the money. Such a finding makes sense. It does not purport to decide that Mr Lewis never made the payment, which would not have been a safe conclusion on the material before the court. It decides only that the money did not reach Mr Barnett, and that if it reached Mr Wakefield, it did not do so in circumstances which made it a good discharge of the debt owed to Mr Barnett.

21. In these circumstances it seems to me that the relationship between Mr Barnett and Mr Wakefield in June 1992 is indeed, as Ward LJ first thought, crucial. The court documents in the Piper/Wakefield litigation are correspondingly central to deciding what I stress is now, by leave of Ward LJ, a properly constituted appeal before this court. Not only would I therefore not accede to Mr Barnett's application to refuse to allow Mr Lewis to adduce fresh evidence, I would restore Ward LJ's original direction that Mr Barnett produce to Mr Lewis and to the court all documents, save those protected by legal professional privilege, in his possession, power or control concerning or arising out of litigation between Mr Barnett and Mr Piper and between Mr Barnett and Mr Wakefield.

22. This in turn means that the present appeal has to stand adjourned to enable our order for production to be implemented. I would, subject to my Lord's view, direct that the documents I have identified be produced to Mr Lewis and to this court within 28 days of today. I would continue the stay of execution of the possession order meanwhile, with an indication that it is at least possible that on the next occasion we shall discharge it and the charging order on which it is founded. Depending on what the documents from the Piper/Wakefield litigation show, we would expect to be in a position either to allow the judgment to stand as to £2,000 only, on the ground that there is no fresh evidence of a partnership or other agency, or to set aside the entire judgment because such evidence has emerged. In either event, however, the action will have to proceed upon the new basis in relation to the disposal of the horses, which remains in dispute.

23. To this end, I would be prepared to allowed Mr Barnett, in due course, to amend his claim in order to place it on the correct legal footing. But because the claim would now be time-barred, Mr Lewis' appeal would, in that event, only be allowed to proceed on condition that he takes no limitation point against the amended claim.

24. It follows, therefore, that, on the substituted agreement which is the only viable cause of action, there would remain to be tried a dispute about the horses and possibly, depending on what the documents show us, about the £2,000 as well.

25. It is right that the parties should appreciate now what the score is because the issues frankly do not justify another bout of litigation, the agony and expense of which the parties are only too well aware of. The court's mediation services are available to them from today, and we strongly encourage them, in spite of the bad blood that now runs between them, to set about using mediation as the best, or the

least worst, way of bringing finality to this long-running dispute. Our order for disclosure will stand meanwhile. The Civil Appeals Office will send the parties full details of the court's mediation service.

26. We have told the parties in the course of argument today the potential consequences of unreasonable refusal or failure to take advantage of the availability of mediation, and they will need to bear that in mind, as well as the benefit of putting a negotiated end to this long-running dispute without further financial and emotional blood-letting. Upon that basis, the appeal stands adjourned.

LORD JUSTICE NEUBERGER

27. I agree with what my Lord has said. It would not be helpful for me to go into the issues and conclusions, which he has so fully set out. I fully agree with them. I would like to make two points. The first is to reinforce what my Lord has said about the parties settling their differences if possible through mediation, however unlikely it may seem to them at the moment. It would be highly desirable for them to try, and it is not inconceivable by any means that it would succeed.

28. Secondly, in the unhappy event of this matter having to go back for retrial, I would respectfully suggest that my Lord's very careful and full summary of the history of this matter to date may provide an extremely useful *aide-mémoire* for the unfortunate judge who is faced with re-hearing this matter.

THE APPLICANT APPEARED IN PERSON

THE RESPONDENT APPEARED IN PERSON