CA on appeal from QBD. (Mr. Justice Popplewell) before Hirst LJ; Judge LJ. 5th December, 1996

JUDGMENT : LORD JUSTICE HIRST:

1. This is a renewed application for leave to appeal after refusal by the single judge. I would like to begin my judgment by paying a very warm tribute to Mr. Michael Bowshser for the admirably forceful, clear and attractive and courteous way in which he has presented what, for the reasons I am about to give, was a very difficult application from his point of view.

2. The judgment with which we are dealing in the application which is made is one given by Popplewell J on 23rd July 1996, whereby it was ordered that the defendant's appeal against the decision of Deputy Master Ashton on 1st July be allowed and that the statement of claim in the action be struck out with judgment being entered for the defendant with costs.

3. The facts are in summary as follows. The plaintiff is Mrs Chandler, previously Mrs Plumridge. She was the owner of a property at 10, Woodlands Park Avenue in Maidenhead. She had previously been married to Mr. Plumridge who had been a joint owner. They engaged the defendant, Mr. Welland, trading as Welland Building Contractor, to undertake some work on this property. The plaintiff moved in in April 1988, and there was an oral contract that the defendant should carry out extension works for a lump sum of £27,000 over a three month period, with the work to start in July 1989. The work started towards the end of August. It was agreed that there should be staged payments in the normal way during the course of the work and requests for payment in August, September, October and November were presented to the plaintiff and were fulfilled with, in all, some £21,000 being paid up to November 1989.

4. However, when the December 1989 date for payment came and a further sum of some £2,000 was sought, it was not paid. Mr. Plumridge explained that there were difficulties. The upshot was that on 7th January 1990 the defendant presented an invoice in the sum of £4,655. It seems that at that stage Mr. Plumridge said that he was not going to pay any more. Part of the problem was the marital difficulties which had by then eventuated. The upshot was that Mr. Welland treated that failure to pay as a repudiation and instructed his solicitors to start proceedings in the Slough County Court for the amount that had been invoiced, that of £4,655. That summons, in which the present defendant was the plaintiff and Mr. and Mrs Plumridge were the defendants, is dated 19th February 1990 and seeks the sum to which I have referred. Acknowledgement of service was due within 7 days and the defence was due 14 days thereafter, but neither of those matters were dealt with by or on behalf of Mr and Mrs Plumridge, with the result that on 28th March a default judgment was entered in Mr. Welland's favour in the Slough County Court in the sum of £4,797, a little bit above the invoice. There was either some interest or some costs. That judgment was duly entered.

5. Three weeks later or so, Mr. and Mrs Plumridge's solicitors wrote to the defendant's solicitors saying that they were going to apply to set aside the judgment. At that juncture Mrs Plumridge put in a defence. That was in the following terms. *"The plaintiff"* -- that is Mr. Welland -- *"agreed to build an extension house for an agreed amount. No agreement was made regarding staged payments but from goodwill I paid £21,000. The work is some way from completion and"* -- and a number of very important words -- *"I have a number of complaints about the work done so far. The plaintiff has has been informed about the defects. I am told to take legal advice as I intend to counterclaim against [Mr. Welland] and request 14 days delay for me to do this."*

6. I pause there. It is apparent that even as early as April 1990, the suggestion that there were defects in the work had already surfaced from the Chandler/Plumridge side. On 27th June the matter was heard before the Registrar, i.e. the application to set aside the default judgment. He made an order that the judgment be set aside on Mr. Plumridge or Mrs Chandler paying £2,500 into court within 21 days of the order. In default the judgment was to stand. There was no appeal against that decision. The £2,500 was not paid. In consequence the judgment as originally given stood and Mr. Welland was entitled to the original judgment sum of £4,797.

7. This was followed by a step which is critical for the purpose of understanding this case. It is that Mr. Welland obtained a charging order nisi dated 22nd January 1991 relating to the premises. That was entered as a caution on the register. On 18th March 1991 Messrs Willmett & Co., Mrs Plumridge's solicitors, wrote to Mr. Welland regarding the divorce, stating: *"At present you are owed £4797 by Mr. and Mrs Plumridge for which you have a County Court judgment. You are seeking to enforce this judgment by way of charging order. The charging order relates to 10 Woodlands Park Avenue, which is the matrimonial home and is presently occupied by Mrs Plumridge and her five children. It has been agreed between Mr and Mrs. Plumridge and it is now proposed to you that if you agree to complete the building works, then Mrs. Plumridge will undertake upon completion of the building works, to immediately put the property on the market and to pay the monies owing to you out of the net proceeds of sale."*

8. The letter goes on, saying: *"... would you let us know if the above proposal is acceptable."* A copy of the letter was sent to Mr. McCartney, who was and no doubt still is Mr. Welland's solicitor. That was then followed up by a chaser on 2nd April 1991, but nothing further happened at that juncture. Everything seems to have gone quiet for the succeeding three years or so.

9. The matter surfaced again on 26th May 1994 which, as the judge pertinently commented, was nearly five years from the start of the building contract. That date is the date of another letter dated 26th May 1994 from Messrs Willmett, Mrs Chandler's solicitors, to Mr. Welland, which is in the following terms:

   "Our client has been forced to live in a virtual building site due to the building works which have not been finished by you. From our instructions and the documentation which we have had sight of we are quite satisfied that our client has

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a claim against you for negligence and/or breach of contract in relation to the building works. We have advised our client to institute court proceedings and in this regard she is applying for legal aid.

A part of our client's claim will relate to certain of the building works undertaken by you which are either in breach of building regulations and therefore illegal..."

10. Three items are set out which are said to be part of the claim and carried out, allegedly unlawfully, by Mr. Welland. Then over the page: *"Our client had to suffer and live with these unfinished building works for several years, and now has reached the point when she would like the matter to be resolved. Bearing in mind the county court judgment you have obtained against our client, we are instructed to put forward the following proposals."*

11. I shall read these out, shortening them in a manner which will make them clear:

1. *"You will complete the work and do the repairs set out in the enclosed schedule. When a date has been agreed in writing for you to commence these works we will forward a cheque to you for £2,000.*
2. *When you have actually started... [we will] forward a cheque for £1,500.*
3. *When the remedial works, repairs and extension works have been completed to our client's satisfaction, we are instructed to forward to you a cheque for £1249.00.*
4. *You will immediately write to H.M. Land Registry confirming that you withdraw your objections to the transfer of the property to our client's sole name...*

As we have said, our client wants this matter resolved, and so if the above proposals are not acceptable to you we are instructed to institute court proceedings."

12. There is a categoric assertion of serious shortcomings, to put it no higher, of various kinds in the work which had been done about five years before by Mr. Welland and an intimation that in default of settlement on the terms that I have read out, Mrs Chandler would bring court proceedings; at the bottom of the letter the three figures are added up in manuscript, obviously in Mr. Welland's writing -- it is on his copy that they are entered -- and they are the amount, as will appear later on in this judgment, at which the final settlement payment was made.

13. Mr. Welland replied to that letter in very clear terms on 6th June 1994.

"As you are aware I have a county court judgment and a charging order absolute against Mr and Mrs Plumridge/Chandler.

I was advised to apply for judgment after Mr and Mrs Plumridge/Chandler admitted they had exhausted their funds; therefore they could not honour the invoice presented or the balance of £2245 which would have been due on completion.

With reference to your client's claim . . ."

14. Then he seeks to refute all the criticisms of the work. I do not need to read that out. He goes on:

"My objection to Mrs Chandler's application to transfer the property to her sole name will remain in place until such time as I receive full payment due to me.

I am advised that considering my strong position and the fact that payment is long overdue it would be appropriate for me to restore proceedings and conclude matters by obtaining an order of sale.

I now require immediate payment of the total sum due, namely £4655 plus interest and costs. If this sum is not paid to me direct within 7 days from the date of this letter, proceedings will be issued against your client for the recovery of this sum."

15. What comes out as clear as daylight from that letter is that Mr. Welland appreciated that he held the whip hand in this particular dispute because of his charging order. Indeed, he puts it in clear terms when he talks of *"considering my strong position"*. Secondly, he is going to have nothing to do with the claims for the defective work and, thirdly, he is insisting on a clean payment for the amount due without any reduction whatsoever.

16. Messrs Willmetts write back on 6th July 1994:

"While our client does not agree with your comments, she would like 10 Woodlands Park Avenue transferred to her sole name.. . . It is apparent that you will only withdraw your objection if the county court judgment, which you have obtained, is satisfied. We are instructed, therefore, to put forward the following proposals:-

We will draft an application to HM Land Registry cancelling the caution which you have registered. You will sign the caution...

On receipt of the signed application, we will forward to you the sum of £4,749 in satisfaction of the county court judgment which you have obtained."

17. That is an important letter. There is no mention or reservation of any claim for defects or failure to undertake the building works. That does not figure in the letter. There is a plain recognition, as I put it a moment ago, that Mr. Welland did hold the whip hand and that the only way they were going to get the caution removed was to settle on his terms. In my judgment, from that moment onwards, the repair work aspect of the case disappeared from the negotiations. The letters went on debating the terms of the settlement, and there were various arguments about figures with nothing being said at all on either side about the repairs. Ultimately, there were two letters exchanged at the very end of the sequence, pages 154 and 158, where McCartneys write on 4th October 1994 to Mrs Chandler's solicitors: *"... [we] are prepared to agree to the proposals set out in your letter to them of 6th July."* -- That was the last letter setting out the actual figures -- *"However, they are prepared to do this on the*

understanding that they are prepared to release the caution when the payment has been received by ourselves namely the £4, 749.00 and perhaps this can be arranged between the respective firms."

18. That was answered on 17th November 1994: *"On behalf of the plaintiffs we formally acknowledge receipt of the sum of £3,749.00 in full payment and satisfaction of the judgment debt . . . Please confirm by return your authority to release the cheque to our clients."*

19. That sequence of correspondence was before Popplewell J. In his judgment he went through a number of other issues which he considered at some length, on res judicata and issue estoppel. At the end of his judgment he also said: *"It was open to the present plaintiffs to have raised this matter as long ago as 1990 and the present defendant is now faced with a claim in respect of building all of which occurred some six or seven years ago and which he was perfectly entitled to believe had been fully and totally dealt with by his acceptance of the compromise of some £3,700."*

20. The single judge, Phillips L.J., refused leave to appeal on the ground that he considered that, having regard to the compromise that preceded it, the final compromise agreement was paid and accepted in settlement of both claim and any cross-claim. That conclusion is now criticised by Mr. Bowsher in his argument on the following footing. He points first to the statement of claim and defence, the claim of course raising a number of points about alleged defects, and the defence, not in terms pleading a compromise but pleading an estoppel on facts which he accepts are, to all intents and purposes, identical to the facts relied on in the correspondence as supporting a compromise. In other words, he accepts that the facts were before the court, and the formulation of what they resulted in in legal terms, whether as an estoppel or as a compromise, was not a significant difference.

21. The evidence in the affidavits is absolutely clear. Mr. Welland swore an affidavit dated 16th July 1996, when he said as follows: *"In agreeing to accept the sum of £4,749.00 in payment of the judgment liability I expected that this would finalise the issue between myself, the plaintiff and Mr Plumridge and that it would see an end of all matters between us. While there had been raised in correspondence complaints about my work as set out in the Plaintiff's solicitors letter of 26 May 1994, which I deny, in view of my response of 6 June 1994 and no further mention made prior to the settlement I believed that any such complaints had been abandoned. Certainly if I had known that having settled the matter with the plaintiff and Mr Plumridge that there was any possibility that they might counterclaim against me or bring any proceedings in respect thereof after I had released the charge I would never have done so."*

22. It is said nevertheless by Mr. Bowsher that, if you look at the correspondence as a whole and particularly at the lack of any mention of the building works in the last two letters -- that is Nos 158 and 154 -- the proper construction of the correspondence is that it only settled Mr. Welland's claim and left completely on one side the potential counterclaim or new claim for damages for defective workmanship. In my judgment, as was also the view of Popplewell J and Phillips L.J., from the absence of any further mention in the correspondence of the alleged defects after the first two letters and after Mr. Welland had made it crystal clear in his letter at pages 122 and 123 that he was not having anything to do with the complaints against him, insisting that he got his money without any deduction and that he would hold on to his strong position and remove the caution, it is apparent that the building defect aspect of the case disappeared once and for all; and, thereafter, the correspondence was clearly on the basis that all litigation and potential litigation was going to be settled once they could agree a sum which would be paid in exchange for lifting the caution.

23. Quite apart from the correspondence supporting this conclusion, there is also the commercial reality of the case. It is plain and obvious that Mrs Chandler's overriding concern was to clear off the caution. It is plain and obvious that Mr. Welland knew that was the case that he was in a very strong position, and that he could really dictate his terms so far as the removal of the caution was concerned. To suggest that commercially it would make any sense for either side to have this further claim, no doubt very expensive to fight, with Scott schedules and all the paraphernalia of a case of this kind is totally inconceivable. The commercial reality supports the construction of the correspondence.

24. I am grateful to Mr. Bowsher for the admirable way in which he presented his case. He has not convinced me that Phillips L.J.'s view was wrong. For the reasons I have given in some detail out of respect to his admirable argument, I would dismiss the application.

LORD JUSTICE JUDGE: I agree.

Order: Application refused; legal aid taxation

MR. M. BOWSHER (instructed by Messrs Willmett & Co., Maidenhead) appeared on behalf of the Applicant/Plaintiff.

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