

Case 18
Mortgage Express

v

Sawali

[2011] 2 Costs LR 288

Neutral Citation Number: [2010] EWHC 90181 (Costs)
High Court of Justice, Chancery Division
22 November 2010

Before:
HHJ Simon Brown QC

Headnote

The court had to determine the appropriate costs order after an application by a claimant for production of documents by a solicitor who had acted for both the claimant lender and the borrower and for a different claimant lender in a re-mortgage transaction on the same day. In the first transaction both parties had waived privilege by signing a declaration authorising the conveyancer to send their entire file to the claimant on request but there had been no such waiver in the second transaction by the lender and the court held that the signed declaration did not extend beyond the whole transaction between the borrower and the claimant.

Judgment on Costs

Introduction

1. In this Part 8 claim, the claimant sought delivery up of a number of the files of a predecessor firm of the defendant solicitor, pursuant to the inherent jurisdiction of the court as extended by s 68 of the

Solicitors Act 1974. The solicitors had acted for both the claimant and their borrowers (“the Borrowers”) in a number of separate mortgage transactions.

2. The defendant accepted that the claimant is entitled to production of documents created in the course of the claimant’s retainers of the defendant but contended it did not extend to “the entire file” in each case where some of the documents are “the Borrowers” and are covered by legal professional privilege.

3. The defendant asserted no personal interest in, nor lien over, the documents sought by the claimant. However, the defendant submitted that the court would be exceeding its jurisdiction, or exercising its discretion wrongly, if it were summarily to override the Borrowers’ rights of privilege and/or confidentiality in the documents created in the course of *their* retainers of the defendant’s predecessor.

4. Although invited to do so, the claimant did not seek to obtain the waiver of privilege by the Borrowers and their expressed position was unknown. The defendant, both as an officer of the court and as their solicitor and of the claimant too, was placed in the position of having to put the potential arguments of the Borrower on privilege before the court.

Submissions

5. Mr Phipps, for the defendant, kindly drew the court’s attention to the helpful guidance provided by Blackburne J in this difficult area of conflict of interests and duties where a solicitor is retained by both lender and borrower/purchaser in a mortgage transaction and two separate retainers are created.

6. In *Nationwide Building Society v Various Solicitors* [1999] PNLR 52, Blackburne J said on page 69:

“I take the view that whether or not the client has any recognisable interest in continuing to assert privilege in the confidential communications, the privilege is absolute in nature and the lawyer’s mouth is ‘shut for ever’. I also agree ... that it follows from this that it is the lawyer’s duty to claim the privilege on behalf of the client, or former client, whose privilege it is, at any rate where it is at least arguable that the privilege exists.”

7. Mr Phipps submitted that it was ‘reasonable’ and proper for the solicitors to raise the issue of the Borrower’s privilege when it was

sought to be summarily overridden by their other client, namely the Lender as here.

8. He further submitted that this is a situation where the claimant is in reality trying to obtain pre-action disclosure that would normally be governed by CPR 31.16 where the claimant would probably be obliged to pay the defendant's costs. However, he does not go so far as to claim such an order for costs here. He submitted that there should be "no order as to costs".

9. Mr De Waal for the claimant submitted that an express agreement in each case between the Borrower and the Lender overrode the default position and anticipated the current situation. He submits the claimant was "successful" in their primary case that a Declaration signed by the Borrower in each case waived its privilege:

"I/We declare and agree that ...

17. I/We irrevocably authorise my/our conveyancer to send their entire file relating to the whole transaction (not just the loan) to you at your request."

10. Accordingly, he submits that the claimant should have the costs of its 'successful' applications.

11. However, Mr Phipps submits that as regards this criterion of "success", the claimant was only "partially successful". The claimant had also sought under the Declaration in cases involving two separate transactions (a purchase funded by a different lender and a subsequent re-mortgage of the same property on the same day to the claimant), the documents relating to the "previous transaction" not involving the claimant but another Lender who would also have rights to claim privilege over its documents. Again, the stance of that other Lender was not sought or available. In my judgment the Declaration did not extend beyond the "whole transaction" between the claimant and Borrower, not another transaction and another Lender.

12. Accordingly, Mr Phipps is correct in his submission that the success of the claimant was only partial though it was substantial.

Law

13. Both parties submitted that the principles of CPR 44.3, as explained more fully by Jackson J (as he then was) in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and Another* [2009] 1 Costs LR 55; [2008] EWHC 2280 are to be followed here. It

is, of course, worth restating that this is an area of “discretion” under CPR 44.3(1).

Judgment

14. In my judgment, the claimants are therefore *prima facie* in my judgment entitled to the costs of their “successful” application under CPR 44.3(2).

15. However, under CPR 44.4 the court “must have regard to all the circumstances, including (a) *the conduct of all the parties*”; and (b) “whether a party has been successful on part of his case, even if he has not been wholly successful”.

16. Mr Phipps reminds me that CPR 44.5(b) states that “conduct” includes “whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue”.

17. In my judgment, it was entirely reasonable for the defendant to raise the issue of privilege of his other absent client. As the judgment of Blackburne J demonstrates, the solicitor’s conflicts of interest and duty place him in an unenviable and difficult position in order to make an objective decision that is ultimately one better left to the court to decide upon, as here. Furthermore, the court’s ruling was required to make an important objective construction of the scope of the Declaration overriding the privilege as between the claimant and Borrower but not that beyond covering the previous Lender and Borrower. On this latter smaller, but arguably more important in terms of content of documentation, aspect, the defendant rightly claims his own “success”.

18. A discretionary judgment here requires a balancing of these factors.

19. In my judgment, it was not only reasonable for the defendants to “raise these issues” in all these difficult circumstances, it was their duty to do so. The jurisdiction involved here is a summary one under the Solicitors Act 1974 concerning the jurisdiction of the court. It is only right and proper that they should have raised them with the court, as they did.

20. In my judgment there should be “no order as to costs”.

John De Waal (instructed by Wright Hassall of Leamington) appeared for the claimant.

Charles Phipps (instructed by Kennedys of London) appeared for the defendant.