IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MR JUSTICE HARMAN)

LTA 96/5877/C

Royal Courts of Justice
Strand
London WC2

Monday, 21 October 1996

B e f o r e:

LORD JUSTICE MILLETT

LORD JUSTICE MUMMERY

- - - - - -

BOTHAM

PLAINTIFF/APPLICANT

- v -

TSB BANK PLC

DEFENDANT/RESPONDENT

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

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MR F MORAES (Instructed by Messrs Dickens & Co, London EC4A 2AB) appeared on behalf of the Appellant

The Respondent was not represented

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J U D G M E N T
(As approved by the Court)

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IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WEST LONDON COUNTY COURT
(HIS HONOUR JUDGE PREVITE QC)

LTA 96/6121/G

Royal Courts of Justice
Strand
London WC2

Monday, 21 October 1996

B e f o r e:

LORD JUSTICE MILLETT

LORD JUSTICE MUMMERY

- - - - - -

BOTHAM

PLAINTIFF/APPLICANT

- v -

TSB BANK PLC

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MR F MORAES (Instructed by Messrs Dickens & Co, London EC4A 2AB) appeared on behalf of the Appellant

The Respondent was not represented

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J U D G M E N T
(As Approved by the Court)

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Monday, 21 October 1996

J U D G M E N T

LORD JUSTICE MUMMERY: There are two applications before the Court for leave to appeal. The first is in relation to an application to set aside a statutory demand. The statutory demand dated 24 February 1995 was served on 5 April 1995. It was for a total of £9,916.49 and was based on two judgments obtained on 30 July 1992 against Mr Graham Botham by the TSB Bank Plc. On 20 April 1995 an application was issued to set aside the demand. After various adjournments, the matter was heard by Mr Registrar Pimm on 16 January 1996. He refused a late application for an adjournment made on the basis that Mr Botham had only just received legal aid in this matter. The Registrar refused to set aside the statutory demand. There was then an appeal against that refusal. That appeal was heard by Harman J on 22 March 1996. He dismissed Mr Botham's appeal and he refused leave to appeal. A Single Lord Justice refused to grant leave to appeal. The application for leave is renewed before us.

Before dealing with the submissions by Mr Moraes in support of this application for leave, I will mention the other application for leave to appeal. That is an application arising out of a set of proceedings in the West London County Court between Mr Botham and the TSB Bank. Those proceedings had been called the "bailment" proceedings. Mr Botham claims against the bank (to whom he had mortgaged a property at 90 Cheyne Walk by legal charge on 18 June 1986) that there should be delivered up to him certain chattels, that that has not been done and that he is entitled to damages for wrongful detention of chattels and for loss suffered as a result of negligence in the care of certain chattels, as particularised in the particulars of claim dated 21 July 1995.

In those proceedings, TSB made an application on 26 September 1995 for the transfer of the proceedings to the Chancery Division of the High Court, where other proceedings have been issued by the TSB Bank against Mr Botham for possession of the property at 90 Cheyne Walk SW3. In those mortgage proceedings, the bank obtained an order for possession and in April 1995, sold the property as mortgagee. The application for transfer was initially refused by the District Judge. On an appeal to Judge Previte QC on 23 February 1996 an amendment to the TSB Bank's defence and counterclaim was allowed, and an order was made for the transfer of Mr Botham's County Court proceedings to the Chancery Division of the High Court, so that the two could be consolidated.

On that part of the case, it is important to note the amendments for which leave was granted to the TSB. The TSB denied most of the allegations against them by Mr Botham the bailment claim. The amendment granted allowed the bank to plead that if (which was denied) Mr Botham had any claim for damages against the TSB, the TSB claimed to set off against that a sum for removal and storage charges of £669.87 and the balance of the mortgage debt, alleged to be in excess of £170,000 claimed by the TSB against Mr Botham in the proceedings in the Chancery Division, commenced as long ago as January 1992.

The basis of the Judge's decision was that there were now issues in the County Court proceedings raising the plea of equitable set-off. That created a sufficient nexus between the bank's mortgage action (started in 1992 in the Chancery Division) and the County Court proceedings to entitle him to exercise the discretion to direct that these cases be heard at the same time by the same Court. That should be the High Court. That course would save unnecessary costs. Leave to appeal against that decision was refused by Mr Recorder Russell. A Single Lord Justice refused leave to appeal on 27 July 1996. This application is now made to us.

I deal first with the appeal against the order for the amendment and the transfer, because that is a more straightforward case and can be disposed of more quickly. The position is that, on the question of the amendment and the application for transfer, Judge Previte had a discretion. It is argued by Mr Moraes that it was wrong to exercise the discretion in the way that the Judge did. He said that there was an element of bad faith, and what he described as "tactics" on the part of the Trustee Savings Bank. He pointed out that it was only the day before the hearing before Judge Previte, namely, on 22 February 1996, that the TSB reactivated the High Court proceedings by taking out a summons for payment of the mortgage debt, or the balance of the mortgage debt alleged to be due from Mr Botham.

Mr Moraes argued that the County Court proceedings and the High Court proceedings raised different issues, and that it was not an appropriate case for them to be consolidated in one Court. The County Court claim was a claim in relation to the chattels only; TSB's claim for the balance of the monies alleged to be due was under the covenant for repayment in the mortgage. He said that, if the order for transfer had not been made, then the County Court proceedings and Mr Botham's claim in them would be disposed of more expeditiously. Other points were made to the Judge on this matter about the costs that would be involved in transferring the County Court claim to be dealt with in the High Court. Another point was taken that the value of Mr Botham's claim in the County Court did not justify sending the matter for decision in the High Court.

I have considered these arguments and, in my judgment, there was no error of principle or anything else wrong in the Judge's decision to allow the amendment and to order the transfer of the County Court proceedings to the High Court. The Judge was legally entitled to exercise the discretion in the way that he did. I can see no possibility of this appeal against the exercise of

his discretion succeeding. For those reasons, I would refuse leave to appeal against the decision of Judge Previte.

The second application for leave arises in more complicated circumstances. Its similarity to the first application is that it is also an appeal from the exercise of a discretion. The position before Mr Registrar Pimm, who had been asked on 16 January 1996 to set aside the statutory demand served almost 9 months earlier, was that he was asked to exercise a discretion which exists in certain circumstances under rule 6.5 of the Insolvency Rules. Rule 6.5 is concerned with the hearing of an application to set aside a statutory demand. The relevant sub-rules (3) and (4) are in these terms:

> "(3) On the hearing of the application, the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate."

It is clear that there is a discretion in the Registrar to adjourn the application. This discretion had been exercised, prior to the hearing on 16 January 1996, to grant a number of adjournments. I mention that specifically because one of the main complaints about the decision of Mr Registrar Pimm was that he had refused the adjournment applied for just after Mr Botham had received legal aid in relation to that matter. In the terms of discretion:

> "(4) The court may grant the application if -
>
> (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand..."

Mr Moraes referred to paragraph 4 of Practice Note number 1/87, which regulates the procedure on applications to set aside a statutory demand.

4. "When the debtor (a) claims to have a counterclaim, set off or cross demand (whether or not he could have raised it in the action in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand or ..."

(b) does not apply; that is a matter of disputed debt:

"... the court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue."

Mr Moraes emphasised the reference there to "a genuine triable issue". I also draw attention to the fact that under Insolvency Rule 6.5 the Court has a discretion to grant an application to set aside a statutory demand, only if the terms of one of the sub-paragraphs is satisfied. The only one relied on here is (a) that is: that there is a counterclaim set-off or cross demand equal to or exceeding the amount of the debt which is demanded. Only if that matter is satisfied, can the Court proceed to the exercise of discretion.

Mr Moraes made two main points about the decision of the Registrar and about Harman J's dismissal of the appeal against the decision of the Registrar. The first is the adjournment point. Mr Moraes submitted that the Registrar was plainly wrong in refusing the application for an adjournment. He said that Harman J should have allowed the appeal against that refusal. Mr Botham had only obtained legal aid hours before the hearing. He submitted that, if the matter had been properly considered, then the adjournment would have been granted. He pointed out various matters which he said were relevant to the exercise of the discretion in relation to adjournments: the length of the period between the dates when the judgments were obtained (30 July 1992) and the service of the statutory demand in April 1995. He argued that the adjournment would not have prejudiced the Trustee Savings Bank whereas, on the other hand, it

would have an important impact on Mr Botham and on his ability to litigate various actions against the TSB. The point that he particularly emphasised was that Mr Botham had, by the refusal of the adjournment, been deprived of the opportunity to obtain legal advice about the evidence relevant to his argument on the cross claim.

The particular point on which evidence was argued by Mr Moraes to be relevant, concerns the fixtures action. In the High Court in January 1995 an action had been started between the TSB and Mr Botham about whether items in the property amounted to fixtures and whether the TSB had a charge over them and possession of them pursuant to the mortgage. Jacob J had found that all the items scheduled in an order were fixtures. In March 1995, the TSB had given an undertaking to the Court that they would compensate Mr Botham in the event of him succeeding in his appeal in the fixtures action. Mr Botham was granted leave to appeal by the Court of Appeal and, on 30 July 1996, Mr Botham's appeal was allowed to the extent that certain items were held not to be fixtures.

On this matter it was submitted that Harman J in his judgment had proved correct about the prospects of Mr Botham's success in the fixtures action, but that the Judge had erred in law in holding that the claim did not amount to a valid cross demand against the statutory demand. That error was on the basis that Mr Botham had not provided valuations of the market value of the subject matter of the fixtures action. Consequently, Harman J held, there was no evidence from which the claims could be valued.

The position on that is that no evidence on the value, other than on the replacement basis, had been put before Mr Registrar Pimm at the hearing on 16 January. As appears from the Notice of Appeal from Mr Registrar Pimm's decision and from Harman J's judgment, there was no question raised on the appeal to Harman J about another basis of valuation of the fixtures in

question. There was an application to Harman J for leave to adduce further evidence which had not been before the Registrar, but that evidence did not concern the valuation of the fixtures; it was concerned with the valuation of securities, a different point discussed in Harman J's judgment.

Mr Moraes submitted that the refusal to grant the adjournment, so that Mr Botham could get legal advice, had deprived him of the opportunity to get expert evidence of the valuation of the fixtures on a different basis than the replacement basis referred to in the evidence. It does not appear that this point was made before the Registrar. It is not mentioned in the Notice of Appeal against his decision. It was not raised before Harman J. Mr Moraes submitted that it was not raised before him because the principles of Ladd v. Marshall (referred to by Harman J in his judgment) might have applied to exclude that evidence. It appears that, even now, there is no evidence of valuation on any basis other than the replacement value basis. The importance of the absence of such evidence is that, it is difficult for Mr Botham to argue that he has satisfied the burden on him to make it appear to the Court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt. The basis on which he has put forward the valuation of his cross claim is not a legally correct one (the replacement basis). There is no relevant evidence before any Court on any of the three occasions before the Registrar, before Harman J or before us, from which it could appear that he had a cross claim in relation to the fixtures which equalled or exceeded the amount of the debt in the statutory demand. All that we are told by Mr Moraes today, on instructions, is that steps have now been taken to obtain such a valuation and it is hoped to have those details within the next few weeks.

That is not sufficient to persuade me that there is an arguable ground for appealing against the discretion on this part of the case. It is for the debtor to produce the evidence for the Court to consider. The relevant evidence relates not just to the existence of a triable issue in relation to

fixtures. It also relates to the existence of a triable issue on a matter where the value of the claim would satisfy the requirements of Insolvency Rule 6.5(4)(a). There was no such evidence before the Registrar. He cannot be criticised for exercising his discretion by failing to take account of a matter that was never put to him. There was no such material before the Judge. He cannot be criticised for his dismissal of the appeal by not taking account of the grounds on which no evidence was put before him.

On that aspect of the case, I would therefore find that there is no possibility of an appeal succeeding on the arguments which Mr Moraes has advanced on a cross claim on the fixtures.

We have heard detailed argument from Mr Moraes on three other areas which cover much of the same ground. He relied on the existence of the claims in the bailment action. They have been summarised in dealing with the appeal from the order for transfer in that action. Mr Moraes criticised the Judge's conclusions, as set out in his judgment, about the nature and value of that claim. He submitted that there was a prima facie case on which Mr Botham had produced the best evidence available to him on the valuation of the subject matter of the bailment action. He submitted that Harman J ought to have used his experience to make an assessment of the value of the items in question, and, he submitted, the aggregate of those items (with Mr Botham's other claims) amounted to a cross demand exceeding the amount in the statutory demand.

Detailed submissions were also made by Mr Moraes in relation to a securities claim which Mr Botham says that he has. This is a matter discussed in detail in the learned Judge's judgment. Mr Moraes invites us to conclude that Harman J ought to have held that the TSB had a security or assets of Mr Botham in a sum exceeding the debt specified in the statutory demand.

Finally, Mr Moraes made submissions about the exercise of the discretion. He criticised Harman J for the conclusion which he reached in dismissing the appeal. He raised the question that the shortfall claimed by the TSB was not a matter to be considered for the purposes of rule 6.5(4), and that the only debt that should be considered in the exercise of the discretion was the debt which was the subject of the statutory demand. It was for all those further reasons that Mr Moraes submitted that Mr Botham had a valid cross claim (or aggregate of valid cross claims) against the TSB that exceeded the amount which it has been demanded he should pay.

I have considered those arguments and my conclusion is that there is no possibility of those arguments succeeding on an appeal. I would therefore refuse leave. In my view, the point on the exercise of the discretion is never reached on this application, because the discretion can only be exercised if the case has been brought by Mr Botham within 6.5(4)(a). I agree with the conclusion which Harman J reached in relation to the arguments on the bailment claim, the fixtures claim, and the securities claim; that it has not been shown by Mr Botham that he has a cross claim of a value which equals or exceeds the amount of the statutory demand. The condition precedent to the existence of the discretion has not been satisfied.

In brief, I would not grant leave to appeal in this case, because it has not been shown that there is any error in the exercise of the discretion by Mr Registrar Pimm. Harman J was right, on the appeal to him, to refuse to overrule the Registrar's exercise of discretion.

I would therefore refuse leave to appeal in both appeals.

LORD JUSTICE MILLETT: I agree.

ORDER: Both applications dismissed; legal aid taxation of the applicant's costs.