

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

BRENDAN MacMAHON and IMELDA MacMAHON

(Plaintiffs) Respondents

and

**ROBERT HAMILTON, JAMES G DORAN and JOHN D DORAN,
practising as JAMES DORAN & CO (a firm)**

(Defendants) Appellants

CARSWELL LCJ

This is an appeal against a judgment given by Higgins J on 7 June 2001, whereby he ordered that the appellants pay to the respondents a total of £113,590.01 and costs on foot of a claim by the respondents against the appellants for damages for professional negligence. There was no appeal against the judge's finding on liability and the issue before us was restricted to that of the proper measure of damages.

The facts found by the learned judge present an unhappy history of neglect, prevarication and deception. The first named appellant Mr Hamilton, a brother of the second named respondent, was at all material times the solicitor acting for the respondents. Mrs MacMahon took little or nothing to do with her husband's business affairs and in effect he was the plaintiff in the action, as the judge described him. For convenience we shall

refer to Mr Hamilton in this judgment as the appellant and Mr MacMahon as the respondent.

In 1988 the respondent purchased premises in Royal Avenue, Belfast from the Burton Group plc (Burtons). At the time of completion parts of the building were leased to three tenants, and subsequently a further part was let to Robert Hogg & Sons Ltd (Hoggs).

The respondent made three main claims in the action, two of which were subsequently abandoned:

- (a) In respect of the matter which was the subject of the judgment under appeal he claimed that Burtons received rents which should have been payable to him after completion, that electrical fittings and conduits had been ripped out by Burtons and that mirrors, a circular stairway and banisters had been damaged by them. His claim against the appellant was that he failed to pursue this claim and allowed it to become statute-barred.
- (b) He also advanced in the action a claim that Hoggs owed him a substantial sum for its contributions due towards roof repairs, for damage caused by removal of landlord's fixtures and fittings and for dilapidations due under its lease. He alleged that the appellant failed to pursue this and that Hoggs then went into liquidation.
- (c) He also claimed damages from the appellant for his failure to prepare the necessary documents for the extension of another tenant's lease, which had been agreed by it with Burtons.

At the commencement of the action the respondent's counsel abandoned the second and third of these claims, and we need not concern ourselves further with them.

The respondent had given instructions to the appellant to pursue his claims by the institution of proceedings, and received constant assurances from him that they were in train. He was even informed, quite without truth, that judgment had been marked against Burtons for £20,000 and enforcement proceedings had been commenced. The respondent expected that substantial sums would be forthcoming in respect of his several claims, whereas in fact the claim against Burtons had become statute-barred and Hoggs had gone into liquidation.

In late 1996 and early 1997 the respondent became stretched financially, and had to decide whether to sell the premises or hold on to them, in the hope of re-letting that part which had been occupied by Hoggs. His bank was pressing him to pay off the moneys which he owed to them or to make other arrangements for security. On foot of the assurances given to him by the appellant he elected to hold on, in the belief that the moneys due to him would be paid by the end of February 1997.

In the early part of 1996 the respondent had obtained a temporary loan from the First Trust Bank to finance the Royal Avenue property and opened a special account, which the bank allowed to be substantially overdrawn on the understanding that it was to be a temporary advance until the outstanding moneys were received by the respondent. It permitted the overdraft to rise to

the sum of £48,706.20, on the repeated assurances of the respondent and the appellant that the money would be coming in at an early date. In the autumn of 1996 the bank had sought security for the overdraft and the respondent decided to remortgage the family home, held in the joint names of himself and his wife. He took out a mortgage in the sum of £110,000, paying off out of that sum the existing mortgage of £50,400.

The judge found that the respondent could have sold the premises in late 1996 and paid off his debts. Instead he made a commercial decision to hold on and borrowed money from the bank, on the appellant's assurance that money would be forthcoming from the court cases. This led to the necessity for him to take out the fresh mortgage in order to maintain the overdraft. The judge found that the appellant's failure to take out proceedings for the recovery of the moneys and his misrepresentations that those moneys would shortly be paid were a substantial cause of the respondent's incurring charges in respect of that overdraft debt and the mortgage and not merely the occasion of them. These findings were not challenged on appeal.

The judge assessed damages under several heads:

A. Moneys not recovered

1. He awarded the sum of £2673.58, which was due from Burtons by way of rent and was not recovered by the appellant, together with interest from 1 January 1992. This was not challenged, except as to the amount allowed for interest.

2. He accepted the respondent's claim for £14,500 for removal of electrical fittings, which the respondent should have recovered from Burtons.
3. He assessed the cost of repair of damage and redecoration at £3000.

The judge allowed interest on each of these items from 1 January 1992. None of the items in this part of the case was challenged on appeal. In a supplementary judgment the judge allowed compound interest at 8 per cent per annum from 1 January 1992, which he assessed at £20,287.60, making a total under this head of £40,445.13.

Mr Thompson QC submitted on behalf of the appellant that the judge was in error in allowing compound interest. Section 33A of the Judicature (Northern Ireland) Act 1978 permits simple interest, and there is no provision for compound interest, nor is there a practice of allowing it in cases such as the present. Mr Orr QC for the respondent did not attempt to dispute this. We therefore amend the figure for interest to simple interest at 8 per cent per annum on the capital sum of £20,157.53, rounded off to a total of 80 per cent or £16,126.02. The grand total under Head A is accordingly £36,283.55.

B. Costs in connection with mortgage

The judge held at page 20 of his judgment that the respondent was entitled to recover the following items of loss:

1. The capital of that part of the mortgage which discharged the overdraft, that is, £48,706.20.
2. The same proportion, Five-sixths of the one-off mortgage fee of £345.36, which is £287.80.

3. Five-sixths of an insurance premium of £1684.62, which is £1403.85.
4. Mortgage repayments totalling £22,070.00.

The judge again allowed compound interest on these sums at 8 per cent per annum.

Mr Thompson argued strenuously that in allowing items 1 and 4 the judge adopted an incorrect approach. He submitted that the respondent had not lost any capital sum by borrowing the money secured by the mortgage. He had received it from the bank and in due course had repaid it or would do so. Assuming that he would not have taken out the mortgage if the appellant had recovered the money due to him and had not misled him, he lost only the mortgage interest during the currency of the loan, which was paid off when the premises were eventually sold in September 1998. He relied upon the decision of the English Court of Appeal in *Galoo Ltd (in liquidation) v Bright Grahame Murray* [1995] 1 All ER 16, which bears certain similarities to the present case. In that case auditors had negligently audited the accounts of one of the plaintiff companies, one of the results of which was that it continued in business and continued to accept advances from another of the plaintiff companies. This claim was struck out, and the Court of Appeal dismissed the plaintiffs' appeal. Glidewell LJ said at page 24:

“ ... I do not understand how the acceptance of a loan can, of itself, be described as a loss causing damage. If anything it is a benefit to the borrower. Of course, a loss may result from the use to which the loan moneys are put, but no such resultant loss is pleaded, and even if it were it might be very difficult to attribute it to [the defendants].”

There is a close analogy with the present case, and this decision supports the conclusion which we have reached, that the respondent is not entitled to claim the capital amount of the loan which he obtained from the bank and secured by mortgage. He is, however, entitled to recover a sum which would compensate him for either the loss of interest on the money which the appellant should have got in for him or the interest paid on the mortgage. This would run from 4 December 1996, the date of the loan, until the sale of the property in September 1998. We estimate that the figure of 8 per cent per annum which we have adopted in respect of other items would fairly compensate him.

The items which we allow under head B are accordingly as follows:

1. Five-sixths of the mortgage fee, £287.80.

Add interest on item 1 from 4 December 1996 to date at 8 per cent per annum simple interest, rounded off to 40 per cent, £112.12.

2. Insurance premiums for the period December 1996 to September 1998 @ £1684.62 pa = £2948.09; allow five-sixths, £2456.74.

Add interest on each insurance payment:

1996 payment, 5 years @ 8% = 40% of £1403.85, £561.54.

1997 payment, 4 years @ 8% = 32% of £1052.89, £336.92.

Total of interest £898.46.

3. Mortgage interest, December 1996 to September 1998 @ 8% pa = 14% on £48,706.20, £6818.87.

Add interest on these payments – take mid-point of payment period, ie October 1997, calculate interest on total of payments from then to date @ 8% pa, 4 1/4 years = 34% of £6818.87, £2318.42.

Total

Head A £36,283.55

Head B

1. Mortgage fee	£287.50	
Interest thereon	<u>112.12</u>	£399.62
2. Insurance premiums	£2456.74	
Interest thereon	<u>898.46</u>	£3355.20
3. Mortgage interest	£6818.87	
Interest thereon	<u>2318.42</u>	£9137.29

Total of Head B £12,892.11

Total of Heads A and B £49,175.66

For the reasons which we have given we consider that the amount properly owing to the respondent is the sum of £49,175.66. We therefore allow the appeal and substitute that figure for the sum awarded by the learned trial judge.

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J U D G M E N T O F

C A R S W E L L L C J
