

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 263

September Term, 2016

RACHEL L. DEEN

v.

DAVID E. PHELPS

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 23, 2017

Rachel L. Deen, the appellant, f/k/a, Rachel L. Phelps, and David E. Phelps, the appellee, were divorced in the Circuit Court for Montgomery County. Deen challenges the grant of Phelps's motion to revise the divorce judgment and several other post-judgment orders entered by the circuit court.

FACTS AND PROCEEDINGS

Deen and Phelps met in September 2008, when she was 41 and he was 48. They both had children from prior relationships. Deen worked as a surgical nurse at Walter Reed Medical Center and Phelps owned and operated a mortgage brokerage company, Advantage Plus Financial.

Phelps owned a house at 6419 Camrose Terrace, Bethesda. He and his former wife had purchased the house in 1994 and, when they divorced in 2004, title was transferred to him.

In 2009, Deen and her two children moved into the Camrose Terrace house with Phelps. Deen and Phelps soon began renovating the kitchen. By deed dated January 14, 2010, Phelps conveyed the Camrose Terrace house to himself and Deen as tenants in common.¹

¹ The opinion and order in the parties' divorce does not reflect this prior change of title. The omission makes no difference, however.

On June 18, 2011, Deen and Phelps were married. Four months later, in November 2011, they refinanced the mortgage on the property and titled the property in both their names as tenants by the entireties (hereinafter “the marital home”).²

The parties’ marriage deteriorated rapidly in 2013 after Phelps became addicted to narcotics he was prescribed following rotator cuff surgery and also began abusing alcohol. Meanwhile, in September 2013, with Phelps’s knowledge and consent, Deen obtained a Home Equity Line of Credit (“HELOC”) on the marital home in her name only, with a credit line of \$31,000.

In June 2014, the parties separated and Phelps moved out of the marital home. Deen lived in the marital home with her two children until the merits hearing and paid the \$3,031 monthly mortgage payment.

On August 8, 2014, Deen filed for divorce.

The divorce hearing was held over five days in August 2015.³ The division of marital property was the focus of the merits hearing and the major item of marital property was the marital home. Deen asked the court to award her title to the marital home and Phelps asked the court to order the marital home sold, with the proceeds to be divided evenly. Deen testified that she had contributed \$55,000 towards renovations to

² The principal amount of the refinance mortgage loan was \$542,325. The refinance loan paid off three existing mortgage loans, totaling \$391,672.94, after settlement charges, and the parties received \$111,913.11 in cash at closing.

³ As we shall discuss, *infra*, the transcripts from the merits hearing were not ordered or included in the record. We glean the facts about the merits hearing from the opinion and order entered by the court.

the marital home both before and after the marriage. Phelps claimed that he had invested \$74,000 in non-marital funds toward renovations prior to the parties' marriage. The evidence showed that during the parties' separation, Deen made two withdrawals on the HELOC: \$20,000 on July 21, 2014, and \$3,000 on June 4, 2015. She deposited the \$20,000 into her daughter's bank account and the \$3,000 into an account she shared with her ex-husband.

The court entered its opinion and order on November 3, 2015 ("the 2015 Divorce Judgment"). As pertinent, it found that Deen dissipated marital property by drawing on the HELOC and depositing the funds into her children's bank accounts. She also "made a series of transfers from the HELOC via cashier's checks, including one transaction in which she transferred Three Thousand Dollars (\$3,000.00) into an account she shared with her ex-husband." The court further found that Deen misappropriated insurance reimbursement checks made out to Phelps totaling \$3,800, which were intended to cover his medical expenses. Finally, the court found that Deen removed \$3,000 in cash from Phelps's briefcase without his authorization and deposited that money into her son's bank account. In light of these findings, the court concluded that Deen was not credible in her testimony that she had depleted non-marital resources to pay the mortgage on the marital home during the parties' separation.

The court ordered the parties to list the marital home for sale within thirty days; to split the proceeds from the sale of the home equally; to split the mortgage expenses evenly until the home was sold; for Deen to pay Phelps \$3,400 to reimburse him for

monies she misappropriated; and for Deen to pay Phelps “half of the liquid funds in the Home Equity Line of Credit attached to the [marital home].”⁴ Neither party noted an appeal from that judgment.

Thirty days later, on December 3, 2015, Phelps filed a motion to revise pursuant to Rule 2-535(a). He alleged that Deen’s counsel had advised that because the HELOC was maxed out, there were no “liquid funds” and Deen would not be reimbursing Phelps for any HELOC funds she had withdrawn. Phelps asked the court to find that Deen’s post-separation withdrawals from the HELOC resulted in \$17,234 in dissipated assets and to order a set-off from the proceeds of the sale of the marital home in that amount.⁵ He also asked the court to issue a decision on a motion for attorneys’ fees that was pending at the time of the divorce hearing.⁶ Finally, Phelps asked the court to make findings about certain items of personal property.

On December 18, 2015, Deen opposed the motion and filed a cross-motion to revise. She alleged that Phelps was not entitled to a set-off against the proceeds of the sale of the marital home because the evidence adduced at the divorce hearing showed that

⁴ The opinion does not reflect the balance on the HELOC at the time of the divorce hearing.

⁵ Phelps calculated that amount by deducting \$5,766 from the \$23,000 in HELOC withdrawals to account for mortgage payments made by Deen using those funds. He asserted that she had not otherwise presented evidence that she used the HELOC funds to pay the mortgage.

⁶ The motion for sanctions was filed on August 12, 2015. The court granted the motion on August 17, 2015, but reserved on Phelps’s request for attorneys’ fees.

he had failed to make any contribution to the mortgage payments from June 2014 forward. Moreover, he had been ordered to pay \$1,500 per month for six months as emergency family maintenance in a protective order proceeding, but had failed to comply with that court order. Deen alleged that she had paid \$42,447.86 in mortgage payments during the parties' separation, more than double the amounts she had drawn on the HELOC, and had made additional mortgage payments in the months following the merits hearing.

While the cross-motions to revise were pending, Phelps filed a motion to reduce the \$3,400 award to him to a judgment.

By order dated March 22, 2016, and entered on March 24, 2016, the court granted in part Phelps's motion to revise. It ordered Deen to "repay from her share of the proceeds [from the sale of the marital home] . . . []\$15,234[] owed to the HELOC, secured by the [marital home]." It further ordered Deen to pay \$1,200.75 as a contribution towards attorneys' fees incurred by Phelps in filing a motion for sanctions prior to the divorce judgment. Finally, it made findings pertaining to the items of personal property, none of which are challenged in the instant appeal.

By order entered the same day, the court denied Deen's motion to revise, ruling that because it was filed more than thirty days after the entry of the divorce judgment, it was untimely. Finally, the court granted the motion for judgment and entered judgment against Deen and in favor of Phelps for \$3,400.

Also on March 24, 2016, Phelps filed an emergency motion to appoint a trustee and for other equitable relief. He alleged that on January 31, 2016, he and Deen had entered into a contract to sell the marital home to third parties for \$630,000. Closing was scheduled for March 30, 2016, at the offices of Paragon Title in Bethesda. On March 23, 2016, the day after the court issued its order granting his motion to revise, Deen had spoken to Phelps's attorney by telephone and advised that she would not attend closing unless Phelps agreed to "rescind" the court orders granting the motion to revise and the motion for judgment. Phelps's attorney offered to escrow the proceeds of the sale until such time as Deen's challenge to the allocation of those proceeds could be considered by the court, but she refused this offer. Phelps asked the court to appoint a trustee to take possession of the marital home and to complete the sale, and to order Deen to pay the trustee's fees. He suggested that the court appoint David Goldberg, Esq.⁷

Deen, who was now representing herself, opposed the emergency motion that same day. She alleged that she was no longer represented by an attorney as of "Dec 2015" and asked for the opportunity to hire new counsel before the court ruled on the motion. She also filed a *pro se* opposition to Phelps's motion to revise,⁸ claiming that she had never been served with a copy of that motion and was unaware that it existed until she received the order granting it. Finally, she filed a motion to revise the March

⁷ Phelps asserted that Mr. Goldberg had agreed to charge on an hourly basis (\$395 per hour) as opposed to a percentage-based fee.

⁸ As mentioned, she had previously opposed that motion through counsel.

24, 2016 order granting Phelps’s motion to revise, arguing that in light of her payment of the mortgage during the parties’ separation she should not be obligated to pay Phelps any monies out of the proceeds of the sale of the marital home, to pay attorneys’ fees, or to reimburse him for the \$3,400 in insurance checks.

The court held an emergency hearing the next day. Phelps appeared with counsel and Deen appeared *pro se*. The court asked Deen if she was refusing to consummate the sale of the marital home and she replied in the affirmative. The court granted the emergency motion, and appointed Mr. Goldberg as trustee. The order directed Mr. Goldberg to “make a public or private sale of [the marital home] in his sole discretion.” The court reserved on the request for Deen to pay the trustee’s fees, ordering that that matter be referred to the judge who had presided over the parties’ divorce hearing.

At the emergency hearing, Phelps filed a request for \$3,442.25 in attorneys’ fees incurred to file the emergency motion and proceeding.

On March 28, 2016, Deen filed another motion “requesting to seek legal counsel” prior to the closing on the sale of the marital home.

On March 29, 2016, the day before the closing, Phelps filed an emergency motion to vacate the order appointing Mr. Goldberg as trustee and for entry of a new order consistent with the instructions received from the title company. He alleged that the title company (and the trustee) had advised the parties that settlement could not go forward unless the parties agreed to waive certain requirements of Rule 14-305, pertaining to the procedures following a judicial sale. Deen had refused to sign a waiver, however. The

title company had further advised that, alternatively, the court could issue a new order directing the trustee to “complete settlement ‘pursuant to the sales contract,’ stat[ing] that the requirements of Maryland Rules 14-305(c) and 14-305(d) are waived and ratif[ying] the Sales Contract[.]”

The court held an emergency hearing that same day, at which Phelps appeared with counsel and Deen appeared *pro se*. At that hearing, counsel for Phelps explained that the title company had advised that in order for closing to go forward, the parties had to sign a waiver agreeing to waive the right to file exceptions and for referral to an auditor or, alternatively, the court had to issue a new order appointing the trustee and waiving those requirements. During that hearing, Deen advised the court that she was willing to sign the waiver and she did so in open court. Out of an abundance of caution, the court also granted Phelps’s motion and issued an order that same day (entered on April 4, 2016), vacating the prior order appointing a trustee and entering a revised order appointing Mr. Goldberg “for the purpose of selling [the marital home] to [the contract buyers] pursuant to the Sales Contract dated January 31, 2016”; ratifying that sales contract; waiving the requirement of a bond; waiving publication pursuant to Rule 14-305(c); prohibiting the filing of exceptions pursuant to Rule 14-305(d); waiving an audit pursuant to Rule 14-305(f); and ordering Deen to pay the trustees’ fees.

On April 7, 2016, Deen noted an appeal to this Court.

After Deen noted the instant appeal, Mr. Goldberg filed the Trustee’s Report with the court on April 20, 2016, and moved for ratification of the sale. Deen opposed that

motion. The court ratified the sale by order signed May 10, 2016, and entered June 7, 2016.

By order entered May 2, 2016, the court denied Deen’s motion to revise the March 24, 2016 order granting, in part, Phelps’s motion to revise the divorce judgment. That order also granted Phelps’s motion for “reasonable costs and attorneys’ fees incurred in responding to [Deen]’s Motion for Amendment of [the divorce] Judgment,” but mistakenly stated that the fees incurred were \$6,642.25. Phelps separately had moved for \$6,642.25 in attorneys’ fees incurred filing the emergency motion to appoint a trustee and to vacate and revise the order granting that motion.

By order entered June 22, 2016, the court granted Phelps’s motion to revise the May 2, 2016 order, revising the amount of fees owed to \$493.75, and granting Phelps’s motion for fees relative to the appointment of the trustee in the amount of \$6,642.25.

ISSUES ON APPEAL

Deen presents nine questions on appeal,⁹ but many of the issues she raises are not properly before this Court. We explain.

⁹ The questions as posed by Deen are:

1. Did the Trial Court err in GRANTING the Appellee’s Defendant’s *Motion to Exercise Revisory Power . . . and Motion for entry of Judgment . . .* on March 22, 2016, within hours of notification from Appellees’ attorney, . . ., when the Appellant was Never notified after 3 months of being on the docket.

2. Did the Court err in allowing the private conversations held between the Judges and the Appellees’ attorneys . . . when the Appellant

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As mentioned, neither party noted an appeal within thirty days of the 2015 Divorce Judgment. *See* Md. Rule 8-202(a) (notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken). Phelps did file a motion to revise pursuant to Rule 2-535 within 30 days. His motion was not filed within

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was denied time to seek legal counsel, a Hearing request, or an opportunity to present her evidence[.]

3. Did the Court err in **GRANTING** the Appellee's, *Emergency Motion to Appoint a Trustee?* . . . when it was inaccurately written by Appellee's counsel . . . to begin with? Submitting the Motion just days prior to the Scheduled Closing of the Property* that directly affected the entire outcome of the Settlement?

4. Did the Court err in not conducting an Audit Ordering, prior to . . . and conducting an Audit, allowing the Court appointed Trustee to proceed to the Settlement company.

5. Did the Court err in Granting All Attorney's Fees, costs and expenses ordered to be paid by Appellant, when the Motion was Vacated just days later? . . . the *Motion for Revisory Power* and *the Order*, on the very same day **Granting** these Motions, rendering a decision.

6. Did the Court err in Granting *Defendants Motion to Vacate* only days after they Granted the Motion to Appoint a Trustee, and placing the attorney fees and costs, as well as the cost of the Trustee on the Appellant, . . . who knew nothing of this case just 48 hours prior.

7. Why was the Appellee and his attorney, . . . Permitted to withhold their knowledge of the Appellee's Premarital Personal Business Tax Lien . . . (Aadvantage Plus Financial) held against the marital Property* titled Tenets by Entirety . . ., which would have been revealed had an Audit been Ordered and performed.

8. Did the Court err in not addressing the unpaid Mortgage that was Ordered by the Court by the Appellee addressing the statement made by the Appellee's counsel, Which was never stated ANYWHERE in the *Divorce OPINION & ORDER or the Appellants Motion for Revisory Power*.

9. Did the Court err in Granting the Appellee, \$3400, when these checks were written directly . . . To: Rachel L. Phelps (Deen) from FEP Blue, and the Appellant NEVER producing not one receipt for medical service to the Court.

ten days of the entry of the 2015 Divorce Judgment, however, and thus did not toll the thirty day period in which to appeal that judgment. *See Unnamed Attorney v. Attorney Grievance Comm’n*, 303 Md. 473, 486 (1985) (“A motion filed more than ten days after a judgment but within thirty days of the judgment, under Rule 2-535(a) . . . [has] no effect upon the running of the thirty-day appeal period.”).

Rule 2-535(a) permits the court to “exercise revisory power and control over [a] judgment and, if the action was tried before the court, . . . take any action that it could have taken under Rule 2-534.” Rule 2-534 grants the court broad discretion to amend its findings, set forth new findings, and to amend a judgment. The court order granting, in part, Phelps’s motion, was entered on March 24, 2016. Because the circuit court granted, in part, Phelps’s motion to revise, however, the order entered on March 24, 2016, in conjunction with the unamended aspects of 2015 Divorce Judgment, became a revised divorce judgment (“2016 Revised Divorce Judgment”). *See Paul V. Niemeyer, Linda M. Schuett & Joyce E. Smithey, Maryland Rules Commentary* 600 (4th ed. 2014) (“If the court revises the judgment [on a motion to revise filed under Rule 2-535 outside of ten days, but within thirty days], the revised judgment becomes the final judgment in the case and is appealable.”). In other words, the 2016 Revised Divorce Judgment supplanted the 2015 Divorce Judgment, and was a final appealable judgment. Deen noted her appeal to this Court within thirty days of the entry of the 2016 Revised Divorce Judgment. Thus, the propriety of all of the court’s findings in the divorce judgment are properly before us in the instant appeal.

Within ten days of the entry of the March 24, 2016 order, Deen also moved to revise that order. Her motion to revise was denied by order entered May 2, 2016. Pursuant to Rule 8-202(c), we treat her notice of appeal as having been filed on that day, after the denial of her motion to revise the March 24, 2016 order.

Deen's notice of appeal also was filed within thirty days after the grant of Phelps's motion to appoint a trustee, the grant of the motion to vacate and revise the order appointing the trustee, and the grant of the motion for entry of judgment. Thus, the propriety of the grant of those motions also is before us.

The orders ratifying the sale of the marital home and granting Phelps's motions for attorneys' fees incurred in filing various post-judgment motions were entered after Deen noted her appeal to this Court. She did not subsequently note another appeal to this Court. Having failed to do so, the propriety of those orders is not before us in the instant appeal.

With this context, we condense and rephrase the questions presented as follows:

I. Did the circuit court err by granting, in part, Phelps's motion to revise the divorce judgment to order Deen to pay Phelps \$15,234 from her share of the proceeds of the sale of the marital home and/or did the court abuse its discretion by denying Deen's motion to revise the order granting that motion?

II. Did the circuit court err or abuse its discretion by appointing a trustee to consummate the sale of the marital home and by vacating and revising the order appointing the trustee to comply with instructions from the title company?

We answer both questions in the negative and shall affirm the orders of the circuit court.

DISCUSSION

I.

Deen argues that the court erred by finding that she dissipated marital property by withdrawing \$23,000 on the HELOC during the parties' separation and by ordering her to pay \$15,234 from her share of the proceeds of the sale of the marital home. She asserts that the court failed to consider that she had used the HELOC monies to pay the mortgage on the marital home during the parties' separation without contribution from Phelps. Phelps responds that this Court lacks jurisdiction to consider whether the court erred "in its original ruling directing her to repay the funds she dissipated from the HELOC."

As already explained, however, we have jurisdiction to review the 2016 Revised Divorce Judgment. Our review is governed by Rule 8-131(c). That rule provides that in an action tried to the court, we "review the case on both the law and the evidence[, and] . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, . . . giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses."

Our review is severely constrained, however, because Deen did not request or supply this Court with transcripts from the five-day divorce hearing. *See* Md. Rule 8-411(a)(2) (requiring an appellant to provide this Court with "a transcription of any proceeding relevant to the appeal . . .").¹⁰ She only supplied transcripts of the emergency

¹⁰ On July 5, 2016, Phelps filed in this Court a motion to correct the record to, *inter alia*, include transcripts from the divorce trial. Deen opposed that motion, arguing that she was not challenging the 2015 Divorce Judgment and was not required to supply the transcripts. By order dated August 12, 2016, this Court ordered Deen to show cause

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hearings held relative to Phelps’s motions to appoint a trustee. As this Court explained in *Kovacs v. Kovacs*, 98 Md. App. 289, 303 (1993), the party asserting error has the burden to show “by the record, that the error occurred.” “Mere allegations and arguments . . . , unsubstantiated by the record, are insufficient to meet that burden.” *Id.* In light of the failure to provide these transcripts, we cannot determine if the court clearly erred in any of its underlying findings. Thus, Deen’s claim that the circuit court, in entering the 2016 Revised Divorce Judgment, clearly erred in its assessment of the evidence relative to the HELOC and the parties’ contributions to the mortgage during the period of their separation must be rejected. *See id.* (“The failure to provide the court with a transcript warrants summary rejection of the claim of error.”); *see also Burak v. Burak*, 231 Md. App. 242, 273 (2016) (dismissing appeal to the extent it challenged ruling made at a hearing for which no transcript was provided).

Deen makes one legal argument. She contends the court erred by ordering an unequal division of the proceeds of the sale of the marital home. This contention lacks merit. We explain.

The court found in the 2016 Divorce Judgment that Deen had dissipated marital property by drawing on the HELOC after the parties separated and depositing those funds in her daughter’s bank account and her ex-husband’s bank account. In his motion to

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why her appeal should not be dismissed for failure to “order the transcript(s) within the time required.” Deen responded on September 7, 2016, again asserting that she was not challenging the 2015 Divorce Judgment. By order dated September 27, 2016, we ordered that the appeal could proceed.

revise, Phelps asked the court to clarify its order directing Deen to pay him half of the “liquid funds” in the HELOC in light of her claim that the HELOC was maxed out. In ruling on the motion to revise, the court entered the 2016 Revised Divorce Judgment and ordered Deen to pay Phelps from her equal share of the proceeds of the sale of the home \$15,234 to adjust the equities. That amount equaled approximately one-half of the HELOC line of credit.¹¹

That order did not, as Deen suggests, run afoul of our decisions in *Hart v. Hart*, 169 Md. App. 151 (2006), and *Murray v. Murray*, 190 Md. App. 553 (2010). In those cases, we explained that when the court orders the sale of jointly titled marital property, it lacks discretion to order an unequal distribution of the proceeds of the sale. *See Hart*, 169 Md. App. at 165 (court may not order the proceeds of the sale of the marital home split on a less than 50/50 basis as a substitute for ordering a monetary award); *Murray*, 190 Md. App. at 576 (court erred by ordering that a portion of the proceeds of the sale of the marital home be paid to the wife, prior to the equal distribution of the remaining proceeds). Here, the court ordered the proceeds of the sale of the marital home split evenly, but separately ordered Deen to pay Phelps \$15,234 at closing, which was half of the principal balance on the HELOC, as an adjustment of the equities. The court did not err by so ordering. *See Hart*, 169 Md. at 165 (noting that the court may order a monetary award paid at the time of the sale of the marital home).

¹¹ A loan statement entered into evidence at the divorce hearing showed that the outstanding balance on the HELOC in August 2015 was \$30,642.61.

For the same reasons, the court did not abuse its discretion by denying Deen's motion to revise the March 24, 2016 order granting, in part, Phelps's motion to revise the divorce judgment.¹²

II.

Deen challenges the court's orders granting the motion to appoint a trustee to sell the marital home and vacating and revising the order appointing the trustee. She suggests that the appointment of a trustee was unnecessary and argues that she should not have been ordered to pay the trustee's fees. The record belies these assertions. Deen refused to attend the March 30, 2016 closing on the sale of the marital home unless Phelps agreed to forego the relief granted to him by the circuit court on his motion to revise. She further refused Phelps's counsel's offer to place the proceeds of the sale in escrow pending the resolution of her challenge to the grant of the motion to revise. Under these circumstances, the court plainly did not err or abuse its discretion by appointing a trustee to consummate the sale of the home consistent with the divorce judgment. *See* Md. Rule 14-302 (authorizing the court to order a sale and to appoint a trustee to effectuate a properly ordered sale).

¹² To the extent that Deen claims that the motion to revise was not served on her, we note that the attorney who represented her at the divorce merits hearing was still her attorney of record when Phelps filed his motion to revise. Phelps's motion was served on Deen's counsel and Deen, through her counsel, filed an opposition to it. Deen, through counsel, also filed a motion to revise the judgment, though she did so outside of thirty days.

The court also did not err or abuse its discretion by vacating and revising its order appointing a trustee to state that the trustee's role was limited to selling the marital home to the contract buyers at the contract price. Moreover, Deen affirmatively waived the right to an audit when she signed the waiver at the March 29, 2016 emergency hearing and may not be heard to complain on appeal that the court should not have included the same waiver provision in its revised trustee order.¹³

Finally, Deen challenges the order directing her to pay Mr. Goldberg's fees. Given that the appointment of the trustee was necessitated entirely by Deen's actions, we perceive no abuse of discretion by the court in ordering her to pay the fees.¹⁴

**ORDERS OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID
BY THE APPELLANT.**

¹³ Deen maintains that an audit would have revealed the existence of a tax lien on the marital home that pre-dated the marriage and was never disclosed by Phelps. The propriety of the allocation of the proceeds of the sale of the marital home is not before us in the instant appeal, however, because the Trustee's Report was filed after Deen noted her appeal. In any event, the Trustee's Report states that the IRS Tax Lien was satisfied from Phelps's 50% share of the proceeds.

¹⁴ We have considered Phelps's motion to dismiss the appeal or in the alternative strike the record extract and exercise our discretion to deny it.