Neutral Citation No. [2014] NICh 18 | *Ref:* **HOR9317**

Judgment: approved by the Court for handing down | *Delivered: 13/06/14*

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

BANK OF SCOTLAND PLC

Plaintiff;

-AND-

GREG FOSTER (ALSO KNOWN AS GREG JAMES FOSTER)

First-named defendant;

and

STUART FOSTER (ALSO KNOWN AS STUART WILLIAM GEORGE FOSTER)

Second-named defendant.

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HORNER J

[1] The appellants, two brothers, Greg Foster ("GF") and Stuart Foster ("SF") appeal the decision of Master Ellison dated 3 April 2014 whereby he ordered the defendants to deliver to the bank possession of property situate and known as 1 Boulevard, Wellington Square, Belfast comprised in Folio DN175137 County Down ("the Property") and which consists of a dwelling house. In the Order the Master gave the parties 21 days to agree a stay. In fact, the appellants have agreed to repay £1,400 per month to the bank and the bank is satisfied with this proposal. The bank does not intend to resile from this agreement regardless of the outcome of this appeal. The appellants are pursuing their appeal because they claim that there are important points of legal principle involved. After hearing argument I confirmed the Master's order and due to pressures of time, I said I would give an ex tempore judgment as soon as a time could be agreed. I also said that if it was intended to take the matter further on appeal, I reserved the right to amplify my reasons in a more detailed written judgment.

[2] It is not disputed by the bank and the appellants that they entered into a mortgage deed dated 12 December 2011. I drew attention to the fact that the deed was not "sealed" in the formal sense. The bank rely on Santander UK Plc v Anthony Parker (No. 2) (2012) NICH 20. I am satisfied on the basis of this authority, the passing of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 and the acceptance of the applicants that they signed the deed, nothing turns upon this. The deed can be enforced by the bank.

[3] The appellants admit signing the mortgage deed, being advanced credit of £198000 to allow them to purchase the Property and being presently in arrears of payment. Monthly instalments under the mortgage are £1,243.78 and the total arrears are £17,112.92. The balance outstanding on the mortgage is £210,687.00. Subsequent to the Order of the Master, the applicants, as I have recorded, agreed to pay the bank £1,400 per month to cover on-going instalments and arrears, and that has been accepted by the bank. The bank will not attempt to resile from this agreement. The appellants are both in steady jobs and can well afford to pay the agreed monthly sum.

[4] There are a number of defences put forward that the appellants claim will allow them to escape from the consequences of having to repay the principal sum together with interest which has and will accrue due on foot of their loan and mortgage with the bank. On the face of it, this result would be a surprising one. The appellants would retain the benefit of the transaction, namely the Property, but not be subject to any detriment such as having to pay for it. In fact the appellants' defence amounts to a full frontal attack on the present financial and legal system. Indeed, they make the bold claim that following the abolition of the Gold Standard and the making of the Bretton Woods agreement, that there is now no such thing as money, only currency exchanges.

Defence of the appellants to the bank's claim

[5] The appellants claim that there has been a failure to comply with contract law because there is no consideration. The appellants signed a mortgage deed. No consideration is required for a deed: see Morley v Boothby (1825) 3 Bing 107, 112-2.

[6] In any event there was consideration provided by the bank, namely £198,000, which the appellants used to purchase the Property. The appellants' determination to label the consideration a "currency exchange" does not improve their position, even if it is misguided. On any analysis the bank gave the appellants consideration and allowed them to purchase the Property. That consideration was secured on the Property as a condition of the loan. The appellants are obliged to repay the consideration pursuant to the terms and conditions of the mortgage deed. To date they have refused to do so and are in breach of the terms of the mortgage. Accordingly the bank is entitled to enforce the terms and conditions under which they provided the consideration to the appellants.

[7] The appellants claim that there has not been full disclosure by the bank. But this is not a contract which is "uberrimae fidei". There is no obligation on the bank to make "full disclosure". That is no evidence that the bank has failed to disclose to the appellants any matter that the bank was legally obliged to so disclose.

[8] The appellants rely on their affidavit which they claim has not been rebutted by the bank. In that affidavit they assert that the bank has acted in the role of trustee and as a collection agent on behalf of the creditors. This allegation is not made out. No evidence has been adduced that would allow the court to reach such a conclusion. The bank does not have to respond to assertions which remain unsubstantiated allegations.

[9] There is also a claim that "securitisation" provides a defence. It is asserted by the appellants that this loan has been converted into stock and it is no longer a loan. There is not a shred of evidence to support such a claim. It is an unparticularised allegation. Accordingly, I dismiss it.

[10] Further it is alleged that the bank has failed to comply with the Banker's Book Evidence Acts. Authorities are relied on from the Republic of Ireland. However, the Civil Evidence (NI) Order 1997 has been passed since the Banker's Book Evidence Acts. This allows the court to act on hearsay evidence: see the decision of Deeny J in Santander (UK) Plc v Thomas Anthony Carlin and Another (2013) NICh 14. But in any particular case the court will decide what weight has to be given to that hearsay evidence. I consider the evidence adduced by the bank to be reliable and that the court can act upon it with confidence.

[11] The appellants also sought to argue that they were both the creditors and the debtors. They claimed that this was a debt due by SF and GF. But they claimed that Greg and Stuart of the family Foster were creditors. They sought to highlight the different legal personalities that existed. They claimed that on the one hand there were SF and GF who were men and Stuart and Greg Foster who were legal persons. I am afraid that I was unable to follow their novel proposition for which no legal authority was offered. But in any event it failed to deal with the undisputed fact that the appellants received £198,000 by way of consideration to buy the Property, that they would have been unable to buy the Property without that loan, that the loan was charged on that Property and that they in whatever capacity have failed to abide by the terms and conditions upon which the loan was made and secured on the Property.

[12] Finally the appellants sought to rely on Section 2 of the Law Property (Miscellaneous Provisions) Act 1989 to defeat the bank's claim. This illustrates the appellants' determination to grasp any straw. This is an Act which does not apply to Northern Ireland and is therefore irrelevant to the court's considerations.

Conclusion

[13] The appellants made their submissions politely and articulately. However, there is no legal or factual basis for them. They have reached an agreement with the bank and it is difficult to understand why the appellants in those circumstances decided to spend hard earned money running an appeal without any obvious merit. This is a difficult area of the law and the appellants have been unable to grasp some legal principles which are fundamental to the law of property. For whatever reason they have decided to make a root and branch attack on the law of mortgages which, on reflection, they may feel was ill-advised. It is an approach which will have adverse financial consequences regardless of the appellants' motives as the bank will no doubt seek to recover the costs of the appeal. The bank will be able to do so under the terms of the mortgage. In any event, I would have made an order, if asked, for the appellants to pay the costs of the bank.