Neutral Citation No. [2015] NICh 13

Ref: **DEE9670**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **02/07/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2011 No. 059952

BETWEEN:

BANK OF SCOTLAND PLC

Plaintiff;

-and-

CHARLES CHRISTOPHER MALLON (LIAM JOSEPH MALLON AS APPOINTED ATTORNEY)

First Defendant;

-and-

(BY ORDER OF MASTER ELLISON OF 6 SEPTEMBER 2012) LIAM JOSEPH MALLON

Second Defendant.

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MR JUSTICE DEENY

[1] By originating summons of 17 May 2011 the plaintiff sought possession of premises at 1 Kennedies Road, Killylea, County Armagh from the first defendant with payment of monies due on foot of the plaintiff's charge on the property of 17 September 2007. In the event the history of the matter disclosed several unusual characteristics which led in turn to some novel legal submissions which are considered below.

[2] By order of Master Ellison of 6 September 2012 Liam Joseph Mallon was added as a second defendant. I ordered on 19 November 2012, when the matter came before me, that the proceedings were to be converted to a writ action and there was a subsequent exchange of pleadings and of lists of documents. Two listed hearings had to be vacated, regrettably, one on the application of the plaintiff and one on the application of the second defendant's advisers.

The Plaintiff's Case

[3] The core of the matter is that the bank lent monies for the purchase of a substantial dwelling house at 1 Kennedies Road, Killylea to Mr Charles Christopher Mallon. In fact he was only 21 at the time and a student. The real purchaser was his father, and later attorney, Liam Joseph Mallon. At this time the second defendant, as he now is, was practising as a solicitor. The principal sum lent was some £349,099 secured in favour of Halifax Plc by a charge of 22 October 2006. That charge was subsequently converted to one in favour of the Bank of Scotland in 2007, following the merger of those two entities. There was a further advance, again ostensibly to the first defendant, of £95,862 on 17 January 2008.

[4] For some time the requisite payments under the mortgage of the property and the further advance were paid. The second defendant accepted that he was making those payments on foot of the loans and that he did so until November 2010. He then fell into arrears and on 15 February 2011 a demand was made to the legal owner of the property Charles Christopher Mallon, the son of the second defendant. An originating summons was issued on 17 May 2011 and served. By the time the originating summons was issued the arrears had begun to amount and by the time Cathal Doran, a solicitor for the plaintiff, swore an affidavit in support of their notice of motion on 5 January 2012 those arrears amounted to £21,289.24. They have continued to increase. In an undisputed affidavit of 17 March 2015, Steven Jones, a collections analyst with the plaintiff, averred that the total amount then owing on the two loans was, with simple interest, £534,248.58. Mr Jones gave evidence at trial in March, confirming these figures and that there had been no capitalisation of arrears by the plaintiff.

The Defendant's Case

[5] In his affidavit of 2 May 2012 Mr Liam Mallon averred that he lived in the premises with his wife although his son, the first defendant, was the registered legal owner. He did not live there and did not make any contribution towards the mortgage or other financial liability in respect of the premises. "It was always intended that I would pay the mortgage instalments". Initially his son lived with him in the house but moved to New Zealand in 2009. On 12 November 2009 Liam Mallon avers that he was appointed attorney for his son by an enduring power of attorney pursuant to the Enduring Powers of Attorney (NI) Order 1987.

[6] The issues between the parties ranged over a number of fields in the course of the proceedings. A key figure in the history of the matter was Damien Mallon, who represented Halifax Plc in one way or another and who was the brother of Liam Joseph Mallon and the uncle of Charles Christopher Mallon.

[7] In his closing submissions Mr John Coyle who acted for the defendants narrowed down the issues for adjudication by the court to the following.

> "1. Was Damien Mallon an agent of the plaintiff, with actual or ostensible [authority] thereby binding his principal by his actions?
>
> 2. If Damien Mallon is found as a matter of fact to have been an agent of the plaintiff at the material time, as the defendants contend, does the public policy and principle encapsulated in the maxim *ex turpi causa non oritur actio*, operate in this action to prevent the plaintiff recovering possession and any shortfall following its sale of the premises as a trustee for the first defendant?"

[8] The concluding words are a reference to the fact that it is expected that the sale of the property now will not discharge in full the debt owing to the plaintiff let alone the interest thereon. At one point the plaintiff made an open offer to take the house alone and waive any further liability but this was refused by Mr Mallon.

[9] This approach by counsel enables me to proceed justly to an outcome without elaborating on a number of the matters which were canvassed before the court in the course of the hearings. I do so with the assistance of the written and oral submissions of Mr Coyle and Miss Jacqueline Simpson Q.C., who appeared for the plaintiff.

Agency

[10] Mr Coyle referred to the 19th Edition of Bowstead on Agency and to Halsbury in support of his submissions on this topic. For these purposes the matter is conveniently summarised in Chitty on Contracts, Volume 2, 31st Edition, 31 -001:

> "At common law the word 'agency' can be said to represent a body of general rules under which one person, the agent, has the power to change the legal relations of another, the principal."

Agents are to be distinguished from mere canvassing agents, used to attract or introduce business as, in England at least, estate agents. 31-002.

[11] Counsel submits that even if a full agency is not established here between Damien Mallon and the plaintiff's predecessor in title there was, at least, ostensible authority or apparent authority as it is often described.

> "Where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorised them. This doctrine, called

> the doctrine of apparent or ostensible authority, applies to cases where a person allows another, who is not his agent at all, to appear as his agent, to cases where a principal allows his agent to appear to have more authority than he actually has, to cases where a principal makes reservations in his agent's authority that limit the authority which such agent would normally have, but fails to inform the third party of this, and to cases where a principal allows it to appear that an agent still has authority when such authority has in fact been terminated."
> Chitty op. cit. 31- 057.

[12] What was the evidence in support of the defendant's contention that Damien Mallon was the agent of the plaintiff? His oral evidence began by pointing out that when he was looking for the finance to purchase 1 Kennedies Road, his first port of call was Damien Mallon. Adduced in evidence on that occasion was correspondence of 28 July and 11 August 2006 from the First Trust Bank in Newry offering loan facilities for this purpose to Mr Mallon. It appears therefore that, as the plaintiff contends, his brother was not a tied agent of Halifax but could arrange or broke loans with different lenders.

[13] It emerged that the second defendant was engaged in a scheme to construct two large houses outside Dublin and that the monies from the First Trust Bank were really for those purposes. Mr Liam Mallon envisaged that his son Charles would end up with the Dungannon house and that the two other sons would end up as the legal owners of the other two houses, or so he said in evidence. How he or they were to pay for these houses was not made clear.

[14] I pause to observe that the application form submitted by Damien Mallon on behalf of his brother and/or nephew was a Birmingham Midshires mortgage application form. No issue arises from these different corporate emanations of the lender.

[15] Liam Mallon said in evidence that his brother Damien was unquestionably an agent in his mind. He had been from approximately 1983. It is what it said on his notepaper. The court was shown a few examples of that. One did undoubtedly describe:

> "Damien Mallon B.Sc.
>
> Appointed financial advisor, agent for Halifax Building Society, Auctioneer and valuer."

The symbols for both Halifax and the Eagle Star Insurance Company were on the paper. Somebody had written on that sheet April 1992. There were two compliment

slips, one with a different address in Keady, one with the same describing Mr Mallon as an agent for Halifax Building Society, but one of those was expressly dated 8 May 1987 and it was not suggested that the other was other than from the 1990s. Nevertheless, I take those into account.

[16] Liam Mallon said that when his brother moved from Victoria Street, Keady, to larger premises in Market Street, he told him that the Halifax had paid for the refurbishment. As a conveyancing solicitor, Liam Mallon had dealt with thousands of mortgages from the Halifax though his brother. He said that he would never go to the central core of Halifax save on issues of title or other matters regarding the issue of the loan or security. Liam Mallon considered that because his brother knew that he, Liam, would be living in the house and not Charles that Halifax therefore knew.

[17] In cross-examination he acknowledged that the Birmingham Midshires form said they were not responsible for Damien Mallon. He accepted that on paper there was a clear distinction between the plaintiff and Damien Mallon. At page 694 of the trial bundle, Section 2, one finds this expressly set out:

> "Damien Mallon recommended that you take out this mortgage. If you have any queries about this service, you should contact Damien Mallon. Birmingham Midshires is not responsible for the advice or information you received."

[18] This key document, the mortgage application produced on 22 September 2006, ostensibly by Charles Christopher Mallon, bears further examination. At paragraph 9 dealing with insurance a clear distinction is drawn between Birmingham Midshires and Damien Mallon whose name is printed on the form. At paragraph 13 one finds the following:

> "Using a mortgage intermediary
>
> Birmingham Midshires will pay £1,850.22 in procuration fees and inducements, which will be split between St James' Place Partnership and Damien Mallon if you take out this mortgage."

[19] The plaintiff used St James' Place as an intermediary and it in turn used local agents. I observe that the plaintiff was unable to locate the precise agreement between it and St James' Place Partnership relating to this period. They did produce another document to the effect that St James' Place Partnership were not agents but brokers. As can be seen from the quote above St James' Place then split the fee with local representatives such as Damien Mallon.

[20] At paragraph 14 of the form one also sees the following:

> "Contact Details
>
> If you have any queries regarding this Offer, please contact us, at Cardiff mortgage processing, Birmingham Midshires, Trinity Court, 21-27 Newport Road, Cardiff, CF25 0AA or on 0845 302 9847 …
>
> If you have any complaints regarding the service provided by Mr Damien Mallon of Damien Mallon, please contact Damien Mallon at 8 Market Street, Keady, Co Armagh, BT60 3RP or on 028 37 538393."

[21] I pause there to say that this was a "self-certification loan". The plaintiff maintains that Damien Mallon was not its agent. The consequence of that is that it was lending these very large sums of money based on a representation from a fee charging broker which would not be checked by any employee of the lender but only by a computer. The plaintiff accepts that its software was inadequate to detect this and other kinds of fraud at that time. That large sums of money should be had in this way might indeed seem astonishing but that is no longer relied on as a separate ground of defence in this action and nor could it be in the light of my findings below.

Findings on Agency

[22] I find on the documentary evidence put before me that the relationship between the plaintiff's predecessor in title, working though the emanation Birmingham Midshires, and Damien Mallon was not that of principal and agent. The lender had deliberately sought to establish a different relationship and had done so. Damien Mallon did not have the power to change the legal relations of the plaintiff save by the fraudulent manipulation of its inadequate systems. Did Damien Mallon, nevertheless have ostensible or apparent authority on which Liam Mallon could rely? I find against Liam Mallon in that regard. It seems striking to me that, despite his evidence that he had arranged thousands of mortgages with his brother up to and after 2006, he produced no letter from his brother from the relevant period indicating an assertion that he was an agent of the Halifax or Birmingham Midshires or anyone else. The few documents he did produce were of some antiquity. Independently of that Liam Mallon was not some elderly person lulled into a false sense of security by the recollection of Liam Mallon having been an agent of the Halifax in the past. He was a practising solicitor. He was the solicitor for both the lender and the borrower here. In truth he was the borrower using his son as his agent, in effect. He had the duty to understand and, if proper, implement the contract to be entered into by the parties. If, as he says he did, he read the application form which had been submitted and the documents which were forwarded to him for conveyancing purposes, he could not properly have concluded that Damien was still an agent of the Halifax, as Liam Mallon repeatedly described

him. Whether he was being disingenuous in saying that or whether he had convinced himself I need not determine. Even a lay person reading this form and the other written materials would see that the lender was not accepting Damien Mallon as its agent. For these and the other reasons advanced by Ms Simpson QC I find, in answer to Mr Coyle's first question that Damien Mallon was not an agent of the plaintiff with either actual or ostensible authority to bind it as his principal.

Illegality

[23] On one view, having found that Damien Mallon was not the agent, I need not take the matter further. But in case it was thought that I had erred in that regard I propose to address the second part of the defendant's case. As I indicated at the commencement of this judgment the court is presented with a rather novel proposition. It is to the effect that because the application to Birmingham Midshires was, in effect, a fraudulent application and a transaction organised by Birmingham Midshires' agent, as alleged, then the principal lender is not entitled to enforce the loan. As indicated this fails because I find that Damien Mallon was not the agent with either real or apparent authority to bind the lender in the way that the defendant submits. But in any event even if he were the agent one would have to examine the facts that prevailed to see if either of these defendants were entitled to avail of the maxim ex turpi causa non oritur actio.

[24] In support of his case based on ex turpi causa or illegality Mr Coyle for Liam Mallon relied on two decisions of the House of Lords and Supreme Court respectively. The first of these Gray v Thames Trains Limited and Another [2009] UKHL 33; [2009] 4 All ER 81, I duly note but the facts are so significantly different that I consider it more fruitful to principally address the later case. That is Hounga v Allen and Another [2014] UKSC 47; [2014] 4 All ER 595. The court was considering whether an illegal immigrant could sue the former employer who had arranged that immigration for unfair dismissal. The court was united in its view on the outcome of the appeal, that she could, but Lords Hughes and Carnwath concurred on less extensive grounds than those favoured by the majority, Lord Wilson, Lady Hale and Lord Kerr. Mr Coyle relied in particular on paragraph [56] of the judgment of Lord Hughes which included this passage:

> "When a court is considering whether illegality bars a civil claim, it is essentially focusing on the position of a claimant vis a vis the court from which she seeks relief. It is not primarily focusing on the relevant merits of the claimant and the defendant. It is in the nature of illegality that, when it succeeds as a bar to a claim, the defendant is the unworthy beneficiary of an undeserved windfall. But this is not because the defendant has the merits on his side; it is because the law cannot support the claimant's claim to relief."

[25] I, respectfully, do not quarrel with that statement as it stands but would draw attention to two further passages which show that the role of the court when faced with the defence of illegality clearly does not prevent or deter it from consideration of factors for and against the application of the defence. Lord Hughes himself at [58] cites the following passage from Saunders v Edwards [1987] 2 All ER 651, at 665-666, from the judgment of Bingham LJ:

> "Where the issues of illegality are raised, the courts have … to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lends its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct … [O]n the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where the plaintiff's action in truth arises directly ex turpi causa, he is likely to fail … [w]here the plaintiff has suffered a genuine wrong, to which allegedly unlawful conduct is incidental, he is likely to succeed …"

[26] Lord Wilson in his judgment conducts a "penetrating analysis" of the defence of illegality resting upon the foundation of public policy. At [42] he says this:

> "So it is necessary, first, to ask 'What is the aspect of public policy which founds the defence?' and second, to ask 'But is there another aspect of public policy to which application of the defendant would run counter?'"

He goes on to cite McLachlan J in Hall v Hebert [1993] 2 SCR 159.

> "'The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a

> damage(s) award in a civil suit would, in effect, allow a person to profit from illegal or unlawful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. Now the comment of these instances is that the law refuses to give by the right hand what it takes away by its left hand'."

[27] For my own part I would respectfully say that there is force in the simple statement of the doctrine as being that a wrongdoer should not benefit from his own wrongdoing. I appreciate that it has been applied more widely than that but I consider it wise to remind myself that this is the underlying principle.

[28] I turn therefore to consider the conduct of the parties here on the hypothetical basis that Damien Mallon was the agent of the predecessor in title of Bank of Scotland and that that lender was thereby liable for his wrong doing. Given that this is based on that hypothesis, which I have rejected, I will not dwell unduly on the facts and nor will I repeat those set out above.

[29] The additional facts as they emerge from the evidence of Liam Joseph Mallon himself are illustrative. As mentioned above there were other loans from the First Trust Bank available. Mr Mallon referred to these loans from Halifax as 'capital raisers'. He wanted to put the house in the name of his son Charles Christopher Mallon and on foot of that he spoke to Damien Mallon.

[30] I find disingenuous Mr Liam Mallon's affidavit of 21 September 2012 in its dealings with this topic. He, at paragraph [10], says as follows:

> "The said Halifax Agent was a Mr Damien Mallon who then had Halifax branches in Keady, County Armagh and Dungannon, County Tyrone."

This was not 'a Mr Damien Mallon' but Liam Mallon's own brother. Not only was he his own brother but as his evidence went on he had dealt with him in regard to thousands of mortgages over the years. Furthermore Liam Mallon adduced no evidence of his brother having 'Halifax branches' at this time in two counties.

[31] Liam Mallon was not only the true borrower, the father of the ostensible borrower and the brother of the broker, as I find him to be, but he was also the solicitor acting for both the lender and his own son Charles Christopher Mallon. He accepts that he was written to in that capacity on 22 September 2006 with an offer letter attached. He admitted that this was brought to his attention including the presence at paragraph 3 of the form of the statement that the declared income of Charles Christopher Mallon was "£100,000". This "jumped off the page" at him and was "patent nonsense or worse. I phoned Mr Damien Mallon (sic) to find out what

that was about as he was organising it all." It did not occur to him, claimed Liam Mallon, to contact the central core. If that is a truthful answer, of which I am not persuaded, it showed an extraordinary attitude on behalf of the solicitor. The very paragraph after the entry for declared income reads as follows:

> "This offer is based upon your declared income. If the figure is incorrect, you must notify us immediately by telephoning 08453029847 and you must not proceed with the transaction without our prior approval.
>
> It is an offence to make a false, inaccurate, or misleading declaration or you may face criminal prosecution leading to a fine and/or imprisonment. You may also face civil action for recovery of any losses that Birmingham Midshires incurs."

[32] It did not need the evidence of the plaintiff's expert conveyancing witness Mr Neil Faris to condemn this conduct on the part of a solicitor. By continuing to process the matter knowing that a palpably wrong figure was being put forward to the lender was entirely discredible.

[33] Liam Mallon then set out what his brother said to him on the phone and was "immediately struck that Damien was telling him the truth" i.e. to the effect that Birmingham Midshires wanted it that way and knew that Liam would be paying the mortgage.

[34] In fact Damien Mallon was perpetrating mortgage frauds at this time. He was later prosecuted for this and sentenced to a period of imprisonment. Liam Mallon said that part of the reason for him ceasing to make payments on these loans in November 2010 was because of the very substantial reputational damage he had suffered because of the prosecution of his brother. He expressed the view that while the bank was a victim so too was he but the bank were perpetrators also. It is noteworthy that he resorted to the same use of Charles Christopher Mallon when the second offer was made except on this occasion his purported income had increased to £110,000 per annum.

[35] In her able cross-examination of Liam Mallon, Miss Simpson drew attention to the fact that he and his firm were in breach of several of the requirements to be found in the mortgage lenders handbook to which he had agreed to subscribe. Consistent with the theme of this case the other solicitor in his office who dealt with these matters and who signed the Certificate of Title for Halifax Plc was Julie McBrien, who is the sister of Liam and Damien Mallon.

[36] Mr Mallon had to accept that Section 2 of the Letter of Offer which he received and read drew a clear distinction between Birmingham Midshires and Damien Mallon:

> "Damien Mallon recommended that you take out this mortgage. If you have any queries about this service, you should contact Damien Mallon. Birmingham Midshires is not responsible for the advice or information you received."

Mr Mallon in response had to accept that he "fell away, in his discharge of his duties". He accepted that despite these plain words he had not contacted Birmingham Midshires but only his brother. He accepted he had been guilty of bad judgment. He accepted that his brother was definitely fraudulent but denied that he was. He accepted that he was briefed by the lender to protect them and had no answer to the suggestion that he had failed to do so.

[37] In cross-examination he made the remarkable concession that the second loan of £100,000 was not for improvements to the house as said in the paperwork but was "mostly to buy blood stock".

Finding on Illegality

[38] It is a matter of which I can take judicial notice that the use by lenders of self-certification mortgages in the first decade of this century lent itself to mortgage fraud. But it is significant that the researches of counsel for the second defendant did not yield any authority for the proposition that a lender whose agent had participated in that mortgage fraud thereby deprived the lender of recovering the monies where they had been lent or securing possession of property used to secure the loan.

[39] Even if Damien Mallon had been the agent of Halifax Plc at the relevant time I would hesitate to conclude that there was sufficient public policy reason to found a defence of illegality. It seems to me that the lender there is the victim of its agent and that public policy does not dictate that the lender, despite behaving foolishly, should therefore forfeit the right to recover money or property to which it is otherwise entitled. We are not here speaking of consumer credits where the legislature has intervened.

[40] Even if, however, a defendant such as this did succeed under that first heading it would still have to face the duty on the court to consider whether there was "other aspects of public policy to which application of the defence would run counter" as Lord Wilson said. That second heading is consistent with the analysis of Bingham LJ, as he then was, speaking of two unacceptable positions. I am entirely satisfied that it would be an unacceptable position to defeat this claim on the ground of illegality, even if Damien Mallon was the plaintiff's agent, because the money had

been lent in the way that it was because Liam Joseph Mallon as solicitor facilitated the loan in that way. It is true that he says that Messrs Wilson Nesbitt, solicitors, asked him was he the father of Charles Christopher Mallon but I do not see that it assists him here, even if in the climate of the time a careless attitude to these mortgage applications was being taken. It can be neither just nor equitable to allow him to enjoy the windfall of retaining his substantial dwelling house without repaying the lender the considerable sums of money that, directly or indirectly, allowed him to acquire and retain it until now. It seems to me, referring back to the dictum of Bingham LJ, that even if Damien Mallon was the agent of Halifax his unlawful conduct attributed to the lender was "incidental" to what was otherwise a perfectly legal and normal contract of mortgage. Therefore the plaintiff is entitled to proceed. I will grant the order for possession sought and judgment in the sum proved by Mr Stephen Jones with interest from the date of hearing until the date of judgment. As Liam Joseph Mallon swore in evidence that he had received the sums of money lent and not his son the judgment for the monies amount will be against him. I will hear counsel as to what order is appropriate with regard to Charles Christopher Mallon.