Neutral Citation No. [2014] NICh 1 | *Ref:* **HOR9127**

Judgment: approved by the Court for handing down | *Delivered:* **24/01/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

BANK OF SCOTLAND PLC

Plaintiff

and

(1) ANTHONY BRENNAN (OTHERWISE KNOWN AS ANTHONY MARTIN BRENNAN)
(2) GRAINNE BRENNAN (OTHERWISE KNOWN AS GRAINNE MARY BRENNAN)

Defendants

HORNER J

Introduction

[1] The appellants appeal against the Order of Master Ellison dated 7 June 2013 whereby he granted Bank of Scotland Plc ("the Bank") an Order for Possession of 9 Upper Malone Road, Belfast, ("the Property").

Facts

[2] In July 2007 at the height of the property boom in Northern Ireland, the appellants purchased the Property for £800,000. If sold now in the condition it was in at the time of its purchase, I am informed, that the Property would be worth less than half this purchase price. This appears to be non-contentious. The appellants purchased the Property with the benefit of a loan from the Bank secured by a Charge dated 5 July 2007 ("the Charge"). This Charge was subject to various conditions. Condition 11 related to the appellants' legal responsibilities for the Property. They agreed, inter alia, pursuant to Condition 11 (1) to keep the Property in good repair and to obtain the Bank's permission before making any structural alteration or addition to the Property. The Charge was registered in the Land Registry of Northern Ireland on 2 May 2008. In July 2007 the appellants moved in to the Property with their two children. Over the next three months it is alleged by the

appellants that they discovered that the house was in a much worse state of repair then they had been led to believe from the pre-purchase surveyor's report.

[3] The first named appellant is a qualified barrister and holds a responsible position in the Civil Service. The elder son, L, is autistic and the second named appellant is his carer. Both L and his younger sister, M, attend the local primary school.

[4] The appellants soon fell into arrears with the Bank. An arrangement was reached with the Bank for payment of the arrears in January 2009. This was cancelled in April 2009. A further agreement was made in November 2009 but this was cancelled in December 2009. In April 2010 the Bank served a Notice to Quit and notification that the Bank was going to initiate proceedings for possession of the Property. The appellants who had obtained planning permission to demolish the house, the subject of the Charge, and build two semi-detached houses in its place, unilaterally demolished the dwelling house on the Property sometime in mid 2010. On 12 October 2010 the first named appellant met a field officer from the Bank and advised him of their plans which included building two semi-detached houses on the now vacant Property. The first appellant was advised to inform the Bank that the detached house had been demolished. The appellants and their children resided in rented accommodation in south Belfast from January 2011. The appellants had also purchased a property in Downpatrick which they hoped to develop as a nursery. In October 2011 the appellants sought permission from the Bank to sub-divide the Property so that they could sell one of the semi-detached dwellings. The Bank has not given its permission for any sub-division of its security.

[5] In February 2012 an originating summons was issued by the Bank claiming possession of the Property. An application by the appellants for a scheme of repayment of arrears was rejected by the Bank. The appellants carried out construction work on the site and the semi-detached houses are at different stages of construction. One of the proposed semi-detached units is on offer for sale at £400,000. It is only partially completed. In June 2012 the appellants' family moved again. In January 2013 a proposal was put forward to the Bank which involved:

(a) Sale of a semi-detached house on the Property for £400,000.

(b) Sale of the nursery in Downpatrick for £450,000 within "a matter of months".

(c) An offer of a contribution out of a claim for damages for misrepresentation against the previous owner of the nursery which the appellants thought would settle.

The appellants claimed that this proposal would allow them to clear their arrears and pay off part of the principal sum which is due. In the circumstances they sought relief under Section 36(1) of the Administration of Justice Act 1970.

[6] At the time proceedings were issued the Property had been cleared of the original dwelling house. There were foundations in place for two semi-detached houses. One of the semi-detached houses had been partially constructed on site and by July 2012 it had reached the stage of floor grid and concrete floor. On 31 May 2013 it was claimed that the properties were built up to ground floor ceiling level. On 12 November 2013 the amount due to the Bank was £797,288.11. The current monthly instalment is £2,877.40. The last instalment that had been paid by the appellants was in January 2013 and was for the sum of £837.72.

[7] At present the semi-detached partially completed unit on the Property remains unsold. The court has not been told of any offers that have been made in respect of it. There are no valuation reports offered to the court either in respect of its expected value if sold on the open market in its present condition or in its completed condition. Nor is there any report on the cost of completing it so that it would be eligible for, for example, an NHBC certificate. Further there is no valuation in respect of the Downpatrick nursery. It is not clear what indebtedness is secured upon the Downpatrick property. The suggestion is that there are borrowings of £260,000. There is a proposal dated 26 September 2013 that out of any proceeds of sale in respect of the Downpatrick nursery, the appellants will be able to spend £100,000 on developing other properties for sale. No trading accounts for the Downpatrick nursery have been made available. There is an offer, the court was told, but this is for a sum substantially less than the asking price which is now £300,000. Further the income and expenditure accounts submitted by the appellants are not supported by any vouching documents. On their face, there is £3,800 being received each month by the appellants in respect of wages and benefits (unvouched) and £1,230 in respect of outgoings (also not vouched). This means that if they are required to discharge the monthly instalments in the mortgage their income is less than their outgoings. Obviously they are not in a position to pay any arrears.

The Legal Principles

[8] In Birmingham Citizens Building Society v Caunt [1962] 1 Ch 883 Russell J stated that a court did not have an inherent jurisdiction to adjourn lenders' claims when the borrower fell into arrears. He said at page 912:

> "Accordingly, in my judgment, where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether in terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of

paying off the mortgagee in full or satisfying him; but this should not be done if there is no reasonable prospect of this occurring."

I also draw attention to 10.12 of the Law of Mortgages in Northern Ireland by Charles O'Neill.

[9] Parliament then intervened to provide a more generous regime for dwelling houses the subject of charges and mortgages when it passed Section 36 of the Administration of Justice Act 1970. This provided:

> "(1) Where the mortgagee under mortgagee of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property.. the court may exercise any of the powers conferred on it by sub-section (2) below. If it appears to the court in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue to the mortgage.
>
> (2) The court –
>
> (a) may adjourn the proceedings, or
>
> (b) on giving judgment, or making an order, for delivery of the mortgaged property, or at any time before the execution of such judgment or order, may:
>
> (i) stay or suspend execution of the judgment order; or
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> (ii) postpone the date for delivery of possession, for such periods as the court thinks reasonable.
>
> (3) Any such adjournment, stay, suspension of postponement as is referred to in sub-section (2) above may be made subject to such conditions with regard to payment by a mortgagor or any sum secured by the

> mortgagee or the remedying of any default as the court thinks fit."

[10] In Royal Bank of Scotland Plc v Millar [2002] QB 255 at paragraph 26 Dyson LJ said:

> "In my view this interpretation is supported by the plain purpose of the sub-section, which is to afford protection to mortgagors of dwelling houses from the full rigours of the law as explained in the Caunt case. The court should have the power to adjourn proceedings, stay or suspend execution of a judgment for delivery or possession, or postpone the date for delivery of possession where it is satisfied that the mortgagor of the dwelling house is likely to be able, within a reasonable period, to pay any sums due under the mortgage or remedy a default consisting of a breach of any other obligation."

[11] There can be no doubt that Parliament was affording the courts a discretion to be exercised solely in favour of persons who had borrowed from lenders and whose indebtedness was secured on their dwelling house. This was not available in respect of other mortgages and charges secured on other properties. Insofar as these mortgages or charges are concerned, Caunt remains good law.

[12] Section 39 of the Act confirms that a dwelling includes any building or part thereof which is used as a dwelling. The time to consider whether a building is being used as a dwelling house is the time when the lender initiates possession proceedings. In Royal Bank of Scotland v Millar Dyson LJ said:

> "In my judgment the true interpretation of Section 36(1) is that the time at which the land is required to consist of or include a dwelling house so as to attract the benefits of the sub-section is the time when the mortgagee brings an action in which he claims possession of the mortgaged property. It seems to me that, as a matter of construction, this is the most natural interpretation of the sub-section. It is not a condition of the sub-section coming into play that the mortgages of land which, at the time when the mortgage was granted, consisted of or included (in the past) a dwelling house. **The present tense is intended to indicate what condition is required to be met at the very time when the mortgagee starts proceedings for possession.**" (Emphasis added)

[13] Where there is a dwelling house involved, then the proper approach of the court in Northern Ireland to Section 36(1) of the Act is set out in the judgment of Girvan J in National and Provincial Building Society v Lynd and another [1996] NI 47. He said at paragraph 60(b):

> "What the court must do under Section 36 is to consider all the circumstances of the case, approaching the matter with an open mind seeking to do justice between the mortgagor and the mortgagee. …
>
> If a mortgagor declines to put any material before the court which could lay a basis for the court exercising its powers under Section 36 the mortgagee would be entitled to his remedy based on his clear contractual rights under the mortgage. It is for a mortgagor to adduce some justifiable basis to enable the court to exercise its discretionary power under Section 36 in his favour. A mortgagor who is in default under his mortgage has no right to demand that the court exercises its discretion in his favour to grant what is in effect a form of relief against the consequences of a breach of contract. The mortgagor having defaulted in the payment of instalments including interest is in breach of contract and owes a liquidated sum to the mortgagee. A mortgagor seeking to persuade the court to exercise its powers under Section 36 should be expected to put before the court his best realistic proposals to avoid the consequences of his breach of the contractual terms of the mortgage and to discharge the liquidated debt due to the mortgagee."

Girvan LJ then went on to say at page 64(a):

> "In determining whether or not and if so how the court should exercise its discretion under Section 36 the court should take into account and give proper weight to the views expressed by the mortgagee who has suffered as a result of the mortgagors' default.
>
> The Building Society is acting wisely and with an appropriate degree of compassion although it is also acting in its own interests since a forced sale of the property at this stage would (be) unlikely to attract the best price."

[14] An order for possession of a person's home is a substantial interference with their Article 8 Rights which needs to be justified under Article 8(2).

[15] It is also claimed that there has been a breach of the appellants' rights under Article 1 of the first protocol. However, I agree with the comment of Mr O'Neill in the Law of Mortgages in Northern Ireland where he says at 10.149:

> "Thus it is unlikely that the assumption of possession by a lender under a court order can be challenged by reference to other convention rights. In application 11949/86 [1988] 10 EHRR CD149 the European Commission of Human Rights said:
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> > "The Commissioner there identified that the drafting of this provision (the second sentence of A1P1) shows clearly that the deprivation rule is generally intended to refer to acts whereby the State lays hands on, or authorises a third party to lay hands on, a particular piece of property for a purpose which is to serve the public interest."

[16] The present proceedings relate to a contract freely entered into between the appellants on one hand and the Bank on the other. Clearly the appellants are in breach of the agreement in a number of respects. One of the remedies open to the Bank at law is to seek an order for possession of the Property

Conclusions

[17] There can be no doubt that at the time proceedings were instituted, there was no dwelling house on the property. No one lived there, nor could anyone live there because of the absence of a dwelling house on the Property. It was a site upon which a dwelling house, which formed part of the Bank's security, had existed at one stage, but which had been completely demolished by the appellants. The site works which had been carried out could not constitute on any view a dwelling house. The submissions of Mr Potter BL on behalf of the appellant, while ingenious, miss the point. This is not a case where the appellants have gone on holiday or are having work done to their house. These appellants had deliberately razed the house to the ground. This was an egregious breach of the terms of the Charge. What is on the Property at present cannot be described as a dwelling house. Accordingly, applying the principles of the Caunt case, and it is important to note that it is not just that the appellants are in arrears, but they have also breached the conditions of the mortgage by demolishing the house without the Bank's permission, an order for possession in favour of the Bank is unavoidable even if the destruction of the dwelling house is ignored. The appellants cannot rationally suggest that a short adjournment will give

them the opportunity to pay off the mortgagee in full, never mind paying off the arrears to date. Accordingly, the appellants are not entitled to the relief of a stay.

[18] On the basis that I am wrong, and that there is a dwelling house on the property, despite all evidence to the contrary, I must consider whether it is appropriate to exercise the power to stay or postpone an order for possession under Section 36(1) of the Act. The basis upon which I should exercise that discretion are that:

> "It must appear to the court that in the event of the court exercising the power the mortgagor is likely to be able to pay the sums due under the mortgage … within a reasonable period." See Lynd's Case at 53(f).

[19] I draw attention to the following:

(i) There is no professional valuation of any property offered by the applicants. An asking price is not a valuation. It usually reflects the input of the vendor.

(ii) There is no evidence from a quantity surveyor or a builder as to costs of completing either of the two semi-detached houses on the Property.

(iii) There is no evidence that the applicants have the funds to complete either of the two semi-detached houses on the Property.

(iv) It is suggested that the Downpatrick property will be sold to realise a cash sum. But in one proposal it is stated that there are borrowings of £260,000 secured on this property and in another it is suggested that £100,000 should be used by the appellants to allow them to pursue their property development enterprise.

(v) There are no accounts of the trading history of the nursery, although apparently it has been trading since mid 2012.

(vi) The documents relating to the appellants' income and outgoings make it clear that their present outgoings, including the monthly instalments due in respect of the mortgage exceed their income.

(vii) There have been no mortgage repayments made by the appellants for nearly a year.

(viii) Finally the appellants assert that they have a claim for damages for misrepresentation which they value at £250,000. There is no supporting documentary evidence for this, not even an opinion from junior counsel or their instructing solicitor.

[20] The proposals which have been put forward to date including the most current one dated 26 September 2013, can best be described as wish lists. The last one before the court is not grounded on fact. It is inconsistent with other information previously provided. This proposal had no prospect of being accepted by the Bank or by the court because it is divorced from reality. This is especially disappointing because the first named appellant is a legally qualified barrister and he must have realised that such a proposal, unsupported by independent and objective evidence, was bound to be rejected. There is no point in guessing at the appellants' reasons for this approach except to note that proceedings were issued in February 2012 by the Bank and nearly two years have passed. In the circumstances it is difficult to see what other option the Bank has except to try and realise its security. Furthermore given the obvious and serious breaches of the conditions of the Charge by the appellants, and for which no satisfactory explanation has been offered, the making of an Order for possession is both in accordance with the law and proportionate. I am satisfied that, if necessary, ample justification has been provided under Article 8(2) of ECHR.

[21] There are no grounds made out on the papers upon which a court could lawfully exercise its discretion and grant a stay of enforcement to the appellants. The Master was correct. This court affirms his decision without hesitation.