Neutral Citation No. [2013] NIQB 135 | *Ref:* **DEE9122**

*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **16/12/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

BANK OF SCOTLAND

Plaintiff

v

SEAN DOHERTY AND MARY THERESA DOHERTY

Defendants

DEENY J

Application

[1] In this application before the court I have had helpful submissions from Mr Liam McCollum QC on behalf of Sean Doherty and Mary Theresa Doherty and Mr Keith Gibson on behalf of the Bank of Scotland Plc. Several judgments of my brethren and of the Court of Appeal of Northern Ireland have been cited and, indeed, I have judgments myself on this topic of an extension of time to appeal from an Order of the Master.

[2] The Order of the Master here was for possession of Mr and Mrs Doherty's dwelling house which is obviously an important matter for Mr and Mrs Doherty. It is not an unimportant matter for the plaintiff which has lent a considerable sum of money on the security of the dwelling house, in excess of £400,000, and which is in the position that the last payment was made on 1 November 2011. Mr McCollum is instructed that that is because of a dispute on Mr Doherty's part with regard to LIBOR, that is interest rates and to his apprehension that the then plaintiff, Halifax, which was taken over by or merged with the Bank of Scotland had sold his loan. I do have to observe that the payments of Mr and Mrs Doherty seem to have varied over the years even when they were paying and the last payment was only for £500. So I am not currently persuaded that that is the underlying reason for the breaking off of payments.

[3] In any event that is the position, so the Bank sought repossession. I had an application for an injunction on behalf of Mr Doherty restraining the Bank of Scotland from proceeding with a sale of his former dwelling house and I gave judgment on that matter on 28 November and I do not propose to repeat everything I said there. The reason he was seeking that injunction was because the Bank had effected enforcement of the Master's Order which is a relevant factor on the application for a belated appeal out of time of the Master's Order and it is an unusual circumstance which Mr Gibson relies on. The decision which is binding on me is the decision of the Court of Appeal in Northern Ireland in Davis v Northern Ireland Carriers [1979] NI 19 which counsel addressed. The Rules of the Court of Judicature provide rules, the orders of the court are there to be obeyed but nevertheless the court has a dispensing power with regard to the Rules which it can exercise in its discretion and Mr McCollum invites me to exercise my discretion in favour of Mr Doherty here.

[4] The Court of Appeal's relevant principles as set out by Lord Lowry are as follows. Firstly, 'whether the time is already sped: a court will look more favourably on an application made before the time is up.' Well, that is not this case; clearly the time is spent, so that is against Mr Doherty.

[5] Secondly, 'when the time limit has expired, the extent to which the party applying is in default'. Now with regard to that there are really two periods of time. Mr Doherty does send in something called a Notice Declaration claiming that the Master's Order is void. This, as I said in my earlier judgment, does not appear to be a creature known to the law; it is quite misplaced. The reason given for saying the Master's Order was void was quite misplaced and so one could take a strict view and say, as Mr Gibson invites me to conclude therefore, that he should have lodged his application in mid-February and instead did not lodge it until 12 November, a delay of nine months, which is a very grave delay in such matters. Even if I accepted Mr McCollum's submission, which to a degree I do, that the court should take a forgiving eye for that first delay because there is a communication from Mr Doherty that would suggest he had misunderstood something that had been written to him by the Northern Ireland Court Service, he could not really think that i.e. that the Order was void after the Enforcement of Judgments Office started writing to him about the matter. Even if one overlooked that one cannot overlook that by 20 September when a further letter on behalf of the Court Service was written to him it was made absolutely clear that the law was taking its course unless he put in a late Notice of Appeal with a request to extend time. Even then he did not do so for a further approximately six weeks. So I am afraid Lord Lowry's second item is in favour of the Bank also.

[6] Thirdly, 'the effect on the opposite party of granting the application and in particular whether he can be compensated by costs'. Mr Gibson submits [the effect] is grievous here. I have already adjourned this matter once to allow Mr Doherty to instruct counsel. The Bank is waiting to execute the contract. They may lose the bidder that they have for the property. Mr McCollum's answer to that is one which

has force, namely that it is fairly clear now that we are in a rising market and somebody else will buy the house even if this buyer does not. Well that is right and I think I will leave three as not against Mr Doherty but I do observe that there is no convincing evidence that the Bank could be compensated in costs, for the costs they will lose in legal fees and other fees and continuing loss of interest because Mr Doherty has not made a payment since November 2011 and is vague even now in his contention that he could service this substantial mortgage.

[7] Fourthly, 'whether a hearing on the merits has taken place, or would be denied by refusing an extension'. A hearing on the merits has taken place. The Master adjourned it three times. At one stage the appellant had the benefit of the Housing Rights Service but they later withdrew from the case. It is not the hearing he would like. To a degree this overlaps with the fifth and sixth points of Lord Lowry that is whether there is a point of substance to be made which could not otherwise be put forward and six whether the point is of general and not merely particular significance. Well there is certainly no suggestion of a point of general significance. Four and five has now been looked at presumably by the Housing Rights Service a year ago and by senior and junior counsel in the two matters before me and nobody has been able to locate a point on the merits.

[8] Any dispute about interest rates does not invalidate the mortgage and nor has that been crystalised and the fact that the original lender may have sold the loan does not invalidate it provided I have the right plaintiff before me. This plaintiff says it is the right plaintiff. There is an Act of Parliament naming the Bank of Scotland Plc as being responsible for the former Halifax. I have literally no evidence before me that that is incorrect and is contrary to averments made on behalf of the Bank. So, with the best will in the world I cannot see a point of substance to be made on the substantive issue or on the merits.

[9] The seventh principle set out by the Court of Appeal in Davis is that the Rules of Court are there to be observed. At least 6 of these 7 principles are against the appellants here. It is right to say that the deed has never been challenged and there was a copy before the court with a belated suggestion of seeing the original and I would be happy to direct that in the right case but I cannot see any sufficient ground here for disregarding the dicta of the Court of Appeal at this stage. It is also right to say as Mr Gibson has pointed out that this case is unusual in as much as the enforcement has actually taken place and the appellants have moved out.

[10] So for all these reasons it seems to me clearly my duty that I refuse an extension of time to appeal the Order of Master Ellison and that Order therefore stands and remains valid.