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Judgment: approved by the Court for handing down | *Delivered:* **01/12/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

2009/67544

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THE WOOLWICH
Amended by Order of 27 November 2015 to
BARCLAYS BANK PLC trading as THE WOOLWICH

Plaintiffs

v

CREGAN BOYD AND PAULA BOYD

Defendants

____

DEENY J

Introduction

[1] This is a case which raises issues as to the extent of the discretion of the court in an application for a stay for an order for possession of a dwelling house and the exercise of any discretion. It arises in the following way.

[2] The defendants, Cregan and Paula Boyd, a married couple, purchased a property in Belfast, as their home in 2000 for £135,000. They did so with the assistance of a mortgage from the Woolwich, now a division of Barclays Plc. I accede to the belated application of the Plaintiff to amend its name on these proceedings. A further £90,000 was advanced for "major construction work on the property".

[3] In 2006 they re-mortgaged the property. They were given a current account facility up to £100,000 as well as the actual re-mortgage in the sum of £247,500 on the house, presumably reflecting the perceived increase in its value at that time.

[4] Considerable drawdown took place by the defendants on the current account and by 14 October 2009 it stood at a debit balance of £106,332.52.

[5] The mortgage was an interest only mortgage and the plaintiffs benefited from the marked fall in interest rates in the United Kingdom in 2009. Nevertheless, they fell behind in their payments. A Notice to Quit was issued on 31 July 2009. An originating summons for possession of the premises followed on 14 August 2009. The matter came on for hearing before the Chancery Master on 18 June 2010. He granted the Order for Possession but suspended it on condition that the defendants paid to the plaintiff the normal monthly instalments payable under the mortgage of 22 December 2006 and also that they paid a further sum of £500 per month in respect of their current account liability. Some payments were made on foot of that order of the Master. These seemed to have ceased on or about 16 June 2011.

[6] At about that time Mr Boyd avers that he became concerned about the physical state of his property. He was in touch with the Woolwich for a protracted period of time because he was concerned that there was an underlying defect in relation to the property which he was not told of at the time of purchase or at the time of re-mortgage. With the assistance of an ombudsman, he obtained a copy of the report of E. Surv Ltd. He avers that on receipt of that document he found there was a fourth page to it which he had not been sent at the time of the purchase of the property in 2000. Mr Boyd says he learnt from that that there was evidence of differential movement in the property, internally and externally and that a structural engineer's report should be obtained. Mr Boyd, while remaining in correspondence, did not take any active steps on foot of that but nor did he make payments to the Woolwich.

[7] On 30 June 2014 the lender issued proceedings against him by way of Notice of Motion in effect seeking to lift the stay and obtain possession of the premises with a view to selling the same and mitigating its loss. Master A E Wells granted the plaintiff liberty to enforce the said Order of Master Ellison of 18 June 2010. This was done on 16 September 2014. Since then, the parties, on consent, have furnished the court with a further affidavit of Cregan Boyd of 6 November 2014 with exhibits, a response from Ms Gillian Crotty on behalf of the Woolwich of 19 November 2014 and a further affidavit of Mr Boyd of 1 December 2014. The matter came on for hearing on appeal to me from the Master in December 2014 but it became apparent that further consideration and submissions were required. A further hearing was held in 2015.

[8] Mr Keith Gibson appeared for the lender and Mr Jonathan Dunlop for the Boyds. I am obliged to counsel for their series of submissions over the adjourned hearings.

<u>The Plaintiff's Case</u>

[9] The plaintiff's case is that as a mortgagee dealing with a mortgagor who is in breach of the mortgage conditions it is entitled as of right to possession. The statutory qualification of that, where, as here, the Consumer Credit Act 1974 does not apply because of the sums involved, is limited. Even if, contrary to the plaintiff's

submissions, the defendant has a cause of action pursuant to Section 150 of the Financial Services and Markets Act (2000), applicable at the time, such a claim gives a right to damages but, pursuant to Section 151(2) of the Act, any contravention does not invalidate or make unenforceable the mortgage.

[10] The plaintiff therefore says that the defendant is either wholly or effectively confined to the relief which can be obtained under Section 36 of the Administration of Justice Act 1970, as amended by Section 8 of the Administration of Justice Act 1973. In its submission, on an analysis of the sums involved, the defendants were unable to meet the test under that provision of the likelihood of payment of the sums due under the mortgage within a reasonable period.

[11] In response to the defendant's further submission that there remained a discretion in the court, whether under Section 86 of the Judicature Act 1978 or otherwise, he submitted that either no such discretion existed or, in the alternative, should not be exercised in favour of the defendants because the defendants claim to have a cause of action against the plaintiff lender justifying a stay of these proceedings until that action was determined because the claim was, in truth, hopelessly weak.

The Defendants' Case

[12] The defendants by the second affidavit of Cregan Boyd dated 1 December 2014 confirmed that they had completed Form 10A setting out the means available to them to make payments. Mr Boyd averred that their joint income was now much smaller than at the time the original stay was granted. He has a public service pension and his wife works part time. His proposal was to pay £169.38 "in respect of the ongoing monthly payments" and a further £330.62 per month against arrears totalling £500 per month. It can be seen therefore that he was not offering to contribute to the current account linked to the mortgage. I shall return to this in due course in my consideration of the respective cases.

[13] Mr Jonathan Dunlop's principal submissions, understandably in the circumstances of his client's difficulty in making a more substantial payment, concentrated on his alternative argument. He submitted that the court retained a discretion to stay the proceedings under Section 86(3) of the Judicature Act (NI) 1978. It reads as follows:

> "Without prejudice to any other powers exercisable by it, a court, acting on equitable grounds, may stay any proceedings or the execution of any of its process subject to such conditions as it thinks fit."

[14] He acknowledged academic opinion leaning against this e.g. Capper, Enforcement of Judgments Northern Ireland, 2004, 3.33. Valentine says the power should only be exercised if the court is satisfied beyond a reasonable doubt but cites

no authority for that proposition. The introduction of the criminal standard of proof may seem surprising. Mr Dunlop referred to the following passage from the judgment of Lowry LCJ in Northern Ireland Housing Executive v McAuley [1974] NI 233, 235:

> "Counsel further relied on Section 27(5) of the Supreme Court of Judicature Act (Ireland) 1877. Like Section 36 of the Supreme Court of Judicature Act 1925, which was mentioned in James' case, the sub-section merely introduces into all Divisions of the High Court relief which before 1877 could have been obtained only in the Court of Chancery. Its provisions, including the power to stay proceedings, can be invoked only for the purpose of protecting legal and equitable rights which exist or may be shown to exist. An example is the staying of an ejectment decree against his tenant who had himself obtained a decree for compensation under the Land Act 1870 until such time as he should have received payment: Judge v Belton [1875] IR 9 CL 414. The purpose of the stay was to protect a legal right which the tenant had acquired against the landlord. It is impossible to find an example of the sections being used merely to temper the rigours of the law in favour of a person who has no legal or equitable claim, and it has been expressly held that it gives power to stay only in cases where, before the act, the Court of Chancery could have restrained the action: Higgins v Brown [1885] 16 LRI.r.173: see also Harrison on Ejectments pp.359 et seq, where certain statutory provisions for staying ejectment proceedings against tenants are collected."

[15] As I understand it Mr Dunlop's case is that his client is seeking to protect his legal right to sue a subsidiary of the plaintiff, as discussed below, and that a stay can properly be granted for that purpose. He also relied on a judgment of Lord Bingham of Cornhill CJ in Reichhold Norway ASA v Goldman Sachs International [1999] 2 ALL ER (Comm) 174; CA. There the then Lord Chief Justice upheld the following dictum from Moore-Bick J at first instance dealing with the equivalent power under the Supreme Court Act 1981:

> "It is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interests of justice. I am in no doubt, therefore, that I do have jurisdiction to stay the present proceedings; the question is whether it would ever be

> right to do so in a case such as the present, and if so under what circumstances."

I will return to this judgment in due course.

[16] With regard to the exercise of the court's power under Section 36 of the 1970 Act and Section 8 of the 1973 Act Mr Dunlop relied on the judgment of Campbell J, as he then was, in Alliance & Leicester Building Society v Carlile (Unreported) 8 September 1995 citing a number of the relevant English cases, which I have taken into account. These are also to be found at O'Neill: The Law of Mortgages in Northern Ireland, 2008, 10.31. What is a reasonable period within the meaning of the Act is not the key question here, whether it is 3 or 4 or 5 years. What is perhaps more relevant is this quote from Griffiths LJ in Bank of Scotland v Grimes [1985] 1 ALL ER 254, 259:

> "It is the intention of both sections to give a measure of relief to those people who find themselves in temporary financial difficulties, unable to meet their commitments under their mortgage and in danger of losing their homes." (Emphasis added)

[17] That is an observation with which I respectfully agree. It chimes with the plain words of the statute. If a mortgagor has allowed him or herself to fall into arrears and their income and prospects are such that there is no reasonable prospect of them clearing the arrears in a reasonable time the proper course is to not deny the mortgagee its legal right. Mr Dunlop's argument here is that his clients' cause of action against the plaintiff or its subsidiary may relieve them completely of its debt and thereby make these financial difficulties temporary indeed.

[18] Counsel for the defendants also adopted the argument (following an observation from the court) that the position of Mr and Mrs Boyd might be strengthened by Article 8 of the European Convention on Human Rights and, he also submitted, Article 1 of the First Protocol. As to the former I take that into account. This is the home of the defendants but the rights under Article 8 are not absolute. As I have observed in Official Receiver v O'Brien [2012] NICh 12 Article 1 of the First Protocol is less likely to be of assistance to homeowners as the mortgagee can claim rights under the same Protocol.

Consideration

A. The extent of the Discretion under s.86 of the Judicature Act

[19] I have already set out the statutory provision concerned under Section 86 of the Judicature Act and the authoritative dictum of Lowry LCJ sitting as a judge of the Court of Chancery in Northern Ireland.

[20] It seems to me that the provision should be read in such a way as to render it consistent with Article 8 of the European Convention on Human Rights as indicated above. I think Article 1 of the First Protocol is of limited application. I note the important affirmation by the Court of Appeal in England in Reichhold, op. cit., p.179 that:

> "The judge then pointed out that, since the court's jurisdiction to stay proceedings was discretionary and the circumstances in which an application for a stay might be made where almost infinitely variable, he found it difficult to accept Mr McCaughran's submission that it would never be proper for the court to grant a stay of an action pending the outcome of proceedings. But he did accept that such a step should only be taken if there were very strong reasons for doing so and the benefits which were likely to result from doing so clearly outweighed any disadvantage."

I shall not go into the facts of that case which are far removed from the present situation but I note that after consideration of the submissions of counsel and the citation of authority Lord Bingham said this at page 185 of the All England Report:

> "I for my part recognise fully the risks to which [counsel] draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances."

[21] Those words, "cases of this kind" may be taken to refer to the substance of Reichhold i.e. an attempt to stay proceedings in the English High Court to await the determination of an arbitration in another country or they may be taken more widely.

[22] In assessing the extent of the discretion open to the court under Section 86 one must place it in the context applicable here i.e. a mortgagee action for possession. Mr Gibson in his submissions relied on the Marquis Cholmondeley v Lord Clinton and others [1817] 2 MER 171. I here quote the robust language to be found at paragraph 359 of the Report:

> "It will not be disputed that an Equity of Redemption is an Equitable right for it is only in equity that, after forfeiture, it has an existence; and, although the Equitable Ownership be in the mortgagor, yet his Possession is of a more precarious nature than that of any other cestui que trust. In general, a Trustee is not allowed to deprive his cestui que trust of the possession, but a Mortgagee may

> assume the possession whenever he pleases, and therefore a mortgagor is called Tenant at Will to the Mortgagee and, in point of possession, he is so even in equity: for a Court of Equity never interferes to prevent the mortgagee from assuming the possession."

This principle has been preserved until now, for example, at Section 151(2) of the Financial Services and Markets Act 2000.

[23] That principle was addressed by our Court of Appeal in Bank of Ireland v Walker [2013] NICA 2. There, upholding an unreported decision of my own, Morgan LCJ, delivering the judgment of the court, said as follows:

> "[7] The general rule is that subject to contractual or statutory limitations a mortgagee under a legal charge is entitled to seek possession of the mortgaged property at any time after the mortgage is executed. Any cross claim would not by itself defeat that claim for possession even if it exceeded the amount owed (see National Westminster Bank v Skelton [1993] 1 WLR 72). Mr Walker has issued proceedings on the basis that the provision of a commercial mortgage rather than a mortgage regulated by the MCOB was a breach of the relevant financial services regulations. Even if that turns out to be right the claim arises under Section 150 of the Financial Services and Markets Act 2000 and is limited to damages. By virtue of section 151(2) any contravention of the regulations does not invalidate or make unenforceable the mortgage.
>
> [8] The burden of Mr Walker's submission is that he did not intend to place his home at risk. The documentation signed by him and witnessed by his solicitor shows that this was precisely what he did. That was confirmed in the three further facilities letters signed by him. We agree that the signing of the facilities letter by someone purporting to be him would be outrageous and that the form of mortgage provided by the Bank may give rise to an action for damages on his behalf but the documents demonstrate that he had independent legal advice at the time of signing the mortgage deed which itself made clear the nature of the liability he was incurring in respect of 43 Hillside Crescent.
>
> [9] In those circumstances we accept that the only course available for Mr Walker at the hearing was to offer

> to make an arrangement to pay off the outstanding monies on his residence. That was the course which his legal advisers at the hearing pursued and it seems to us that they had no alternative in the circumstances. Mr Walker gave evidence on that basis and his case was presented in his presence on that basis. He was unable to persuade the judge that he could do so and we agree that the judge applied the correct principles to this. We see no basis for the suggestion that Mr Walker was in any way disadvantaged by his representation."

[24] That decision is of binding authority upon me, albeit the point was not argued extensively, if at all, before me at first instance nor, perhaps, very fully before the Court of Appeal. Morgan LCJ was referring there particularly to FISMA but the principle remains the same.

[25] Mr Keith Gibson, in his carefully researched submissions in 2015, also referred to the decisions of Master Ellison in GE Money Secured Loans Limited v Morgan and another [2013] NI Master 19 and Swift Advances v Heaney [2013] NI Master 18. He also referred to Mountney v Treharne [2003] Ch 135.

[26] It seems to me that, particularly in the context of a repossession action for a dwelling house, where the right to family life of a party may come into effect, that the discretion under Section 86 of the 1978 Act should not be confined solely to instances where it would be unconscionable not to do otherwise. As Lowry LCJ said in McAuley it could be exercised to enforce a legal or equitable right. That would include, in an appropriate case, staying possession while a mortgagor either exercised a right at law against the mortgagee or pursued proceedings that would allow the mortgagor to pay the sums due under the mortgage. But, in the context of the basic principle, respected by Parliament in the Financial Services and Markets Acts, that a mortgagee is entitled to possession of the property when the mortgagor is in default, it seems to me that that exercise of such a discretion outside Section 36 should only be in "rare and compelling circumstances" as Lord Bingham said in Reichhold. Given that it is an exercise of discretion it would be unwise to hypothesise in advance in any rigid way on the circumstances which would cause the discretion to be exercised. One might, however, consider that one such circumstance might be where the mortgagor had a clear and strong case against either the mortgagee or, perhaps, a third party, which made it likely that the mortgagor would recover compensation greater in extent than the sums overdue to the mortgagee, and that that compensation would be forthcoming in a reasonable period of time to address the arrears. In saying that, one ends up being very close to the statutory power given under Section 36 of the Administration of Justice Act 1970 to adjourn proceedings or to stay or suspend any judgment, execution or postpone the date for delivery "if it appears to the court that in the event of its exercising the power [to do so] the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage …".

For the avoidance of doubt I should confirm that we are dealing here with unregistered land so the provisions of the Land Registration Act (NI) 1970 and Schedule 7 thereof do not apply. All the same it would scarcely be ideal if the court's discretion regarding registered land in this jurisdiction were to differ to a marked extent from its discretion regarding unregistered land.

B. The Exercise of the s.86 Discretion

[27] On 1 December 2014 Mr and Mrs Boyd issued proceedings against the Woolwich [Barclays Bank] PLC, Woolwich Surveying Services Ltd trading as Eakins Surveyors and Northern Ireland Water Limited. The endorsement on the writ seeks damages for loss and damage sustained by the plaintiffs by reason of the negligence, mis-statement, misrepresentation, breach of contract and/or breach of statutory duty of the first defendant it servants and agents in or about the provision of lending and/or financial services and in or about the valuation and/or surveying of the property and further or in the alternative, caused by reason of the negligence, mis-statement, mis-representation, breach of contract and breach of statutory duty of the second defendant, its servants or agents in or about the valuation and/or surveying of the property. The third defendants are joined on various alleged causes of action against them as the possible source of the subsidence beneath the property. As indicated at paragraph 6 above it is the case on behalf of the Boyds that they did not learn from the report furnished by the second defendant on behalf of the first defendant that there was a structural defect requiring further examination. That was in 2000. The primary periods of limitation for tort and contract have long expired, as Mr Dunlop accepted. He accepts that he must bring himself within Article 11 of the Limitation (Northern Ireland) Order 1989. He argues that his clients comply with Article 11(3)(b) and (4) in that the Writ of Summons was issued within 3 years from the date of knowledge required for bringing an action for damages in respect of the relevant damage. He therefore relies for that date of knowledge on the provision through the Ombudsman in March 2012 of the Eakins report of 4 pages which he says he did not get in the year 2000.

[28] It is, therefore, essential to examine whether the Boyd's cause of action is a good one and, in particular, whether or not it is likely to be found to be statute barred. In commenting on these issues I am not reaching any conclusion on that issue which binds me or another court in the future.

[29] In considering this I leave for these purposes to one side the fact that on their own case Mr and Mrs Boyd carried out significant works on the property at the time of acquisition. They would always be open to an allegation of contributory negligence for failing to ascertain the state of the property before expenditure at that time but such a finding would not defeat their claim outright. However, a number of factors pose real difficulties for them. Firstly, a search of the complaint management system of the plaintiff located a note dated 24 June 2000 which states:

> "Val[uers] received property [sic] shows evidence of movement and valuer recommends structural engineer's report. Advised apps [applicants] this is required prior to offer once recd [recommended] refer to Val[uer] and check with WIS re insurance – RH."

This would convey that the applicants for the mortgage i.e. the Boyds, were told of the evidence of movement and the need for a structural engineer.

[30] A further note of 27 June 2000 states:

> "Mr B called – very concerned since D/E tomorrow!!"
>
> 27/6 – Regards the surveyor recommending a structural engineer report – Mr B says he is putting in a lot of his own money to the …"

D/E may mean drawn down/execution. Again this points to Mr Boyd being aware of the issue in 2000 contrary to his later averments.

[31] Secondly, Mr Boyd obtained a report from RPS Consulting dated 24 November 2014 which he put in evidence. The author of that report, Mr Don McQuillan is a highly qualified structural and civil engineer. He discloses that he previously inspected this property on 25 November 2003 for the Trustees of May Street Presbyterian Church who, at the time had identified it as a potential manse. "I was asked, in particular, to comment on alleged distress in the rear extension and in cracking on the front elevation. The Trustees did not proceed with the purchase." It seems rather surprising that that episode in 2003, not denied by Mr Boyd, did not lead him to know that there was some structural defect in his property if he was not already aware of that from 2000.

[32] The author recounts Mr Boyd as only becoming aware that Eakin Surveyors, trading at one point as E Surv was a subsidiary of the plaintiff.

[33] Thirdly, the court was furnished with a copy of a report of Doran Consulting dated 11 November 2004. Their Mr Green apparently visited the property on 22 October and 8 November 2004. They point out in the fifth paragraph of their letter the following:

> "The sales leaflet, [from 2000] a copy of which we possess, includes a photograph of the front elevation of the dwelling. It clearly shows that the supporting lintel over the garage door opening is not horizontal. <u>This suggests differential vertical settlement of the right gable wall</u>." (Authorial underlining).

[34] The first paragraph on the second page of that letter of advice reads as follows:

> "We consider that you may [have] been improperly advised, in that the above settlement should have been highlighted."

They say that based on the Eakin surveyor's report having only three pages. But Mr Boyd seems to have taken no action of that sort at the time. Dorans go on to say at the bottom of the second page:

> "We consider that the decision to carry out the recent works, ignoring the clearly obvious settlement defects in the garage area and the nature of the previous extension on top of the garage seemingly without any investigation or remedial works was not appropriate."

This would appear to have alerted Mr Boyd to a potential problem but nothing seems to have been done.

[35] Fourthly, a letter from estate agents called Cowley of 20 April 2011 to Mr Boyd expressly refers to there being structural issues which would mean that the property would not be mortgagable. Mr Boyd did not issue the proceedings within three years of that date. He relies on his contention that he did not get the fourth page of the report until in or about March 2012 i.e. less than three years before he issued proceedings.

[36] I have taken into account the further notes disclosed by the plaintiff relating to their dealings with Mr Boyd and also certain other undated documents furnished by Mr Boyd.

[37] I also take into account that the property was re-mortgaged for substantially larger sums of money in December 2006. I remind myself that the relevant date of knowledge is the date of knowledge that he might have a cause of action i.e. that the building society, as it previously was, was aware of the structural defects but he was not due to their omission.

[38] It seems to me that the claim of the Boyds against the Woolwich will be a difficult one to bring home. On the documents there must be a real question mark over whether the current recollection of Mr Boyd that he was not advised about a structural engineer's report in 2000 is in fact correct. The surrounding circumstances would point to this being something that was known to the parties then and soon

after. I remind myself of the whole of the provisions of Article 11 of the 1989 Order. That includes Article 11(9) which reads as follows:

> "For the purposes of this article a person's knowledge includes knowledge which he might reasonably have been expected to acquire –
>
> (a) from facts observable or ascertainable by him;
>
> (b) from facts ascertainable by him with the help of appropriate expert's advice which it is reasonable for him to seek;
>
> But a person is not to be fixed under the paragraph with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate to act on) that advice."

[39] I cannot conclude that Mr Boyd did take all steps which it was reasonable for him to take when, if he persuaded a court that he did not get the fourth page in 2000, which seems doubtful, he would, on the probabilities have been aware in 2003 and again in 2004 that there were issues of structural damage which might reasonably have been obtained by the surveyor acting for both himself and the Woolwich in 2000. That is when he should have sought further factual information and expert advice. Indeed he did obtain expert advice from Doran Consulting but did not take the matter further. It is not for me to rule on the matter but it seems to me that he will face very real difficulties indeed in surmounting the obstacles of the Limitation Order in regard to the action which he and his wife have commenced.

[40] What is clear to the court on examination of this matter is that there is considerable doubt over whether the plaintiff or its servants or agents were guilty of any tortious omission. There is also considerable doubt as to whether the belated claim of the Boyds is in time. The remedy sought by the plaintiff is neither nominal nor futile but likely to mitigate its loss if granted. The defendants have not established that this is one of those rare cases where the court should exercise an equitable discretion pursuant to s.86 of the Judicature Act to deny a mortgagee possession of property.

The exercise of the Section 36 Discretion

[41] As set out above the court has a discretion to stay an order for possession "if it appears to the court that 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 …" - s.36 Administration of Justice Act 1970. It is not in dispute that the mortgage current account into which Mr and Mrs Boyd entered in 2006 was, as its name

suggests, "under the mortgage" and that the sums owing under it are therefore relevant sums for this purpose.

[42] In the up to date figures received from the plaintiff the balance on the main mortgage account is £260,638.26 with arrears now standing at £8,493.70. It is an indication of the modesty of the current interest only payments that the arrears are still only at that level given that the last payment was on 1 June 2011, more than 4 years ago and in the sum then of only £164.08.

[43] In addition to that the original mortgage current account has an overdraft limit of £90,830.00 but currently stands at £130,815.90. It is thus overdrawn by the sum of £39,985.90. The total arrears therefore are £48,479.60. Given that interest is due already on both those amounts a sizeable monthly payment would be required to repay these arrears, and pay the current interest, within a reasonable period of time. The only offer made by Mr and Mrs Boyd has been of £500 per month. This manifestly fails to reach a level necessary to address the arrears. Mr Gibson submitted in the course of argument that their means might allow them to pay a little more but even if that were the case the arrears are such that I could not properly exercise my discretion under Section 36 to stay the proceedings.

Conclusion

[44] I consider that the court has a discretion pursuant to Section 86(3) of the Judicature Act (Northern Ireland) 1978 to stay proceedings on equitable grounds. However, that discretion is only to be exercised in rare and compelling circumstances. The facts here fall far short of such circumstances as the defendant mortgagors have a claim which will be difficult to bring home and may well indeed be already statute barred. Their only offer of repayment is also quite inadequate to allow the court to exercise its alternative discretion under Section 36 of the Administration of Justice Act 1970. I therefore refuse to grant any stay except a short period of time to allow Mr and Mrs Boyd to move out, on which I shall hear the submissions of counsel.