Neutral Citation No: [2016] NICh 6 | *Ref:* **KEE9903**

Judgment: approved by the Court for handing down | *Delivered:* **8/3/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DVISION

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2011 No. 142828/03A

BETWEEN:

ULSTER BANK LIMITED

Plaintiff/Respondent;

and

EDWARD THOMAS STEPHEN BOYES

Defendant/Appellant

_____

KEEGAN J

[1] By Notice of Appeal dated 19 January 2016 the appellant appeals to this court from an Order of Master Sweeney sitting in the Chancery Division on 8 January 2016. The appellant applied to the Master by summons dated 26th June 2015. His application related to his property at 21 Glenavy Road, Moira, County Antrim. He applied to have an Order for possession of the 20th of June 2012 in favour of the respondent either amended or struck out. In the course of these proceedings the respondent applied to have a suspension of the Order for possession removed. Master Sweeney declined to grant the application made by the appellant and she ordered as follows:

> (1) The suspension of the order dated 20 June 2012 is hereby removed;
>
> (2) Leave is granted to the plaintiff to enforce the possession order dated 20 June 2012, such

enforcement to be stayed for a period of 14 days from the date of this order;

(3) The time within which any notice of appeal must be lodged is extended to 14 days from the date of this order;

SCHEDULE

The premises situate at and known as 21 Glenavy Road, Moira, Craigavon, County Armagh (sic) BT67 0LT being the lands comprised in FOLIO NO. AN37411 County Antrim .

[2] The appellant appeared in person to argue this appeal. The respondent was represented by Ms Mulholland BL.

[3] In addition to the appeal notice, the appellant also issued a summons dated 19 January 2016 seeking that "the order be an extension of time pending the appeal" (sic). It appears that this application was to seek a stay of the possession order pending appeal. Ms Mulholland BL confirmed that a stay pending appeal was accepted by the respondent.

[4] In support of his appeal the appellant filed an affidavit dated 19 January 2016. He filed a further affidavit dated 16 February 2016 in which he sought disclosure of certain documents. In particular in that second affidavit the appellant states that the respondent had refused to furnish him with the following; the current valid instrument that holds the charge, the original charge documents, the original loan agreement. The appellant avers in this affidavit that he believes the reason for this is due to the fact that he has not signed a loan agreement. He states that in this respect the respondent has misled Master Ellison and the court.

[5] This case was listed on 19 February 2016 for hearing. On that date I was not satisfied that I had all of the papers before me. I did not have an appeal bundle and the appellant began referring to various documents which he had in loose leaf. This was not a satisfactory mode of hearing and so I adjourned for one week to allow matters to be regularised. At the revised hearing date an agreed appeal bundle was produced as a result of the efforts of the respondent's solicitor. However, the appellant applied to admit further documents which had not been shared and which were not included in this bundle. The respondent objected to these documents being admitted. However having been shown them, Ms Mulholland BL agreed that she could deal with issues raised if I admitted the documents. I did admit the documents despite the fact that the appellant produced these papers at the last minute, having had one week to agree an appeal bundle.

[6] This case was listed for judgment on the 7th March 2016. On the morning of judgment I received a letter from the appellant which had been hand delivered late on the previous Friday afternoon. As a result of this correspondence I reconvened the court prior to the handing down of the judgment. I asked the appellant had the letter been served upon the respondent. He said that it had been hand delivered to the respondent's solicitor. It transpired that the letter had been posted and was only received in the respondent's solicitor's office on the morning of the judgment. Neither the solicitor nor counsel for the respondent had seen it prior to coming into court. I provided the letter to them and invited any comments. I adjourned briefly and upon resuming the case Ms Mulholland said that she was able to deal with the correspondence by way of oral submissions. I permitted her to do so and I allowed the appellant a reply after which I adjourned to consider any additional points raised. I will deal with the substance of the additional matters raised later in this judgment.

[7] In order to deal with this appeal from the Master it is necessary to recite some background to this case. The salient parts of the history seem to me to be as follows:

18 July 2007	-	All monies mortgage deed was executed by the appellant/defendant incorporating the standard mortgage conditions of December 2006 of the bank; the defendant acknowledged receipt of a copy of these documents upon execution of the mortgage deed, witnessed by his then solicitor Mr Glen Breen of Sheen Dickson Merrick. The amount of the advance was £600,000.
17 May 2011	-	Appellant/defendant's mortgage called up by the plaintiff.
5 December 2011	-	The plaintiff/respondent issued an originating summons for possession.
20 June 2012	-	There was a hearing before Master Ellison which was contested whereupon an Order for possession was granted in favour of the plaintiff/respondent.
2 July 2012	-	The appellant/defendant issued a notice of appeal from the decision of Master Ellison.
14 September 2012	-	The appellant/defendant's appeal was listed for hearing before Deeny J but the defendant did not appear and the appeal was dismissed.
7 October 2013	-	The appellant/defendant issued an application for a stay of the Order for possession before the Enforcement of

Judgments Office. This was filed on his behalf by McCann and McCann solicitors.

8 October 2013 - There was a hearing of the appellant/defendant's application before the Enforcement of Judgments Master whereupon the application was dismissed.

9 October 2013 - The appellant/defendant issued an application for a stay of the Order for possession before Master Ellison.

11 February 2014 - An order of Master Ellison was made suspending the Order for possession on the basis that the defendant pay the usual monthly instalments along with £556.34 in respect of arrears on or before the last day of every month commencing 28 February 2014.This amounted to a total of £2560.

May 2015 - The appellant/defendant stopped making the payments in accordance with the Order of the 11 February 2014 in that he began to pay the sum of £1,280 only.

26 June 2015 - The appellant/defendant issued an application to the Master for an Order striking out the Order for possession/amending the Order for possession.

9 July 2015 - The plaintiff/respondent put the defendant on notice of the intention of the plaintiff to seek leave to enforce the Order for possession if payments are not brought up to date before the hearing of the defendant's latest application.

8 January 2016 - The hearing took place before Master Sweeney.

[8] It is apparent from the above there is a long history to proceedings in this case. The issue in this appeal is whether the Master was correct to lift the suspension which was placed upon the Order for possession and whether she was correct to dismiss the appellant's application made in his summons of 26 June 2015 to strike out the Order for possession/amend the Order for suspension.

[9] I have read all of the papers provided to me and I heard submissions from the appellant in person and Ms Mulholland BL on behalf of the respondent.

[10] The appellant based his case on the fact that he said there was no valid loan agreement. He provided documents to the court showing two signed mortgage deeds in relation to the property. The documents were produced for the first time in this appeal. The appellant said that documents proved that there were two different

agreements, and that there was therefore a fraud perpetrated by his previous solicitors or the Ulster Bank. The appellant also referred to a lack of original documents. He submitted that the Ulster Bank had failed to return a sworn statutory declaration which he had sent to the bank. He submitted that the respondent should be ordered to verify documents upon affidavit and he submitted that the respondent had not provided full discovery.

[11] The appellant referred to the payments he made when he successfully obtained a suspension of the possession Order. He referred to a total sum of £53,760 paid by him between 2013 and 2015. He also stressed that he was continuing to make payments of £1,280 albeit not the amount agreed. The appellant submitted that he was not in default because due to the absence of a valid loan agreement there is no 'usual amount' and the arrears have been calculated without a valid loan agreement being in place. The appellant said that he had only become aware of this defect in 2015 and that the respondent had failed to recognise this issue despite his correspondence since then. As a result of this the appellant said that he had no option other than to bring the matter back to court.

[12] The appellant referred to various other matters in support of his case. He referred to the fact that the subject property is in fact land locked by a strip of land between the property and the main A26 road. He said that this strip of land has been in the control of the Boyes family under the E T Boyes Trust Settlement 1960. The appellant claimed that various debts were owed to the trust. The appellant argued that as a result of these matters the subject property has decreased in value. The appellant complained that he had not been provided with an updated valuation of the property.

[13] In the letter dated 4th March 2016 from the appellant he states that he does not now accept the authenticity of the original document produced in court by the respondent's solicitor. When I asked the appellant why he did not state this at the hearing he struggled to give a reply and simply said he had thought about the matter further. The appellant also stated in court that he now disputed that Master Ellison had seen the original document. This was contrary to his acceptance of that position at the hearing. Again the appellant could give no proper explanation for his change of heart.

[14] In his letter the appellant asserts that "it has been well documented in recent press releases that banks are producing counterfeit documents." The appellant submitted that the document comprising the legal charge should be forensically checked. He continues in his letter by submitting that the Ulster Bank should make a statutory declaration and swear an affidavit in relation to the documents provided to court. He states that there has been a concerted effort by a range of parties including various solicitors, the Ulster Bank and the Department of Justice/Northern Ireland Office, to have him adjudicated bankrupt. In his letter the appellant relates this to issues regarding land at Maghaberry, the ET Boyes Trust and alleged fraudulent land deals. The appellant asserted that the parties involved are using the court to

cover up fraud and corruption. These assertions were made without proof and cannot be equated with fact.

[15] Many of the arguments raised by the appellant are of no relevance to this appeal. The core issue in this appeal is whether the original Order made by Master Ellison on 20th June 2012 should be struck out because it was not properly made. The appellant asserted that this should happen because there was no valid legal charge upon which to base the Order. I am not persuaded that the letter of 4th March 2016 raises any new issues which bear upon my determination of this appeal. The appellant had made various allegations of fraud and collusion in the appeal papers which he repeated in oral submissions. The appellant also submitted at the hearing that the respondent should be ordered to file a statutory declaration and an affidavit verifying documents. The appellant has changed his mind about matters he agreed at the hearing but he has not provided any explanation as to why. The additional letter does not prevent me from making a decision on the core issue in this appeal. I consider that the letter was simply a calculated and desperate attempt by the appellant to delay matters further.

[16] At the hearing Ms Mulholland BL made measured submissions in relation to all of the points raised by the appellant. She referred me to the summons and the affidavit brought in the original possession proceedings before Master Ellison and sworn by Andrew Metcalfe on behalf of the plaintiff Ulster Bank Limited and dated 27 February 2012. Exhibit 1 marked "AM1" to that affidavit attaches a copy of the mortgage deed signed by the appellant and dated 18 July 2007. The appellant did not actually dispute his signature on that document and I consider that a copy was sufficient proof. However for the avoidance of any doubt I asked that the original of this document be provided in court for inspection. The appellant inspected it in open court and confirmed his signature on the original document and he confirmed that one of the mortgage deeds he produced in court accorded with Exhibit 1 attached to the affidavit of Andrew Metcalfe of 27 February 2012. The appellant appears to have changed his position after the hearing but he gave no convincing reasons for this change of heart.

[17] Ms Mulholland explained why there was a second mortgage deed in existence. She submitted that it is common practice to have two mortgage deeds signed one of which is lodged in the Land Registry and the other with the borrower's solicitors. She explained that there is nothing sinister about this and I accept that explanation. The formatting is slightly different in the two documents but they are each signed by the appellant and represent the same mortgage deed.

[18] Ms Mulholland also referred to the fact that the appellant had made payments on foot of the charge which led to his suspension application being successful. From February 2014 to August 2014 the full amount of £2560 per month was paid on foot of Master Ellison's order of 11th February 2014. In August 2014 the normal monthly amount increased by £30 a month but other than that the full

amount was paid until 30 April 2015. From May 2015 the appellant began paying a reduced amount of £1,280 per month.

[19] Ms Mulholland said that the mortgage deed was clear in referring to the standard terms and conditions of the bank and that corresponded with the amounts due and indeed the amounts originally paid by the appellant. Ms Mulholland submitted that the bank could apply to lift the stay at any time under Section 36 of the Administration of Justice Act 1970 and she submitted that the bank did so apply to lift the suspension on the Order for possession in the context of the proceedings brought by the appellant. That application was ultimately determined by Master Sweeney alongside the appellant's summons.

[20] Ms Mulholland submitted that the appellant's original summons to Master Sweeney should be dismissed on the basis of the principle of res judicata enunciated in Henderson v Henderson (1843) 3 Hare 100 and applied by Girvan LJ in the case of Rafferty v GB Finance Group Limited and Another [2013] NICA 21. In essence Ms Mulholland said that Master Ellison had the correct proofs when he heard the bank's case for a possession Order and as such he made a valid Order. Ms Mulholland referred me to the appellant's own affidavit in those original proceedings that is an affidavit sworn by the appellant on 4 May 2012. Paragraph 1 of that affidavit states:

> "I am the registered owner of the property at 21 Glenavy Road, Moira, Craigavon, County Antrim being the lands comprised in Folio AN37411 (the property). I charged the property to the plaintiff by charge dated 18 July 2007."

[21] It is clear from this affidavit that the appellant accepted the charge and further that the appellant successfully applied for a suspension of the Order for possession due to the payments he made. Ms Mulholland characterised the appellant's case as a delaying tactic given that the Order for possession was made over three years ago.

[22] I am determining this as an appeal from a Master under Order 58 of the Rules of the Court of Judicature of Northern Ireland 1980. I have conducted this appeal as a re-hearing of the case. I afforded both parties an opportunity to present their arguments in full. The appellant presented as a capable man and I note that he has conducted his own litigation for some time. Having listened carefully to the parties' submissions and having read the documents filed in this case I consider that there is very good reason to believe that the principle of res judicata is applicable. However even if the application of that principle is not fatal to this appeal I consider that there is no merit in any of the arguments made by the appellant.

[23] At the hearing before Master Ellison the affidavit of Andrew Metcalfe exhibited a copy of the mortgage deed. In these proceedings I have seen the original mortgage deed as has the appellant. The respondent did verify on affidavit the

documents grounding the original Order for possession. The appellant issued an appeal against Master Ellison's Order but he did not prosecute that appeal before Deeny J. I am not convinced about his explanation for this which seemed to be that a solicitor failed to attend to adjourn the matter on his behalf.

[24] During the course of this hearing the appellant did not dispute his signature on the mortgage deed. He submitted that there were two deeds. However I accept the submissions of Ms Mulholland in relation to the practice that there are usually two signed mortgage deeds, one to be lodged in the Land Registry and one to be retained by the borrower's solicitor.

[25] I have heard nothing which would allow a court to look behind the Order made by Master Ellison in 2012. This was a valid Order. The Order was subsequently suspended by the Master in 2014 to allow the appellant to make payments to fend off possession by the bank. I am not persuaded that a fraud has been committed before Master Ellison when he made the Order for possession. I consider that the proofs were in order and the Master was entitled to make the Order which he did.

[26] The appellant cannot dispute the amounts due under the mortgage deed. Firstly this deed was governed by the standard mortgage terms and conditions which were sent to the appellant. Secondly the appellant paid the full amount due each month including arrears (save that he was £30 a month short for a period) from February 2014 until May 2015.

[27] The appellant successfully applied for a suspension of the Order for possession on the basis of his repayment proposal in 2014. There was no challenge to the validity of the Order for possession at that time. The appellant has changed his position on the basis of knowledge which he says he gained in 2015. I can find no basis for the appellant's claim there has been a material change which would invalidate the Order for possession. Rather it appears to me that the appellant's argument has been contrived by him at a time when he could not meet the amount of the repayments due. I am also convinced on the basis of the appellant's conduct in these proceedings, that he is intent upon delaying matters.

[28] The appellant accepts that the respondent could apply to lift the suspension on the Order for possession and he takes no issue with the procedure adopted by the respondent. In default of the payments previously agreed, I consider that the respondent was entitled to make that application.

[29] I consider that the Order of Master Sweeney of 8th January 2016 was correct in both respects. I consider that the Master was correct in her decision to dismiss the appellant's application to revoke or suspend the original Order for possession made by Master Ellison. I also consider that the Master was correct in her decision to grant the respondent's application to remove the suspension on the Order for possession.

[30] Accordingly the appeal is dismissed.