Neutral Citation [2017] NICh 11

Ref: **HOR10258**

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

Delivered: **29/03/2017**

2012 No 096758

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

CHELSEA BUILDING SOCIETY

Plaintiff;

and

STEPHEN THOMAS MURRAY
ELIZABETH EILEEN FRANCES MURRAY
PHILIP GERALD McCANN
MARGARET CAROLINE McCANN

Defendants.

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HORNER J

A. INTRODUCTION

[1] This is an application for leave to appeal out of time against the Order for Possession made by Master Ellison on 16 August 2013 giving the plaintiff, as mortgagee in possession of those lands comprised and known as 21 Ardmore Road, Crumlin, County Antrim and comprised in Folio AN16573 County Antrim ("the Property"). The Property includes:

(a) A dwelling house occupied by the first and second defendants ("the defendants").

(b) A modular structure at the rear of the property occupied by the third and fourth defendants ("the parents"), the parents of the second defendant.

[2] Although this application to extend time for leave to appeal was heard some time ago, at the request of the parties time was given to allow them to come up with an arrangement to discharge the indebtedness due to the plaintiff and/or come to some compromise agreement that would render these proceedings nugatory. I am informed that there is no prospect of any compromise being achieved, relationships appear to have broken down irrevocably and the court is required to give its judgment.

B. BACKGROUND FACTS

[3] It is necessary to set out and understand the background circumstances against which this application has to be determined. The defendants are the daughter and son-in-law of the parents. Both the defendants and the parents reside at the Property. The defendants live in the parents' former house and the parents live in a modular house constructed at the rear of the 1.5 acre site. The plaintiff is the mortgagee of the Property, it claims, and it took the Property as security for a loan of £150,000 which was used to pay off the mortgage due to the Woolwich Building Society ("the Woolwich"), which amounted to just over £72,000. And also, the court was told, to release some equity which was to be used, inter alia, in the construction of the modular home.

[4] There are related proceedings. The defendants have sued Countrywide Surveyors Ltd ("Countrywide") alleging negligence in respect of the survey and valuation of 21 Ardmore Road. Although the Property was originally valued as being worth in excess of £200,000 by Countrywide, the Property now suffers from subsidence which it is claimed the Countrywide Surveyor negligently failed to "pick up". The Property in its current state cannot be sold on the open market. Apparently it has site value only.

[5] Allied to this the defendants have brought a claim against the solicitors relating to their failure to obtain an opinion from counsel and commence proceedings well before 5 September 2014 when proceedings were finally instituted. I am not at all clear what has happened to those proceedings and what has to be done to ensure they are ready to go to trial.

[6] The circumstances of the defendants and the parents can be summarised as follows:

(a) The parents bought the Property in 1973 and resided in the bungalow for over 30 years. It has 4 bedrooms. The site also includes a shed. The property extends to 1.5 acres.

(b) The parents agreed to sell the bungalow to the defendants provided they could erect a modular home on the land at the rear of the bungalow. This did not require planning permission.

(c) The defendants obtained a valuation from estate agents valuing the bungalow at £225,000 but as I have stated the defendants planned to use the money to pay off the Woolwich mortgage and release equity to allow them to erect a modular home on the back section of the lands.

(d) The parents alleged Mary O'Toole, the Solicitor acting for both the parents and defendants, failed to tell the parents that they were not entering into a

resale but rather into a re-mortgage. The parents thought that they were selling the bungalow to the defendants and retaining the back section where their modular home was to be located.

(e) The application for re-mortgage was completed by the second defendant, their daughter. It alleged wrongly that the parents were leaving part of the property to the defendants by Will, which was incorrect as the parents did not have a Will. The second defendant claimed that she was buying her parents' house for £220,000 when in fact the property had been valued at £225,000.

(f) The parents are not clear if they signed various letters but they are certain they did not sign the letter of 20 September 2007. They did sign the mortgage application form but did so without reading it or knowing its contents. They presumed that it was a document to do with the defendants buying their bungalow. The signatures to the Schedule of Requirements document are not those of the parents.

(g) Documents relating to the application to alter the mortgage from repayment to interest only payments in March 2009 were not signed by either of the parents. The direct debit to make the payments was signed by the defendants.

[7] The personal circumstances of the defendants and the parents also need to be understood.

[8] The parents are both over 70 years of age and have 4 children. The father, the third defendant, has suffered from chronic depression for over 30 years and from diabetes. The mother, the fourth defendant, was diagnosed with breast cancer in September 2007 and she received treatment for up to one year. She then had an unexpected reoccurrence in October 2015. The present proceedings have exacted an enormous toll on the health of both the parents.

[9] The parents claim that they were not on notice of the existence of the possession proceedings. They claim the Possession Order of 16 August 2013 was not served upon them. The first they knew of the existence of the possession proceedings they claim is when they were informed by the EJO that they were about to be ejected.

[10] The parents have issued proceedings against the solicitors claiming that they failed to fulfil the professional duties owed to them.

[11] The second-named defendant has also set out some important information as to her circumstances. They are:

(a) She suffered a brain aneurysm in May 2015.

(b) The first-named defendant experienced a transient ischaemic attack in May 2009. He has since been unfit for work and was made redundant in 2013.

(c) The defendants agree that the arrangement they had with the parents was that the parents would be left the land at the rear to locate their modular home as they were only buying the bungalow.

(d) She cannot understand why the land on which the modular structure has been erected is part of the security as she expected the land to be split.

(e) She did not expect her mother and father to join in the re-mortgage.

(f) She has little memory of the re-mortgage process because of the aneurysm but is certain that she was only mortgaging the house.

(g) She denies forging her parents' signature but agrees she mislead them as she did not understand the nature of the transaction herself. She says that "I would never have signed my parents' name to a document without their permission". She does accept that she signed the parents' names to a document converting a repayment mortgage to an interest only one.

[12] In its affidavit the plaintiff has raised a number of issues in response to these various claims. These include the fact that the parents had signed and executed the mortgage deed re-mortgaging the property and also signed other documents. They were not blind and illiterate. They cannot claim that this is a case of "non est factum". They are bound by their signature: see L'Estrange v F Graucob Ltd [1934] 2 KB 394.

[13] There are attendance notes from O'Toole & MacRandall which are inconsistent with the case the parents now make. They clearly demonstrate, it is alleged that the parents knew of the existence of the Order for Possession on 9 December 2014 at the latest.

[14] The parents have responded to the plaintiff's claims by claiming:

(a) The attendance notes of solicitors are privileged; and

(b) They had no meeting with Mary O'Toole in December 2014 and they knew nothing of any Possession Order.

[15] It is clear that this court cannot possibly resolve the various factual and legal disputes dividing the various warring factions on this application. It will be necessary to receive oral testimony and to observe the parties and their witnesses give evidence under cross-examination.

C. APPEALS OUT OF TIME

[16] Order 58 of the Rules of the Supreme Court (NI) (1980) provides that an appeal to a Judge from a decision of the Master, as here, must be brought 5 days after delivery of the judgment -

(i) Except as provided by Rules 2 and 3, an appeal shall lie to a Judge in chambers of any judgment, order or decision of a Master, or of a (district judge) in exercise of any probate jurisdiction.

(ii) The appeal shall be brought by serving on every other party to the proceedings to which the judgment order or decision was given or made a notice to attend before the Judge on the day specified in the notice.

(iii) Unless the Court otherwise orders, notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the date fixed for hearing the appeal.

(iv) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of proceedings in which the appeal is brought.

[17] Valentine on Civil Proceedings at 11.08 states that:

> "The five day limit is of course extendable under Order 3 rule 5, but there must be some material for exercising a discretion to do so, however short the delay."

[18] In Davis v Northern Ireland Carriers [1979] NI 19 Lowry LJ reviewed the various authorities and set out the principles which should apply to an application to extend the time for an appeal. These can be summarised thus:

(1) An application made before expiry of the time will be more favourably received, if the reason is good;

(2) If the time has expired, the extent of the default;

(3) The effect on the respondent and whether he can be compensated on costs;

(4) Whether there has already been a hearing on the merits or a refusal of an extension would deny it;

(5) Whether there is a point of substance that will not be heard if refused;

(6) Whether there is a point of general, not merely particular importance;

(7) The rules are there to be observed.

[19] The principles set out in Davis are not to be applied mechanistically. Gillen J said in Benson v Morrow Retail [2010] NIQB 14 at [19] that the principles in Davis should not be viewed as a "series of hurdles to be negotiated in succession by an appellant with the loss of the right to obtain an extension if he cannot pass any one or more of them".

[10] The principles set out in Davis v Northern Ireland Carriers may be seen as guidelines which, if followed, will ensure that the overriding objective is achieved, namely that each case, in this instance an appeal out of time, is dealt with justly.

[11] I consider that on the basis of the affidavit evidence it would be proper to grant an extension to permit the parents to appeal out of time. I take all the guidelines into account but I am heavily influenced by the following:

(a) The parents on their case (which is untested) had no warning that there were possession proceedings and the visit of the EJO came as a bolt from the blue. Mary O'Toole was not representing their interests when she completed the memorandum of appearance.

(b) There will be no hearing on the merits if the application is refused.

(c) There may be points of general importance namely when can the doctrine of subrogation be called in aid by the plaintiff (see below) and when does a lender have notice of undue influence.

[12] Mr Gibson for the plaintiff anticipating that the court might adopt such an approach presciently argued that any defence being raised by the parents was doomed to fail because of the doctrine of subrogation. He argued that because the plaintiff had provided the money to pay off the Woolwich Building Society, the plaintiff was entitled to stand in the shoes of the Woolwich and to enforce the security the Woolwich had, albeit if it was only for the sum of approximately £72,000. There was oral argument as to whether subrogation applied and both the plaintiff and the parents have submitted written papers on whether or not subrogation does provide a knockout blow to the parents' appeal, assuming that the parents' evidence is accepted by the court as being truthful.

D. SUBROGATION

[13] Snell's Equity (33rd Edition) at 39-091 states:

> "A mortgage lender may be able to obtain priority and to overcome the problem of a voidable mortgage by resort to the doctrine of subrogation. In broad terms if moneys advanced by a mortgage lender are used to discharge a security the lender will be subrogated to the rights under

> that security and obtain priority over encumbrances subsequent to that security. It has been held that there are three conditions to be satisfied before the doctrine can operate. First, the subsequent encumbrancer must have been enriched at the lender's expense. Secondly, such enrichment must have been unjust. Thirdly, there should be no policy reasons for denying the mortgage lender a remedy."

[14] In Banque Financiere de la Cite v Parc (Battersea Ltd) [1999] 1 AC 221 Lord Hoffman analysed the remedy of subrogation. He said that it is now:

> "…a mistake to regard the availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral. Such an analysis is inevitably to be propped up by presumptions which converge on outright fictions, more appropriate to a less developed legal system than we now have … [Outside of cases where the parties have contracted for subrogation,] it should be recognised that one is here concerned with the restitutionary remedy and that the appropriate questions are therefore, first, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust; and thirdly, whether there are nevertheless reasons of policy for denying a remedy."

He went on to say that:

> "Subrogation is … an equitable remedy against a party who would otherwise be unjustly enriched."

[15] In this case the parents claim they are the victims of undue influence exerted upon them by the defendants and that the plaintiff had actual or constructive notice of this undue influence. This raises difficult issues and again is unsuited for determination in the present application on the papers. It is sufficient to record that it is by no means clear that there was actual or presumed undue influence or that the plaintiff had actual or constructive notice of it. However, it is fair to say that the parents have raised serious issues of undue influence and notice. Detailed findings and a conclusion on these issues must necessarily await a court hearing.

[16] Undoubtedly the parents have been enriched as they have had their mortgage paid off. As subrogation is an equitable remedy designed to reverse unjust enrichment, a claim to be subrogated to a creditor's extinguished rights may be defeated or limited by any defence or bar that will defeat or limit any cause of action in undue enrichment. See 39-28 Goff & Jones, The Law of Unjust Enrichment (9th

Edition). In this case the parents claim that the parents' "notice" of the undue influence exerted on them by the defendants provides a complete defence. It is also clear that there has been a "change of position" on the part of the parents. It may be that when all the evidence is adduced, a court will conclude that the parents have no defence that will defeat or limit any cause of action in unjust enrichment. However, it would be wrong for me to conclude at this stage that the plaintiff has landed a knockout punch on the parents and that they should not have their defence heard and tested in court.

[17] On the parents' case they were unlawfully pressurised into re-mortgaging the whole of their property, when they only intended to sell part of it to the defendants. In doing so they doubled the amount of their debt. It is their case that the plaintiff had notice of this unlawful behaviour. It is difficult to see, if the parents are proved to be correct, and this is a matter for the trial, how they could be said in those circumstances to be unjustly enriched. They have undoubtedly suffered a change of position. There is an arguable case that if the parents can make good their claims against the defendants and the plaintiff, then the plaintiff will not be entitled to the remedy of subrogation. However, as I have said, that is a matter which I am not presently in a position to determine and which will require a trial.

E. CONCLUSION

[18] I consider that the interests of justice require that the parents should be permitted to appeal out of time. There are factual disputes that can only be resolved on the hearing of oral testimony and no such hearing has yet taken place. I do not consider that the plaintiff is bound to be able to rely on subrogation as a knockout blow because the parents, on their case, cannot be said to be unjustly enriched. However that is a matter that can only be determined after all the witnesses have given evidence.

[19] The better way of proceeding is for the Originating summons to be converted into a writ action. The case will then be pleaded in the normal way. I also consider that the other action brought by the parents against Countrywide and the proceedings against the solicitors should all be heard before the same Judge either before or after these proceedings. The parties should submit agreed directions for all actions and their disposal by 23 April 2017. If the parties cannot agree directions, then each party (and that includes those legal representatives acting for the solicitors and Countrywide) should submit their preferred directions 2 days before the first case management review which will involve all the parties and which will take place on 25 April 2017.