

Neutral Citation No. [2015] NICA 52

Ref: **WEI9702**

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

Delivered: **30/06/2015**

IN HER MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

JOHN DOHERTY AND MARY DOHERTY

Appellants;

-and-

**JAMES PERRETT, MATTHEW HUNT AND RACHEL FOWLE
OF TOUCHSTONE LENDER SERVICES**

Respondents.

Before: Morgan LCJ, Gillen LJ and Weir J

WEIR J (delivering the judgment of the court)

The background

[1] In December 2008 Mr and Mrs Doherty (“the mortgagors”) charged a dwelling house which they had purchased for the purpose of letting to The Mortgage Business Plc (“the mortgagee”) in order to secure the repayment of the loan which the mortgagee had advanced for the purchase. The mortgage deed was executed by the mortgagors and witnessed by their solicitor. The deed provided that it incorporated the mortgage conditions, receipt of which the mortgagor acknowledged.

[2] The mortgage conditions are contained in a detailed document entitled “The Mortgage Conditions 2007” (“the conditions”) and those applicable to mortgages in England or Northern Ireland are 43 in number with an accompanying glossary of technical words.

[3] As appears from the ex tempore judgment of Deeny J, the mortgagors subsequently fell on hard times and so defaulted on the payments due under the

mortgage. The mortgagee in pursuance of the powers conferred by the mortgage conditions then purported to appoint as receiver "James Perrett and Matthew Hunt of Touchstone Corporate Property Services Limited" ("Touchstone"). We observe in passing that the third-named respondent ought not to have been joined as a defendant to this action because she was never appointed as receiver but, being an employee of Touchstone, merely corresponded with the appellants on its behalf following the appointment of the first and second named defendants as receiver.

The dispute

[4] The mortgagors were displeased at the purported appointment of a receiver. A lengthy and unproductive correspondence ensued between someone writing on their behalf (as Mr Doherty is, he says, an uneducated person and Mrs Doherty appears to have taken no personal part in the dispute) and Touchstone on behalf of the purported receiver. Ultimately, by a document entitled "Notice of Motion to Remove Receiver", bearing the date 9 January 2014 (although somehow issued on 7 January 2014) and signed "J Doherty", application was made "to remove Receivers from the property. The grounds upon which the application is made are that the said Receivers were appointed by Touchstone Lending Services who were "in negotiations with ourselves ... in order to resolve on-going issues. Continuous requests have been made to Touchstone for documentation regarding our Mortgage situation. Touchstone have failed to furnish the said documentation requested. The said application would be grounded on the affidavit of John Doherty filed and served herewith".

[5] That affidavit was sworn on 9 January 2014 and complained of a failure on the part of Touchstone to provide the information previously sought and asking the court to remove Ms Fowle, Mr Perrett, Mr Hunt and Touchstone from acting as receivers of the property until Touchstone disclosed the documents sought by their letter of 21 October 2013 to Touchstone which was exhibited to the affidavit. That letter contains many and various requests and statements, not all of which can be readily understood. The one matter contained in it that bears upon the appointment of a receiver is the request for "documentary proof that The Mortgage Business Plc has any rights to appoint a receiver on the above property i.e. a contract bearing our wet marks".

[6] A supplemental affidavit was sworn by Mr Doherty on 13 February 2014 in which he complains that joint receivers could not be appointed because the Conveyancing and Law of Property Act 1881 ("the Act") by Section 24 provides for the appointment by a mortgagee of "such person as he thinks fit to be receiver" which implies the appointment of a single rather than multiple persons and that, accordingly, the appointment of more than one person as receiver contravenes the Act. The affidavit concludes by asking the court to remove the receiver (and Ms Fowle) "as their appointment is void and not in compliance with the Act".

[7] A Ms Hughes, solicitor acting for the defendants, swore an affidavit in reply on 26 February 2014 in which she said that, since a matter of law had been raised in the appellants' affidavit, she was replying in kind by pointing out that she had been advised by counsel that Section 37 of the Interpretation Act (NI) 1954 ("the Interpretation Act") provides that in an enactment words in the singular shall include the plural.

[8] In a document entitled "Plaintiff's Final Written Submission to Dismiss Receivers" filed on 12 March 2014 the crucial proposition advanced was that there was no power under the mortgage conditions to appoint more than one receiver and therefore the purported appointment of a joint receiver or two receivers was invalid.

[9] In the course of his ex tempore judgment Deeny J dealt with the proceedings against the purported receivers and also a separate set of proceedings brought by Mr Doherty against the mortgagee for alleged failure to provide him with inspection of documents relating to the mortgage which proceedings the judge dismissed and against which decision no appeal has been brought.

The hearing before and the decision of the trial judge

[10] Mr Doherty, being as we have said uneducated, was given permission to have a Mr Ben Gilroy appear as an advocate on his behalf while it was made clear that such was not to be regarded as a precedent. In his judgment Deeny J acknowledged Mr Gilroy's articulate and helpful contribution. Before us Mr Gilroy was again, exceptionally, given permission to act as advocate for Mr Doherty and again his submissions were crisply presented and to the point. It seems that the matter was heard before Deeny J on a number of separate dates and that in the course of those hearings a miscellany of points was canvassed on behalf of the mortgagors. Those germane to the grounds of appeal to this court were:

- (1) That the appointment of a joint receiver or more than one receiver was invalid.
- (2) That the defendant had not produced to the mortgagors the entire 37 pages of the mortgage conditions but only 24 of those pages so that "the missing 13" were not produced to or considered by the trial judge.
- (3) That there was no evidence confirming that the mortgage had not been assigned or securitized by the mortgagee which would have disentitled it to have appointed a receiver at all.

[11] In relation to the first of these matters, the appointment of a joint receiver or joint receivers, the learned judge accepted the submission of the respondents that Section 37 of the Interpretation Act permits "receiver" to be construed as "receivers" and, further, that if that were not the case the first named receiver's appointment would still be valid even if that of the second named receiver were not.

[12] The second ground of appeal is not expressly dealt with by the judge in his judgment but it may nevertheless have been the subject of argument before him as he makes clear in his judgment that he does not deal expressly with all the various matters addressed to him on the three occasions when the matter was before him. By implication however, if the point was raised, he must have rejected it as he concluded that the appointment of the receivers was valid.

[13] The third ground of appeal was the subject of affidavit and oral evidence on behalf of the mortgagee which the judge reviewed in some detail and accepted, leading him to conclude that he was satisfied that the mortgagee was the lawful holder of the mortgage and entitled to appoint Mr Perrett and Mr Hunt on 23 January 2013.

Consideration

[14] Whether the first and second defendants were validly appointed as receivers out of court must depend upon the terms of the mortgage deed and any condition shown to have been incorporated by it. The second ground of appeal, which may be dealt with shortly at the outset, relating to the alleged missing pages from the Mortgage Conditions is without substance as all the conditions relevant to a mortgage of property in Northern Ireland are contained within the 24 pages that the appellant acknowledges he did receive. The “standard conditions” that are contained in the pages that follow relate only to properties situate in Scotland and therefore could have no bearing upon the mortgage of the subject property and required no consideration by the trial judge.

[15] With regard to the first ground of appeal the provisions of the Act so far as material are as follows:

“19(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

.....

- (iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgage property, or of any part thereof.”

The provisions of the mortgage conditions so far as material are:

“16. When the debt has to be repaid immediately

If any of the things mentioned in this condition happen, you must pay us the debt immediately.

16.1 If you do not pay any two monthly payments (they do not have to be consecutive) except where the flexible options apply to your mortgage and give you the right not to pay them.

17. Our right to take possession of the property

17.1 If you must pay off the debt immediately under Condition 16, we may:

.....

(c) Use the other powers given to mortgage lenders under the Conveyancing Acts 1881 and 1911 (if the property is in Northern Ireland).

(d) Use the extra powers we have under these conditions.

18. Our right to appoint a receiver

... If you must pay off the debt immediately under Condition 16 we may appoint a receiver ...

.....

Any receiver appointed by us will be considered as your agent and you will be solely liable for his actions.”

[16] It does not appear to have been challenged before Deeny J and was not before us that this mortgage was validly entered into by the mortgagors and subject to the mortgage conditions. Nor has it been disputed that, owing to their default, the obligation to pay the debt immediately had arisen before the challenged appointment of the first and second defendants as receiver on 23 January 2013. It is not clear whether the authority of the person who executed the Deed of Appointment on behalf of the mortgagee was challenged before the judge and that matter formed no part of any of the written grounds of the appeal to this court. Rather, the sole question in issue before the judge in relation to the Deed of Appointment appears to have been as to the power to appoint two named persons as the receiver rather than one. We consider, in agreement with the conclusion of

Deeny J, that as Condition 17(c) incorporates the provisions of the Act relating to the appointment of receivers and the provision of the Interpretation Act earlier noticed enables the singular to be read as plural there can be no valid objection to the appointment of two persons as receiver or, as the case may be, two receivers. We therefore conclude that the first ground of appeal must fail.

[17] That leaves the third ground of appeal, the alleged securitization of this mortgage. Little can be said to advance this ground as it is contrary to the express finding of the judge who, having considered the affidavit evidence on behalf of the respondents and the oral evidence of one of those deponents upon which he was apparently thoroughly cross-examined by Mr Gilroy, the judge reviewed the evidence at length and found as a fact that this mortgage had not been securitized and that the Mortgage Business Plc was and is the lawful mortgagee and was entitled to appoint the first and second respondents. No submission has been advanced before us either that the judge misunderstood the facts or misapplied the law in reaching that conclusion nor is any such error apparent to us. Accordingly on this ground also the appeal must fail.

[18] Although that disposes of the grounds of the present appeal, the skeleton argument lodged on behalf of the appellants for this appeal raises at paragraphs 2 and 3 an issue as to whether the purported appointer of the receiver was duly authorised to make the appointment. It is not clear whether this issue was ever raised before the judge and, if so, how it was determined. Accordingly we have decided to remit that discrete issue to Deeny J for his consideration and, if need be, determination.

[19] We will receive submissions from the parties in relation to costs.