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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 14/6/2017*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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RYAN ANDREW FULTON, ERNEST FULTON
AND
CYRIL FULTON

-v-

AIB GROUP (UK) PLC

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Before: Gillen LJ, Weatherup LJ and Weir LJ

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GILLEN LJ (delivering the judgment of the court)

[1] These appeals before us are against judgments of Sir Paul Girvan and Madam Justice McBride ("McBride J") on foot of a number of applications arising out of properties at 3 Regent Wood Belfast and 13 Malone Square Belfast ("the premises") in the case of Ryan Fulton and Units 1-4 Balmoral Plaza Boucher Road Belfast in the case of Ernest and Cyril Fulton as set out below. We have given an ex tempore judgment on the matter on the day of hearing. At the request of Mr Ernest Fulton we undertook to set out our reasoning in a written judgment.

[2] Mr Ernest Fulton has a Power of Attorney to represent his brother Ryan and his father Cyril. He acts for himself in his own capacity. No point is taken about that by the respondents for whom Mr Gowdy appeared.

[3] Accordingly Mr Ernest Fulton properly has presented all the cases before us.

[4] The first appeal is that of Mr Ryan Fulton. Mr Ryan Fulton appeals against a decision of Sir Paul Girvan sitting as a deputy High Court Judge. The background to this case was that an order of possession of the premises was made by Master Kelly on 9 February 2016 in favour of the bank AIB Group UK Plc. It was made on the basis that the Court had been satisfied that there were valid securities in respect of the premises

and that there had been a breach of the covenants in relation to the encumbrances and the mortgages and that the bank was entitled to recover possession.

[5] The orders made by the Master did contain a proviso that on application by summons for sufficient reason the court had power to vary, discharge, stay or suspend the Order if it appeared likely that the defendant would be able to pay arrears of instalments of the entire mortgage within a reasonable time.

[5] Ryan, for whatever reason, had not appealed that original order and the time for appeal is now long spent. He had then sought to avail of Section 36 of the Administration of Justice Act 1970 provisions to seek a review of the circumstances dealing with the enforcement of that decision. The purpose of the legislation is to look again as to whether or not enforcement can be postponed or can be revised where, for example, there is an opportunity for money to be paid.

[6] The problem confronting Mr Fulton is that as a result of not appealing the original Master's decision the validity and enforceability of the charge has been determined conclusively. GB Finance Group Plc v Rafferty [2013] NICA 21, is authority for the proposition that the Order should not be reopened absent an appeal.

[7] The case was heard before Sir Paul Girvan. He, in a judgment which he gave ex-tempore and which we have had an opportunity to see and to read, has clearly set out reasons why there was no basis for a review at that stage. The only ground for the Court revisiting the matter would have been under Section 36 of the Administration of Justice Act 1970 if it appeared to the Court that the mortgagor was likely to be able, within a reasonable period, to pay any of the sums due and no such evidence surfaced during the hearing.

[8] Sir Paul Girvan set out in detail the reasons why he felt compelled to refuse the application. We have, as I have said, read that judgment. We consider it to be flawless. It sets out all the reasoning and, frankly, there is nothing that we can find to add to it. As Sir Paul Girvan said the question which arises is whether the Court should allow the appeal from the Master or affirm the Master's decision. It is incumbent in this appeal for the defendant to adduce satisfactory and sufficient evidence to persuade the Court that it is likely that the defendant would be able to pay the arrears within a reasonable time.

[9] The deputy judge went on to say that the proposals that were put before him were all very speculative. It depended on a number of hurdles being overcome and there was no clarity at all that the appellant would have been able to recover a significant amount of money as a result of the various steps that were open to him.

[11] The defendant bore, as he does with us, the onus of persuading the Court on the balance of probabilities that there would be funds coming available within a reasonable period and Sir Paul Girvan took the view that there were no such grounds.

[12] We are driven to the same conclusion. Therefore, on that appeal, we confirm the decision of Sir Paul Girvan and we dismiss the appeal.

[13] That brings us then to the appeals involving Ernest and Cyril Fulton. The background to this matter is that there was a statutory demand made against the appellants arising out of a repayment due to the respondent Bank. The appellants allege that Units 1-4 Balmoral Plaza Boucher Road Belfast, which were owned by Fulton Fine Furnishings Ltd a family firm involving the appellants, were sold at a gross undervalue by the administrators of the respondent to Sam Morrison in August 2013 for £1.75m whereas in fact they were valued by CBRE in February 2013 at between £4m and £5m. It is further alleged that the premises were subsequently revalued on 8 September 2015 by CBRE at £4.75m.

[14] The respondent mounted and obtained a statutory demand against the appellants on 15 May 2014. The application by the appellants to set that aside, which came before the Master on 24 October 2016, failed. There was then an appeal against that by the appellants and that was to be heard before McBride J.

[14] By summons dated 6 May 2016 Ernest and Fulton sought "orders and directions to enable evidence to be adduced in respect of complicit behaviour whereby AIB (Group) (UK) …. engaged with the administrative receivers of Fultons Fine Furnishings Ltd (FFF Ltd) and a business controlled by Sam Morrison in a manner that has unlawfully deprived the stakeholders with just interests of £3m worth of valuable consideration and that pending the determination of the foregoing issue the statutory demand proceedings be suspended".

[15] McBride J recorded in her judgment that in a further affidavit of 21 October 2016 Ernest Fulton clarified that he sought "the respondent to provide full and frank disclosure of all in context documentation connected to the processes herein and that there be a court direction for a PSNI investigation".

[16] McBride J refused the application for discovery. She refused leave to appeal.

[17] The substantive appeal before McBride J was postponed by her pending the outcome of an appeal against her decision on disclosure. It is an appeal against that refusal of disclosure by McBride J that is before us. It is accompanied by an application for subpoenas against various people, including Counsel and solicitor for the respondents and others, to produce the discoverable documentation.

[18] McBride J's judgment on the discovery matter deals with the legal principles governing disclosure in insolvency cases. She understandably addresses Order 24 of the Rules of the Court of Judicature (NI) 1980.

[19] The background to disclosure in insolvency cases is found under the Insolvency Rules (Northern Ireland) 1991, Rule 6.005 and Rule 7.45. Those rules essentially indicate that the basis upon which disclosure would ever be granted is subject to the Rules set out in Order 24. We take the view that the gravamen of the Rules under the Insolvency Rules Northern Ireland, 1991, are governed by the same approach to discovery under Order 24 of the Rules of Court of Judicature. That means that there are two tests for disclosure. The first is necessity and second is relevance.

[20] Turning to the question of necessity. It has to be borne in mind that the substantive issue does not arise from a High Court action. This is not a case where a writ has been issued. This is a case of statutory demand. A statutory demand is a proceeding which is dealt with as a means of ensuring that such claims can be dealt with swiftly, concisely and comprehensively. It is an interlocutory process conventionally conducted purely on affidavit evidence and before discovery has occurred.

[21] Ulster Bank Ltd v O'Neill [2015] NICA 64 is authority from this court that it is not the role of the court in statutory demand proceedings to decide the issue but rather to simply ask itself whether an arguable defence, that is a defence with some prospect of success, has been raised. Thus it is clear that, when dealing with cases involving a statutory demand, disclosure is not the usual avenue to be explored for the perfectly logical reason that the hurdle is set very low in applications for the setting aside of statutory demands. What must be demonstrated is simply an arguable case.

[22] Such proceedings do have a certain procedural resonance with applications for summary judgment with which the Court is also very familiar.

[23] As indicated in paragraph [13] above the case made by Mr Fulton essentially is that the sale of Balmoral Plaza to Boucher Developments Limited (which is in the hands of Mr Morrison) was at a gross undervalue. In short, he says that the sale by the Administrator, the business having been put into administration, secured a sum of 1.75m which was considerably below the true value.

[24] It is the belief of Mr Fulton that there has been a conspiracy on the part of the Bank, along with Mr Morrison, to bring about this undervaluation. He asserts that the claim he makes for disclosure, hopefully, will reveal that conspiracy and that he wants to have all the documentation relevant to that sale which is in the possession of the Bank.

[25] The difficulty he faces is that the substantive matter before the court is an application to set aside a statutory demand. There is in his possession an affidavit from CBRE indicating that the value of the property was £4m. That in itself would prima facie provide an argument for him to set aside the statutory demand provided all other elements were in his favour.

[26] The fact of the matter is that in cases of this kind where the hurdle is so low, the costs should be commensurately modest, the court time involved short and accordingly the time consuming rigours and expense of disclosure are not conventionally necessary. There may be, of course, exceptional circumstances where disclosure may be necessary provided the two tests of necessity and relevance are established but that should be sparingly invoked.

[27] However in this case we are satisfied that McBride J came to the right decision when she concluded that necessity had not been established. She said that the application for setting aside a statutory demand:

- depends on affidavits where the substance of the grounds are to be found
- is normally before the stage of discovery,
- is short and
- is less costly without the normal vicissitudes of seeking discovery.

[28] She found no basis to vary the conventional approach in this instance. We agree with her conclusion. We find no reason to consider that she has been in error in concluding that the necessity test has not been established in this case.

[29] Mr Gowdy, who has argued this case on behalf of the Bank, submitted that:

- there is unequivocal evidence that the appropriate party to bring these proceedings should have been FFF Ltd and not the individual appellants ,
- that the sale was carried out by the Administrator and the Company was the link with the Administrator and not these appellants.

[30] McBride J accepted this argument and determined that the appellants failed also on the second ground of relevance. She found that in essence the documents made clear that the alleged sale at undervalue was of an asset owned by the limited company and not the appellants. She determined that the sale was carried out by the Administrators, who were not agents of the Company and that the claim for undervalue should involve the Company bringing a claim against the Administrative Receivers. In her view the relevance test was not met by the appellants.

[31] We do not consider that we need to come to a conclusion on that question of relevance. An argument has been put before us today that there is a crossover between

the Company, the partnership and indeed the individual directors which needs to be further argued. It may well have to be looked at again when the substantive matter comes before McBride J.

[32] Mr Gowdy has also raised the question of whether this application is all to no avail because even if the entirety of the alleged value of £4m had been realised it would not have met the substance of the statutory demand given the arithmetic involved. We again consider it is not necessary for us to go into that at this stage. That may well be a matter that will feature before McBride J at the substantive hearing.

[33] Suffice to say that we are satisfied that the application in front of McBride J for discovery was correctly decided by her and we affirm her decision. Accordingly, we also come to the conclusion that there is no basis for the subpoenas now being sought as they arise out of the claim for disclosure. If discovery is not appropriate, then the subpoenas are not appropriate.

[34] The end result is that we refuse the appeals by the appellants in each of these cases. We add that the essence of the failure of the case of Ryan has been because, arguably, the appropriate avenue to pursue the remedy he seeks is perhaps to seek to obtain an extension of time to appeal against the decision of the Master determined in February 2016. That may provide an avenue to be explored by Ryan/Ernest in this case although of course that is a matter to be determined entirely by the Master.

[35] Secondly, so far as the application to set aside the statutory demand in the case of Ernest/Cyril is concerned, in truth if this matter of a conspiracy is to be pursued, and we make no comment whatsoever as to whether there is substance in that or not, the avenue to be explored might be along the lines of writs being issued either by the Bank, if the statutory demand is set aside, or by the present appellants against possibly the Bank, possibly the Administrator and Receiver, possibly Mr Morrison. Once again it is entirely a matter for the appellants to take their own course and legal advice on these issues would be in their best interests.

[36] It is in such arenas where discovery might have a better chance of success. Certainly, these present proceedings are not the appropriate avenue to pursue.

[37] Hence, we have to dismiss these appeals.

[38] In closing we note with concern some troubling correspondence that has been passing between Mr Fulton and the Court staff and, indeed, the other side. Phrases such as "this is nonsense" are not helpful in the legal context and we would strongly encourage any further exchanges emanating from the Fultons to the opposition solicitors to be completed with the politeness and courtesy which was a distinguishing feature of that well-known firm when it was in business.

[39] Secondly, and perhaps even more importantly, we found troubling the tenor of the exchanges with the Court staff. Court staff are hardworking people who are not lawyers, who do not have representation and they do not merit impolite or strongly worded criticisms of them. It doesn't help the case, it simply serves to create an atmosphere which is wholly unsuitable for litigation at this time. We, therefore, strongly exhort the appellants in this case to bear this in mind in future correspondence with the Court staff.