

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

Delivered: 24/02/2017

2013 No 108723

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

BETWEEN:

GODIVA MORTGAGES LTD

Plaintiff;

and

MICHAEL ANTHONY DOYLE

First-named Defendant;

and

ROISIN DOYLE

Second-named Defendant.

HORNER J

Introduction

[1] The plaintiffs' claim is for an order for possession of 1 Lothair Avenue, Belfast. The defendants, Michael Anthony Doyle ("MD") and Roisin Doyle ("RD") are the owners and mortgagors of this property. They are in the midst of a bitter and acrimonious divorce. They are also hopelessly in arrears in respect of mortgage repayments. Indeed, MD and RD are also in arrears in respect of other mortgages secured on other properties such as 15 Cavehill Road and 28 Baltic Avenue. There is no dispute that the terms of the mortgage of 1 Lothair Avenue, Belfast, have been breached and that substantial arrears have been accrued. However, MD claims that he never mortgaged his share in Lothair Avenue and that he is the victim of a fraud perpetrated by RD and his eldest son, Anthony Doyle ("AD") aided either wittingly or unwittingly by various professional persons who failed in their professional obligations towards him. There has been a detailed examination of the somewhat byzantine property and financial arrangements of the Doyle family in the present proceedings. There are pending ancillary relief proceedings between MD and RD and these proceedings form an important backdrop to the present dispute. It is impossible not to conclude that at least some of the evidence has been manipulated by the parties to improve their respective positions in the ancillary relief proceedings which are to follow on from this judgment.

Background Facts

[2] MD and RD were married on 20 April 1981. They have three adult sons, AD, Kieran Doyle and Eamon Doyle. MD is a plasterer by trade. However, he appears to have pursued other business interests which included being the part-time owner of a taxi firm with RD, being the joint owner of Doyle's Sweet Shop with AD and also investing in buy to let properties, mostly with RD. He is now working as a sports massage therapist. RD is in full-time employment as a nursery nurse but suffers from a nervous complaint. She takes a variety of anti-depressants.

[3] During the course of the marriage the parties acquired the following properties jointly:

- (a) 15 Cavehill Road, which was the matrimonial home.
- (b) 1 Lothair Avenue.
- (c) 7 Clanchattan Street.
- (d) 28 Baltic Avenue.

[4] MD acquired 23 Clanchattan Street in his sole name.

Some of these properties were let, but not the matrimonial home at 15 Cavehill Road which was, I understand, repossessed in 2014 because of arrears. Some of the properties had been vested and compensation paid but it is not entirely clear how much compensation has been paid and to whom. Certainly some of the properties retained are in substantial negative equity. It is clear from the evidence that MD and RD were experienced in re-mortgaging properties so as to, if necessary, release equity which could be used for re-investing in other properties and/or obtaining better terms.

[5] MD and RD separated in 2006 as husband and wife. In 2007 MD moved to work in Liverpool, England. He would have returned to Belfast every 3-6 weekends. When he did so, he stayed at the matrimonial home at 15 Cavehill Road. His mail was directed to that address and AD had authority to open letters, although there is a dispute about the extent of that authority.

[6] On 18 November 2008 an online application form for a mortgage of Lothair Avenue was completed by MD's mortgage broker, Select Mortgage Solutions ("SMS") on behalf of MD and RD. The documents, it is alleged, that were signed and/or completed by MD and RD were:

- (a) The terms of business.

- (b) The data protection form.
- (c) The client fee agreement.
- (d) The consent.
- (e) The client confirmation.
- (f) A statutory declaration.
- (g) The direct debit.
- (h) The mortgage deed.

[7] On 9 December 2008 Gary McKibben Preservation, Damp Proofing Specialist, who was going to treat the dampness in Lothair Avenue, sent a letter to MD at 15 Cavehill Road. A mortgage offer was made to MD and RD in respect of Lothair Avenue on 12 December 2008. McKenna Sweeney McKeown, solicitors ("MSM") were retained by a letter of retention which was subject to the CML Lender's Handbook. Kathryn Menown was the solicitor in MSM who purported to act on behalf of MD and RD in the mortgaging of Lothair Avenue. It is relevant to point out that she was the subject of a penalty imposed by the Solicitors Disciplinary Tribunal on 17 June 2011 as a result of which she was "struck off" the Roll of Solicitors. This was successfully appealed to Stephens J who imposed a less severe penalty. She accepted that she was guilty of three charges of professional misconduct. These complaints related to the time when she was working for MSM. The charges of misconduct included one of permitting disbursements in relation to conveyancing matters and not recovering those from the clients so the accounts did not tally. More seriously she was found to have taken £8,000 from an estate to cover up her own professional failings. She left MSM in 2009 shortly after she had purported to act for MD and RD.

[8] On 18 December 2008 a Certificate of Title was forwarded to MSM Solicitors. On the same date a Memorandum of Sale in respect of 26 Baltic Avenue was signed by RD, by RD on behalf of MD and by AD but it was not signed by MD. On 23 December 2008 a charge deed in respect of Lothair Avenue was reportedly executed by both MD and RD. On the same date £98,000 was drawn down by MSM in respect of the defendants. Out of that sum a cheque for £17,191 was released to AD. The remaining monies were used to purchase Baltic Avenue. There was also money invested in the business known as Doyle's Sweets. It was from here that AD on behalf of himself and MD ran a confectionery business. On 15 January 2009 and again on 2 February 2009 two instalments for the mortgage in respect of Lothair Avenue were taken from MD's Santander bank account. By 9 February 2009 the Godiva charge was registered against 1 Lothair Avenue. Subsequently, Baltic Avenue was re-mortgaged. The deed relating to this re-mortgage was signed on 30 October 2009 by AD, RD and MD. On 4 November 2009 Andrew Walker, the

Solicitor for MD sent a letter to MD and RD at 15 Cavehill Road confirming completion of the re-mortgage of 28 Baltic Avenue and that a balance on the account of £77,497.50 had been transferred to the nominated account. On 18 December 2009 Baltic Avenue was registered in their joint names. Sometime in 2010 MD and AD met Andrew Walker at Ten Square, the restaurant, to discuss, inter alia, this re-mortgage which had taken place at Baltic Avenue. On 21 January 2011 a Credit Union Loan was taken out in the name of MD.

[9] On 31 October 2012 Higgins Hollywood Deazley (“HHD”), the solicitors acting for RD wrote to Andrew Walker stating:

“We await your client’s proposals for payment of the mortgage in Lothair Avenue.”

On 9 January 2013, Andrew Walker, Solicitor for MD, wrote to RD’s solicitors, HHD stating:

“We would ask you to note that your client has once again paid Godiva Mortgages the sum of £387.26 as your client has not deposited money into the joint account ...”

[10] There is then various correspondence between MD and SMS and between MD and Andrew Walker. It is clear that giving MD the benefit of every doubt, he must have known at the very latest on 31 January 2013 that £100,000 had been secured on Lothair Avenue because Donna Marks of MSM told him expressly in an email. His immediate reaction was not of someone who had discovered a fraud. In fact, he did very little then to advertise that he was the victim of a fraud. His actions tell their own tale. By the end of February 2013 MD had asked Andrew Walker to obtain his file from MSM. He has also asked in April 2013 that Andrew Walker should obtain paperwork from the Land Registry. On 29 April 2013 MD entered into email correspondence with Keith Hanna of SMS.

[11] On 26 September 2013 MD requested a meeting with Andrew Walker to discuss a “mortgage fraud”. In September 2013 MD attended at the offices of MSM on two occasions and following these visits MSM reported a fraud to Godiva on 18 October 2013. On 24 September 2013 Mr Damien Collins of SMS met MD when MD came to pick up a copy of the Lothair Avenue file. When MD complained of a fraud, Mr Collins said he would report it to Godiva Mortgages. MD said that if he did so then he would deny the fact that any fraud existed. It rather seems from what he said to Mr Collins that MD was worried that such an approach would affect his prospects of agreeing a settlement with RD (and AD). I will discuss this attendance later in the judgment.

[12] On 14 November 2013 a letter was sent to the Chancery Court by Andrew Walker on behalf of MD claiming that the first-named defendant was not a party to the mortgage which was the subject of the possession proceedings brought by the

plaintiff on 24 October 2013. In the same month MD reported the fraud to the PSNI. He followed this up with a written statement of complaint on 17 November 2017. The remaining term of the mortgage on Lothair Avenue was 7 years and 2 months, the current arrears were £17,091.24 and there was a balance due of nearly £119,000. The premises are currently valued at £75,000. During the course of the hearing there were many issues raised and explored. These included:

- (i) The purchase and re-mortgage of Baltic Avenue, which is closely linked to the re-mortgage of Lothair Avenue.
- (ii) The purchase and running of Doyle's Sweet Shop.
- (iii) The loan from the Credit Union, the Credit Union cheque and AD's alleged forgery of MD's signature.
- (iv) MD's threat to kill AD.

However, it is important to appreciate that while these issues might throw some light in determining the credibility of the central protagonists, the sole issue for determination before this court is whether MD re-mortgaged his interest in Lothair Avenue to the plaintiff, and if he did not, whether his conduct and knowledge in some way precludes him from opposing the plaintiff's application for possession. I do however propose to look in some detail in the claim that MD did not understand that there was a re-mortgage of Baltic Avenue, but believed it to be a purchase. This is because the 2 transactions are closely linked and the facts are similar in that they relate to a re-mortgage of property owned by RD and MD. They allow the court an opportunity to assess the credibility of MD in particular.

The Parties and their Witnesses

[13] The central issue, namely whether the plaintiff was entitled to obtain an order for possession of 1 Lothair Avenue should be a straightforward one. However, the internal family dynamics of the Doyle family, the bitter separation of MD and RD, the outstanding application for ancillary relief and the mutual antipathy between father and son made the determination of the central issue much more difficult. This was truly a family at war with accusations of forgery, a threat to kill, intimidation and theft all being made during the course of proceedings.

[14] I found all three Doyles, MD, RD and AD to be unsatisfactory witnesses. All three impressed me as being witnesses who were quite prepared to swear to whatever appeared to be in their own interests regardless of the truth of the matter. To that end I felt unable to place any weight on their individual testimonies. The old truth that actions speak louder than words never had greater force. I considered it important to judge their claims against their objective actions and the reactions of others.

[15] The conduct of Kathryn Menown of MSM fell below the standard that should reasonably be expected of a competent solicitor. While I appreciate that she was operating under some degree of pressure at work and that there were extenuating circumstances, her failure to make any attendance notes of any meeting that she had with any member of the Doyle family placed her in all sorts of difficulties. Quite understandably she has no independent recollection of any meeting with MD. She said that each client would have had to provide identification documents to her but she had not kept copies of such documents. She witnessed the signature of MD but she had no recollection of meeting him. She said:

“I have witnessed the signature and assume I met him.”

She was unable to say why £17,191 was paid out to AD and could point to no written instructions. She was adamant that the balance money was used to purchase Baltic Avenue. Again there were no written instructions. I did not consider her to be a dishonest witness. She appeared to do her best to assist the court and I found her to be credible, if incompetent, in her dealings with the Doyles.

[16] Some witnesses did perform well in the witness box. The evidence of Anthony Reavey of SMS was credible, as was that of Keith Hanna his Manager. Mr Andrew Walker, MD’s solicitor, later on in these transactions and Mr Damien Collins of MSM seemed to do their best to tell the truth when they gave their sworn testimonies of their dealings with the defendants. I felt that I could rely on their evidence.

Discussion

[17] MD swears that he did not sign the mortgage deed at the end of 2008 (or other documents signed on 18 November 2008) at the offices of MSM. He says that the signature on the mortgage deed is not his and relies in support of this claim on the expert evidence of Dorothy Allan, a Forensic Scientist. She was asked to give her opinion on the genuineness of MD’s signature on the mortgage deed only. She was not asked to comment on other apparently similar signatures which appear on other contemporaneous and disputed documents (eg direct debit of 18 November 2008). Her conclusion is that while it is not impossible to entirely exclude the possibility that “MD signed the Mortgage Deed in a style different from his normal signature” there is moderately strong support for the proposition that the questioned signature on the mortgage deed was written by *someone other than* MD. She describes her findings as moderately strong.

[18] However, unlike Ms Allan, I have had the opportunity of watching MD give his testimony over a considerable period of time. It did not make reassuring viewing. He was not an impressive witness. It appeared that when he was challenged on key issues he gave the impression he was making it up as he went along. The manner of his delivery, his body language and his discomfort in the witness box all spoke of someone who was not telling the whole truth and who was

trying to mislead. This strong impression was reinforced when I consider his evidence against independent information and other events upon which I could rely and also when I compared his behaviour with what I would have expected from someone in the position he claimed to find himself, that is someone who had been the subject of a massive fraud.

[19] My reasons for not finding MD credible in his claim that he knew nothing about the Lothair Avenue re-mortgage at the time it took place, apart from his performance in the witness box, include the following:

- (a) I found Anthony Reavey to be a convincing and truthful witness. I preferred his description of his dealings with MD. According to MD they met once by chance. Anthony Reavey says this is not true and it was not a chance meeting. There are detailed documents, such as MD's passport on SMS's file that is inconsistent with the chance encounter described by MD. These documents are required if SMS is to comply with the guidance of the Joint Money Laundering Steering Group as it is obliged to do. SMS is audited from time to time and checks are made to ensure that these guidelines are adhered to. I also note that included within the SMS documentation is MD's mobile number. It is highly unlikely that RD and/or AD if they were defrauding MD would give SMS the mobile number of MD so that he could be contacted and the fraud uncovered.
- (b) Mortgage repayments of 15 January 2009 and 2 February 2009 were taken from MD's bank account without demur from MD. After that AD made the repayments in accordance with the arrangement AD claims he had with his father, MD. It would make no sense for the person(s) carrying out a fraud to alert the victim of a fraud to what had been done by funding it through payments from the victim's account. There is no good reason why AD would compromise his fraudulent act by having the early repayments taken out of MD's bank account. Furthermore, the reaction of MD is also critical. A victim of a fraud is likely to have acted immediately on finding out that payments were unlawfully being deducted from his account. MD's initial response to what was theft from his account was to claim that no payments had been taken out of his account. This position was subsequently abandoned by MD when it became clear that it was untenable in the face of clear objective evidence showing the deductions from his bank account. No satisfactory explanation for this failure to respond to these "fraudulent" deductions has been offered to the court.
- (c) MD also had to explain how he came to pay five monthly instalments in the Lothair Avenue mortgage in 2012. His explanation was risible. He claimed he received a reminder from Godiva at 15 Cavehill Road about unpaid mortgage instalments and mistakenly thought that the notice related to the Cavehill Road mortgage. This was despite the fact that the mortgage taken out on Cavehill Road was with the Birmingham and Midshires Building

Society and the amount of the monthly instalment for Cavehill Road was different from Lothair Avenue. Furthermore, at that stage the Cavehill Road instalments were up to date so the reminder could not have applied to 15 Cavehill Road.

- (d) My assessment of Kathryn Menown was such that I do not believe that she would have signed the mortgage deed if she had not witnessed MD's signature.
- (e) Finally, MD's solicitor, Andrew Walker, wrote to HHD on 9 January 2013 stating:

"We would ask you to note that your client has one again paid Godiva Mortgages the sum of £387.76 as your client has not deposited money into the joint account."

It is difficult to imagine a complaint more inconsistent with the claim that the re-mortgage of Lothair Avenue had been effected by fraud. MD's complaint through his solicitor is not that Lothair Avenue had been fraudulently re-mortgaged, but that he had to pay monthly instalments, the direct product of the fraud which is now the subject of MD's complaint.

[20] MD claims in his affidavit that it was only on 31 January 2013 that he uncovered the fraud. He says he reported it to his solicitor at the time, Andrew Walker and that he then subsequently contacted the plaintiff and the PSNI. But he waited until November 2013 before he let the outside world know, namely when Andrew Walker was given authority to write to the Chancery Office on 14 November 2013. Of course, by that stage the plaintiff had issued proceedings. There is force in the claim that MD seemed to use the allegation of fraud as a means of trying to improve his personal position whether in relation to his wife and son or in relation to the plaintiff. I can think of no good reason why, if MD had been the subject of a fraud, he did not do something about it immediately he discovered on his own case what was happening, namely report it to the police. This is especially important as he was advised to report it.

[21] The evidence of Damien Collins of MSM who met MD on 24 September 2013 suggests that he may have used the allegation of fraud to try and improve his position in his dispute with RD and AD. During this conversation with Mr Collins MD twice stated that if MSM contacted the plaintiff to allege that there had been a fraud, he would deny it. Why would an innocent man react in such a manner if he truly was a victim of such a "sting"? The assessment of Damien Collins was that MD was "very evasive" about the re-mortgage of Baltic Avenue.

[22] MD also claimed that he thought that the Baltic Avenue transaction in 2009 was a purchase and not a re-mortgage. This meant that he had to deny any knowledge about the purchase of Baltic Avenue in December 2008. However, MD's

story was wholly unsustainable when examined in detail. It provided further proof that MD was prepared to confabulate when it suited his own purposes. There were simply too many holes in the story for MD to plug. He had to go out on a limb when he claimed that he did not know that Baltic Avenue was re-mortgaged and in doing so he was exposed as someone who was content to lie when it suited him to do. I highlight a number of different matters. These include:

- (a) MD was well used to re-mortgaging property as I have observed earlier in this judgment. In this case he claims that although he believed he was purchasing a property, that is Baltic Avenue, there was no memorandum of agreement for him to sign.
- (b) If MD is right, this would have been a mortgage like no other. Not only was the lender going to loan the full market price of the property, it was also going to contribute further money well in excess of the market price to allow repairs to be effected. It gave a loan to value of well in excess of 100%. Such a mortgage should have struck MD as being highly unusual.
- (c) No deposit was sought from the vendor.
- (d) There was no stamp duty or tax forms to complete.
- (e) Mr Walker, the solicitor, who acted on MD's behalf, was in no doubt it was a re-mortgage. Yet, according to MD, he somehow failed to communicate this to MD. Despite this obvious failing on Mr Walker's part (according to MD) no complaint was ever made by MD to the Law Society nor have any proceedings been brought against Mr Walker. On 2 October 2009 and on other occasions Mr Walker wrote to MD and RD about the re-mortgage of 28 Baltic Avenue. The correspondence was sent to 15 Cavehill Road so MD may claim he did not receive it. But Andrew Walker witnessed the mortgage signed by AD, RD and MD. His evidence was that he told MD exactly what was happening. MD made no complaints to the police about this transaction. He has never complained to Mr Walker that he had misled him. He has never complained to the Law Society about Walker's performance. Indeed, Mr Walker's evidence to the court, which I accept, was that MD knew that this was a re-mortgage of Baltic Avenue and that he had discussed this with MD.

[23] Further, if MD is right and RD and AD hoodwinked him about the re-mortgage of Lothair Avenue then Mr Reavey, whom I considered to be a credible witness, was party to an obvious fraud. This raises the question as to what was in it for Mr Reavey. Why would he destroy his good reputation by making a fraudulent mortgage application? The same applies Ms Menown. It is also worth noting that in none of MD's emails to Donna Marks of SMS on 31 January 2013 or thereafter when he had discovered the fraud does MD make the allegation that he did not sign the re-mortgage deed for Baltic Avenue.

[24] When all the evidence is assessed, including that of Ms Allan, Forensic Scientist, there can be no real doubt that MD signed the mortgage deed fully intending that he and RD would re-mortgage Lothair Avenue.

[25] If I am wrong in this conclusion, then it is necessary to consider the fall-back position of the plaintiff, namely whether if he did not sign the mortgage deed for Lothair Avenue, MD is in some way precluded from disputing the plaintiff's entitlement to possession of the property.

[26] For the reasons which I have given I am completely satisfied that it was the common intention of MD and RD (and AD) that Lothair Avenue should be re-mortgaged and the cash used to purchase Baltic Avenue. If the deed effecting the re-mortgage was signed not by MD but by RD or AD or some other person pretending to be MD, then that person did so giving effect to this continuing common intention. Accordingly, any right or interest of MD in Lothair Avenue is subject to the plaintiff's mortgage and does not afford any defence to the plaintiff's claim for possession. In Bristol & West Building Society v Henning and Another [1985] 2 All ER 606 a husband and wife purchased a property and in order to raise the purchase price a legal charge was granted to a building society. The property was conveyed to the husband alone and neither the conveyance nor the legal charge suggested he was anything other than the sole beneficial owner of the property. However, the husband and wife separated with the woman remaining in the property with the children. A consent order was made to claim that she had a one half beneficial interest in the property. No further mortgage instalments were paid to the building society by the husband. Proceedings for possession followed. The claim was dismissed at first instance on the basis that the wife had an irrevocable licence to remain in the property which conferred on her a property interest and that she was not estopped from setting up her equity and furthermore the building society had constructive notice of her rights. The Court of Appeal held that since the woman knew of and supported the proposal to raise the mortgage price of the property by a mortgage, it was impossible to impute to the defendants any common intention other than the man's trustee was to have a power to grant a mortgage to the building society which would have priority over any beneficial interests in the property. Accordingly, if the wife had any equitable right or interest in the property, such right or interest was subject to the building society's charge and did not afford a defence to the building society's claim for possession.

[27] Browne-Wilkinson LJ said at 608(i):

“There is a risk that the common sense answer in this case may get lost in the many different technicalities which can arise. The basic fact is that the mortgage was granted to the Society with the full knowledge and approval of Mrs Henning. There was a joint project between her and Mr Henning to buy the Devon house

with the assistance of such mortgage. Without it, the Devon house could never have been bought. Yet Mrs Henning is alleging that she has the right to stay in the Devon house in priority to the rights of the Society which provided the bulk of the purchase money for it. Although she has unsuccessfully tried to find some way of paying the instalments under the mortgage, the logical result of her argument (if right) is that she is entitled to stay in possession indefinitely without making any payment. That would be a strange result which I would be reluctant to reach.”

[28] The same reasoning applies with equal force to the present circumstances. MD knew all along that Lothair Avenue was being re-mortgaged to allow Baltic Avenue to be purchased.

[29] Finally, if I am wrong in my conclusion that there was a common intention that RD and MD would mortgage their interests in Lothair Avenue to raise money, then I am satisfied that within a short term, namely after the instalment was taken out of MD’s bank account on 15 January 2009, MD knew that Lothair Avenue had been mortgaged to the plaintiff. Despite acquiring this knowledge, MD acquiesced in what had happened. In doing so he caused the plaintiff to act to its detriment as it would otherwise have called in the mortgage. The behaviour of MD was unconscionable. Therefore, he is estopped and/or precluded from now taking the point that he did not sign the mortgage deed relating to Lothair Avenue.

Further Thoughts

[30] Given my conclusions of what happened in respect of Lothair Avenue, I do not consider it necessary to determine conclusively:

- (a) whether AD spent the £17,191 he received from the re-mortgaging of Baltic Avenue on repairs;
- (b) whether AD ran Doyle’s Sweet Shop dishonestly;
- (c) whether the number of expensive motor vehicles apparently owned by AD represented the fruits of his criminal wrongdoing on his behalf; and
- (d) whether MD threatened to kill AD.

These are matters which do not bear on the main issue, namely whether a mortgage was raised on Lothair Avenue without the knowledge, consent or approval of MD. They may help explain the mutual loathing and animosity harboured by MD and AD towards each other.

Conclusion

[31] Given my finding that MD signed the mortgage deed for Lothair Avenue, he is bound by its terms. In those circumstances there can be no defence to the plaintiff's claim for possession of these premises. There is no doubt that MD has been guilty of opportunism and sought to exploit, for example, the failure of Kathryn Menown to keep written attendance notes. I am also satisfied that MD has used these proceedings to try and improve his position in the acrimonious ancillary relief application which is presently before the court.

[32] I will hear the parties on the issues of whether or not there should be a stay of enforcement and, also, on the issue of costs.