

Neutral Citation: [2017] NICH 7

Ref: McB10243

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

Delivered: 21/03/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

Between

HSBC BANK LIMITED

Plaintiff/Respondent

and

IVAN ROBINSON

Defendant

and

LOUISE ROBINSON

Proposed Second Defendant/Appellant

McBRIDE J

Introduction

[1] This is an appeal by the proposed second-named defendant/appellant, Louise Robinson, (“the appellant”) against the decision of Master Hardstaff made on 27 October 2016 whereby he refused her application for a stay of execution of an order of possession dated 20 January 2015, in respect of property comprising 67.8 acres of land situate at Ravara Road, Ballygowan, and contained in folios 24165, DM2367, 27996, 32755, 22825 and 27997, Co Down (“the lands”).

[2] The plaintiff/respondent bank was represented by Mr Gibson and the appellant was represented by Mr McCausland. I am grateful to both counsel for their well-researched and marshalled skeleton arguments.

Background

[3] In or around 2008 the plaintiff advanced monies to the defendant, which were secured against the lands by way of a first charge.

[4] The defendant failed to pay the sums when due and owing and as a result the plaintiff issued proceedings for possession of the lands on 23 September 2011.

[5] An order for possession was made on 21 December 2011. The defendant issued a summons on 8 October 2012 seeking a stay of execution of the order. On 28 January 2015 the defendant consented to the dismissal of the stay application, on condition that the order for possession be stayed for a further period of 12 weeks.

[6] On 17 October 2016 the appellant, issued a summons seeking an immediate stay of execution of the order for delivery of possession dated 20 January 2015 and further sought an order that she be joined as a defendant to the proceedings.

[7] The matter proceeded by way of a contested application before Master Hardstaff. On 27 October 2016 he dismissed her application.

The Appellant's Claim

[8] In her grounding affidavit sworn on 17 October 2016 the appellant seeks a stay of the possession order on the basis she has an equitable interest in the lands.

[9] The appellant is the only daughter of the defendant. She was born on 18 January 1984. Her mother died in February 1987. She avers that she acted to her detriment in the expectation and on the understanding that in due course she would be given the lands by her father. The appellant avers that from the age of 10 years she assisted her father on the farm before and after school and at weekends. When she left school she attended Harper Adams Agricultural School, Shropshire, England, to better equip her to take over the management of the farm. When she returned to Northern Ireland in 2006 she obtained employment at Hilltown Livestock Market. She continued to work part-time on the farm for no payment. She used her income to pay various farm expenses and in 2007 took out a £10,000 loan to enable her father to repay farming debts he owed to the Bank of Ireland. Since 2013 she states she has paid all the farming expenses, which total approximately £8,000 to £10,000 per month.

[10] The appellant states that her father represented to her on numerous occasions that he would gift the farm to her. In reliance on this promise she acted to her detriment by expending money on the farm, committing time to the farm without remuneration and directing her education and career so she would be in a position to run the farm.

Submissions of the Appellant

[11] Mr McCausland submitted that the appellant had an equitable interest in the lands on the basis of proprietary estoppel in accordance with the principles set out in Taylor's Fashions Limited v Liverpool Victoria Trustees Co Limited [1982] QB 133 at 144:

“If A under an expectation created or encouraged by B that A should have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with the such land, a court of equity will compel B to give effect to such expectation.”

[12] He submitted that the appellant had established in her affidavit all the necessary ingredients of representation, detriment and reliance.

[13] He further submitted that in accordance with the principles set out in Williams & Glyn's Bank Ltd v Boreland [1981] AC 487 the appellant's interest took priority over the interest of the bank on the basis she was the owner of an equitable interest in the land and was in actual occupation of the property at the time the bank executed its legal charge.

[14] Mr McCausland submitted that unless the order for possession was stayed the bank would sell the lands to satisfy its security and the plaintiff's claim would as a result be rendered nugatory.

Submissions by the Respondent's Counsel

[15] Mr Gibson submitted that the true reason for the application was because the enforcement of the possession order was imminent. He submitted the claim based on proprietary estoppel was hopeless as there was no evidence that the appellant had acted to her detriment. Further, he submitted that even if she had a prima facie case based on proprietary estoppel any interest she had would not rank in priority to the bank's charge because there was no evidence she was in actual occupation at the time the bank executed its charge.

[16] Mr Gibson further submitted that the jurisdiction of the court to stay an order for possession was extremely limited. He relied on dicta in the case of Reichhold Norway ASA and another v Goldman Sachs International (A Firm) [2000] 1 WLR 173 at page 186 paragraph C when Lord Bingham said:

“Stays are only granted in cases of this kind in rare and compelling circumstances.”

[17] He further relied on dicta in Barclays Bank PLC trading as the Woolwich v Creggan Boyd, Paula Boyd [2015] NICh 16 when Deeny J stated at paragraph 44:

“I consider that the court has a discretion pursuant to Section 86(3) of the Judicature Act (Northern Ireland) 1978 to stay proceedings on equitable grounds. However, that discretion is only to be exercised in rare and compelling circumstances. The facts here fall far short of such circumstances as the defendant mortgagors have a claim which will be difficult to bring home and may well indeed be already statute barred.”

[18] Mr Gibson submitted that the high hurdle of “rare and compelling circumstances” was not made out in the appellant’s affidavit as the case had inherent weaknesses and there was delay in the application. For these reasons he submitted that the court should dismiss the appeal.

Relevant Legal Provisions

[19] Section 86(3) of the Judicature Act (Northern Ireland) 1978 provides:

“(3) Without prejudice to any other powers exercisable by it, a court, acting on equitable grounds, may stay any proceedings, or the execution of any of its process, subject to such conditions as it thinks fit.”

Proprietary Estoppel

[20] The classic threefold test of representation, detriment and reliance to establish proprietary estoppel was first enunciated in the case of Taylor’s fashion. Notwithstanding the approval and application of that threefold test in a number of subsequent cases, it remains the case that the essential driving force behind equitable estoppel remains the disapproval of unconscionable behaviour. A number of cases in this jurisdiction indicate that the courts have now adopted a unitary test of unconscionability see In Re Kane [2009] NI Ch 9, Johnston v Johnston [2008] NI Ch 11 and Little v Little [2007] NI Ch 7.

Priority of Interests

[21] Registered land is governed by the Land Registration Act (Northern Ireland) 1970. Schedule 5 lists the burdens which affect registered land without registration and at paragraph 15 it states as follows:

“The right of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where –

(a) upon enquiry made of such person, the right is not disclosed...”

[22] In Williams & Glyn’s Bank Ltd v Boreland the wife had an equitable interest in the property and was in actual occupation. The court held that in accordance with Section 70(1)(g) of the Land Registration Act 1925 (the English equivalent of Schedule 5 paragraph 15) the wife’s interest was a burden on the lands which took effect without registration. As this “burden” existed at the time the bank executed its charge, the bank was subject to her prior interest.

[23] In Ulster Bank Limited v Shanks [1982] NI 143 Murray J held that in accordance with Schedule 5 paragraph 15, there is only one way in which the rights of a person in actual occupation can be overridden by a purchaser or mortgagee, that is by the making of an enquiry of such a person which results in that person not disclosing his rights.

[24] Therefore, if an occupier has equitable rights and is in actual occupation at the time the mortgage is executed, the purchaser/mortgagee takes subject to these rights and the occupier’s rights will rank in priority to the bank’s interest unless upon enquiry by the bank, the occupier fails to disclose his or her rights.

Consideration

[25] This application raises two issues; whether the court has jurisdiction to stay a possession order and if so, the circumstances in which such a jurisdiction will be exercised.

[26] Section 86(3) of the Judicature Act (NI) 1978 sets out the discretion the court has to stay any of its processes.

[27] An earlier similar statutory provision was considered in Northern Ireland Housing Executive v McAuley [1974] NI 233 by Lowry LCJ, who stated at page 235:

“Its provisions, including the power to stay proceedings, can be invoked only for the purpose of protecting legal and equitable rights which exist or may be shown to exist.”

[28] Similarly, in Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 Lord Bingham upheld the following dictum from Moore-Bick J at first instance dealing with the equivalent power in the Supreme Court Act 1981, when he stated at page 179:

“The court’s power to stay proceedings is part of its inherent jurisdiction which is expressly preserved by section 49(3) of the Supreme Court Act 1981... I am in no doubt, therefore, that I do have jurisdiction to stay the present proceeding...”

[29] The appellant seeks a stay of the possession order to protect an equitable right which presently exists or which may be shown to exist. In accordance with the dicta of Lowry LCJ in NIHE v McAuley, dicta of Lord Bingham in Reichhold, I find that the court has a discretionary jurisdiction which can be invoked for this purpose. I therefore find that this Court has jurisdiction to stay the possession order.

[30] The second question which arises is, the circumstances in which I should exercise this jurisdiction.

[31] In Reichhold, Lord Bingham stated at page 179 B that the Court’s discretion to stay proceedings is:

“unfettered and depends only on the exercise of the court’s discretion in the interest of justice.”

[32] The circumstances in which an application for a stay might be made are almost infinitely variable. Most of the authorities dealing with the exercise of discretion are all fact specific and whilst this jurisprudence may give some general guidance, it does not lay down strict rules of principle of general application. In Boyd, for example, the application for a stay was made by the mortgagor. That is a very different context to an application by a third party seeking to stay proceedings on the basis that he or she has an equitable interest in the property. In my view very different considerations apply. Similarly, in Reichhold the parties were attempting to stay proceedings in the English High Court to await the determination of an arbitration in another country. In both these cases the Court found that a stay would be granted only in “rare and compelling circumstances”. I do not find that the court in these cases was setting down a strict rule for the application of the discretion in all stay applications. Rather, I find, the Court was stating that, in the particular circumstances of the case before it, the discretion would only be exercised in rare and compelling circumstances. The test for the exercise of the discretion remains whether the interests of justice demand that it should be exercised. The purpose of the discretionary power is to avoid injustice and I therefore find that the Court should not lay down rigid rules which would deprive it of its jurisdiction. Context is everything. For these reasons I do not accept the submissions of Mr Gibson that the exercise of the discretion is limited to “rare and compelling circumstances”.

[33] In determining whether the interests of justice require the exercise of the discretion, the Court, whilst not laying down rigid rules which would operate effectively to deprive it of its jurisdiction, should, in determining this question

consider all the circumstances of the case. In a case of this type I consider the following matters are particularly relevant:

- The identity of the applicant and the capacity in which she brings the claim.
- The nature of the claim being made.
- The strength of the case.
- Whether there has been undue delay in bringing the claim.
- Any prejudice which the defendant may suffer if a stay is granted.
- Any prejudice the applicant may suffer if the stay is not granted.
- Whether there are alternative forms of relief open to the applicant.

[34] This is a claim brought by the appellant, who was not a party to the original proceedings in which the possession order was granted. It is unclear whether she was notified of the proceedings but she was not a party to them and did not participate in them. As a 'third party' she is in a very different position to a mortgagor seeking a stay of a possession order.

[35] The appellant is seeking to make a claim that she has an equitable interest in the lands which ranks in priority to the bank's interest. In determining whether to exercise the discretion in such circumstances I consider that it is appropriate to consider the strength of the case. In determining the test to be applied I find guidance from the analogous discretion available to set aside a default judgment. In McCullough v BBC [1996] NI 580 Girvan J held that the court's power to set aside a default judgment was an 'untrammelled discretion' and a judgment should be set aside if a defendant could show that it was in the interests of justice that he be permitted to defend the action. In determining this question the court did not need to form a provisional view of the probable outcome. As Girvan J noted at page 584, "experience shows that provisional views of probable outcome can readily be shown to be fallacious when a matter is tried out". Rather if a defendant could show a "real triable issue" between the parties or a "serious question to be tried" justice will normally dictate that the matter be allowed to proceed to trial. If the court is satisfied a case is hopeless, for example, it is statute barred, then the discretion will not be exercised as it is not in the interests of justice to allow it to proceed to trial as this would delay the plaintiff's undoubted rights and send to trial a hopeless case with the attendant waste of time and money.

[36] Therefore in determining the strength of the appellant's case I have to decide whether there are "real triable issues" or a "serious question to be tried" or whether the case is hopeless on the basis, for example it is statute barred, as was the case in Boyd.

[37] Applying this test and taking the appellant's case at its height, as set out in the affidavit I find that there are real triable issues between the parties as to whether the appellant has an equitable interest in the lands and in particular whether she acted to her detriment and whether she was in actual occupation. I make it clear that in so holding I am not ruling the appellant will ultimately establish that she has

such an equitable interest in the lands. I am merely holding that there are real triable issues. It will ultimately be a matter for the trial judge to determine, in the light of all the evidence, whether she has such an equitable interest in the lands and whether her interest ranks in priority to the bank's interest on the basis she was in actual occupation of the lands at the time the bank executed its charge.

[38] Delay is also a factor to be taken into account in the exercise of the discretion. I do not find any evidence that the appellant has delayed unduly in this case although again this may be a matter to be explored further at trial in respect of whether delay acts as a bar to equitable relief.

[39] If the stay application is granted the bank's right to possession is of necessity delayed. It is not extinguished. In contrast if the stay is not granted the appellant's claim to the lands would be extinguished as the bank will sell the lands and the appellant will not be able to obtain the relief she seeks. Therefore, the prejudice to the appellant is not capable of remedy if a stay is not granted.

[40] For all these reasons I consider that it is in the interests of justice to grant a stay of the possession order.

[41] Under Section 86(3) of the Judicature Act (NI) 1978 the court can stay proceedings subject to such conditions as it thinks fit. I therefore grant a stay of the possession order on condition that the appellant issues a Writ endorsed with a Statement of Claim within 14 days of the date hereof. Thereafter the stay will remain in operation until further order of the court.

Conclusion

[42] I therefore grant the appeal and stay the order on the conditions set out at paragraph [41] above and I make an order joining the appellant, Louise Robinson as a defendant to the present proceedings.

[43] I will hear counsel in respect of costs.