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*Ex Tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **18/12/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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HSBC BANK PLC

v

MERVYN COULSON & ORS

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DEENY J

[1] The issue before the court today arises in the following way. On 7 April 2008, HSBC Bank PLC and two receivers appointed by them, David McClean and David Woolf of Moore Stephens, issued proceedings by way of originating summons against Mervyn Richard Coulson. Under those proceedings they sought payment of a debt secured by a mortgage and delivery by the defendant, Mr Coulson, to the plaintiffs of the possession of the premises described in the second schedule thereto.

[2] The second schedule hereto discloses that those premises were situated and known as 22 Portaferry Road, Newtownards, County Down and the conveyances therein described. These are not residential premises but were the business premises of Merkel Ltd of which Mr Coulson, his wife and daughter were apparently directors, with perhaps other people at other times. There is an affidavit in support of that from a Laura Gillespie of L'Estrange & Brett, as that firm was then known. In case I do not advert to it later in this ex tempore judgment, I want to criticise the far to ready use of the word 'fraud' and indeed the word 'fraudulent' by the plaintiff and his next friend. It is a tendency of some people to use language in that way. In

my view there is no proper criticism that I can see in these papers, of Pinsent Mason or of Miss Gillespie of that firm.

[3] The mortgage seems perfectly straight forward; an all monies mortgage. It was Mr Coulson who owned the property but he was giving a guarantee of his business endeavours and in order to secure lending from the Bank, gave a mortgage over the property which he owned. He didn't have to do that. It's very clear from the papers that the business of Merkel Ltd did not prosper. At a much later stage the documents show a series of debts owed by the company guaranteed by Mr Coulson whether in this mortgage or in separate guarantees or on his own dwelling house, although that is a separate matter. Indeed, Mr McGarvey, in his very helpful submissions, draws attention to a judgment of Mr Justice Gillen, relating to Mr Coulson where it was clear Mr Coulson was also indebted to the Bank of Ireland as well as to HSBC Bank at about the same time. A monetary judgment ultimately was entered on 11 December 2009 against Mr Coulson in the sum of £522,496.82. He has since been adjudicated bankrupt, an issue to which I will return.

[4] The Bank obtained a Possession Order from the Master on 8 June 2009. That was appealed but that appeal was dismissed by this court on 17 September 2009 and the Master's Order was affirmed. There is medical evidence that Mr Coulson was suffering from moderate depression at that stage, that is scarcely surprising given the failure of his business and the threats to his home and these other premises. Enforcement proceedings were started, I do not have the date of that but apparently when they were about to be carried out by the Enforcement of Judgments Office, an application was brought to this court to set aside the earlier Orders and that was brought on 27 May 2010.

[5] The defendant, Mr Coulson, subsequently brought an application to stay the Order for Possession a further time, the Order not having been enforced in the interval - I think I needn't go into every step in this very long matter – and that further application for a stay was dismissed by Master Ellison on 30 March 2012. An appeal was dismissed by this court on 8 May 2012. Mr Coulson then appealed to the Court of Appeal in Northern Ireland on 25 May relying on various matters including his illness but the Court of Appeal refused to extend time on 29 November 2012.

[6] In 2013, by a purported summons, we will call it a summons, of 6 December 2011, Mr Coulson, giving the same title as the original title of the action, issued a summons that the Order of the Master of 8 June 2009, as it appears to say, for a possession of premises situated as above be stayed and the defendant be granted such other relief as the courts should see fit. Again he was relying on his own poor health and what he alleged to be, "… the unauthorised removal of funds from our bank account by the bank" and he put in an affidavit and a supplementary affidavit and referred back to the earlier proceedings.

[7] So this was the second application for a stay of an Order for Procession, which had originally been made in 2009 relating to proceedings issued in 2008. The Master heard this on the 30th – that was the earlier application for a stay of enforcement I was quoting from and which I have already dealt with – it was not successful. The second application for a stay was brought on 19 April 2013 for a stay of enforcement of a re-possession order on the property known as 22 Portaferry Road, Newtownards. That was addressed by the Master perhaps on more than one occasion but certainly on 24 June 2013 when he declined to make any order on the stay but rather said that the plaintiff's may proceed to enforce their Order for Possession within 28 days and he gave 14 days in which to appeal his refusal of an Order and that was done on 8 July by a Notice of Appeal. The Notice of Appeal simply appeals the Order granted by Master Ellison.

[8] So the only matter lawfully before me is the appeal from Master Ellison. In an accompanying document, Mr Coulson sought to widen this out into an application to set aside the order for possession. I doubt whether this could have been a valid application after that period of time. Even if it was a valid application it should have been commenced before the Master. Even if it was, there has been no application to widen the stay of enforcement application and finally, the only new ground which might have justified such a widening was an allegation of fraud with which I propose to deal with in a moment.

[9] So the position is that there was an Order for Possession years ago, there was an attempt at a stay which went all the way to the Court of Appeal and was rejected by the Master, by this court and the Court of Appeal declined to extend time. There

was a further stay - it might have been best if the point now raised by HSBC had been raised the first time this was raised before me rather than a month later but in any event no prejudice has been caused by that.

[10] The matter came before me on 4 November and the issue of interrogatories was raised because Mr Coulson was still concerned that the Bank or its servants and agents have behaved improperly and I said that if he wanted to file and serve interrogatories he should apply and so ordered on 4 November and he did so and that is the further issue before the court today whether leave should be granted for interrogatories. In saying that, I am mindful that the Rules allow the litigant to serve interrogatories without leave twice in any cause or matter – although this point was not made by Mr Coulson I make it on his behalf but it could be argued that this is a cause or matter albeit a very unusual one and therefore he should be entitled to serve interrogatories without leave. He has served them and they have been answered in other proceedings involving him but these proceedings only apply to 22 Portaferry Road, Newtownards.

[11] So the issue is whether Mr Coulson is entitled to serve interrogatories and whether the Bank is obliged to answer them. It is, of course, the position that if they were to answer them they would have to do it truthfully on oath. Mr Coulson subsequently served the interrogatories that he wanted to serve.

[12] Now today, 18 December, was originally listed by me to deal with this stay of enforcement. On the previous occasion when the matter was before the court, on 4 November, Mr McGarvey of counsel, did not feel able to deal with Mr Coulson's point about interrogatories; the matter was again before, I think, Mr Justice Burgess but perhaps on related matters on 22 November, it was then again before me on 5 December and I directed that as this was in contention between the parties today, the 18th would only deal with the issue of interrogatories. I subsequently received, in accordance with the order of the court, a helpful and full skeleton argument from Mr McGarvey on behalf of the Bank and I subsequently received and have read a letter – several letters setting out the case of Mr Coulson - received by the court on 13 December which I have had several opportunities to read and which I have read.

[13] The first point logically here is in the middle of Mr McGarvey's submissions as it happens and it is that Mr Mervyn Coulson has, in fact, no right to be heard by the court or to bring these proceedings against his client. He has no locus standi, in the Latin phrase still in reasonably common use. He says this for the following reasons.

[14] Mr Mervyn Coulson was declared bankrupt on 31 January 2011. Article 279 of the Insolvency Order (NI) 1989 as amended provides that the property of a bankrupt vests in his trustee in bankruptcy on his becoming bankrupt. The trustee in bankruptcy here is the Official Receiver. Property is widely defined in Articles 2 and 11 of the Insolvency Order and it clearly extends to these former business premises of 22 Portaferry Road, Newtownards, which, as I say, had been mortgaged to the bank as long ago as 27 April 2000.

[15] Because of a series of events, not of all of which I am cognisant of, Mr Coulson has managed to hold on to the keys of this building until today. The Order for Possession of 2009 has never been enforced. Presumably there was a further threat to enforce it and he brought this further application for a stay. But, and this is an important point, he is not a defendant at this point in time. It is his application to bring a stay. He has chosen to bring it under this title but he is the moving party who is pursuing the application to stay the proceedings. If I may say so that point wasn't perhaps made clear before but that is Mr McGarvey's submission as I recast it here today.

[16] Now this is important because in the case of Swift Advances plc v McKay and Dalrymple [2011] NICh 2 I reserved the position about a defendant who was bankrupt defending proceedings or indeed appealing an adverse order but the order for possession here was made long ago and the application before the court was to stay its enforcement.

[17] Mr McGarvey shows in the appeal book that on 30 April 2012, the deputy official receiver in her capacity as trustee in bankruptcy, disclaimed an interest in 22 Portaferry Road. By Article 293, where that happens, under paragraph 2 of that Article; "…an application may be made to the High Court by 3 categories of person". It might just be argued that Mr Coulson is one of those categories as a person who

claims an interest in the disclaimed property. Such an application is to vest the property disclaimed by the trustee in bankruptcy in such a person.

[18] I note that paragraph 4 of Article 293 reads as follows:

> "The High Court shall not make an order by virtue of paragraph (3)(b) except where it appears to the Court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer."

This does not apply here. Now Mr Coulson did not bring such an application and the position is that the Bank has a claim on the property as a mortgagee, although not physically in possession of it. As Mr Justice Treacy found in Young v Hamilton and as I found in Duncan, the property, therefore, is bona vacantia and escheats to the Crown. The Crown takes no interest in the matter although in theory it could bring these proceedings at this point in time.

[19] Mr Coulson was obliged by the Insolvency Rules in Northern Ireland, Rule 6.183, to bring an application under Article 293 within 3 months. The Article records that that, "must be made within 3 months" from the notice of disclaimer. So it should have been brought by the end of July 2012 and this was not done. When I raised this with Mr Coulson in argument he sought to blame it on his medical condition; but that was wrong. There were two medical reports showing that he was moderately unwell in 2010. He was suffering from moderate depression and I accept the view of the consultant psychiatrist to that effect. But as Mr McGarvey pointed out, on 8 December there was a further report from the same consultant psychiatrist saying that Mr Coulson was over the moderate depression and he now had "an adjustment reaction". The psychiatrist went on to expressly affirm that he now has the capacity to engage with the legal process and instruct solicitors. So it is simply not true to say that Mr Coulson was unfit in the summer of 2012 to deal with these proceedings.

[20] The court has extended, as Mr Coulson has said several times on the record, has been most sympathetic to Mr Coulson and given him many opportunities but I cannot fly in the face of the clearly expressed Rule. Such an application should have been brought, must be brought within 3 months, it was not brought and, therefore,

at this point of time, Mr Coulson has no interest in law in the property at 22 Portaferry Road. That clearly emerges not only from the decision of myself in Swift v McKay and the decision of Treacy J in Young v Hamilton but it emerges also from a decision which could scarcely have more weight, namely Heath v Tsang [1993] 4 ALL ER 694 which is a decision of a Court of Appeal of particular strength, namely Sir Thomas Bingham (then Master of the Rolls), Steyn LJ (as he then was) and Hoffman LJ (as he then was). I need not go into the facts of that case in any detail. The judgment of the Court was given by Lord Justice Hoffman. I cited the case myself before but I think to try and put this matter finally to bed I will quote Lord Justice Hoffman at page 697 dealing with what cases a bankrupt could exceptionally bring.

> "Actions for defamation and assault are obvious examples. The bankruptcy does not affect his ability to litigate such claims but all other causes of action which are vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages vest in his Trustee. The bankrupt cannot commence any proceedings based upon such a cause or action and if the proceedings have already been commenced he ceases to have sufficient interest to continue them. Under the old system of pleadings the defendant was entitled to plead the plaintiff's bankruptcy as a plea in abatement. Since the Supreme Court of Judicature Act 1875, a cause of action does not abate but the action will be stayed or dismissed unless the Trustee is willing to be substituted as a plaintiff, see *Jackson & North Eastern Railway Company (1877) 5 Chancery Division 844*.
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> An illustration of the incapacity of the bankrupt to bring proceedings is *Bowler & Power (1910) 2KB 229* in which an action brought by the bankrupt had been dismissed with costs. The bankrupt then commenced another action to have the judgment set aside on the ground of fraud. The successful party presented a bankruptcy petition on the unsatisfied order for costs and the

bankrupt was adjudicated on the petition. The Trustee declined to proceed with the second action. The petitioner then applied to have it dismissed and the judge's order of dismissal was affirmed by the Court of Appeal. Lord Justice Farrell said at 232:

> 'The right to continue the action is a chose in action vested in the Trustee and the bankrupt has no locus standi …'."

[21] So there, even where fraud was alleged, the High Court and two Courts of Appeal are now saying that it does not entitle the bankrupt to continue. Mr Coulson is discharged from his primary bankruptcy but that does not revest the property in him. Out of an abundance of caution, Mr McGarvey also referred to a passage in Lord Justice Hoffman's judgment later at page 71, where he says Mr Heath, the purported Plaintiff,

> "…..criticises the conduct of the trial and contends that the decision against him was obtained by false evidence and fraud. The Trustee does not wish, or is not in a position to pursue the appeal. In my judgment Mr Heath has no locus standi to do so and his application must be refused."

So that is a strong, highly persuasive authority, on behalf of the Bank with which I respectfully agree, against somebody even when they are alleging fraud, being able to issue fresh proceedings.

[22] Out of an abundance of caution on my own part, I allowed Mr Coulson, on the preliminary issue of the locus standi, to address me. I went further, I allowed his Mackenzie Friend, Dr Alan Webb, to address me on what Mr Coulson said were three examples of fraud in the papers. They are nothing of the sort. I have already criticised the use of such language by plaintiffs and they should not abuse the privileges of appearing in court.

[23] The first example was that bank statements exhibited to the original affidavit of Ms Gillespie, were not sequential and were incomplete. It is quite wrong to describe that as an example of fraud and it matters not tuppence. Secondly, they complain about a loan and Dr Webb who is an electrical engineer, asked the court to

allow for that. He said that because it was not signed by Mr Coulson, it was not a legal contract but it was a document relating to Merkel Ltd and it was signed by two Directors of Merkel Limited, apparently the wife and daughter of Mr Coulson, so again that is not fraud and it is wrong to call it fraud; and thirdly, there was a certificate of execution some pages of which were blank, but again it is signed by both Coulson's on pages 33 and 34 of the bundle. Dr Webb suggests that any graphologist would agree with him that the signatures were quite different. There is no such evidence before the court at all. It is quite wrong to allege fraud again where there isn't a scrap of evidence of that effect and such matters should not be repeated outside this court or both Pinsent Mason and the Bank would be perfectly entitled to sue the people concerned. According to the Court of Appeal in England fraud would not help [Mr Coulson] but, in fact, there has been no fraud here. There is no injustice. Merkel Ltd got into difficulties, it got into further difficulties, it may not have liked the way that the Bank dealt with it but the business clearly ran up a very large debt to the Bank.

[24] So Mr McGarvey's preliminary point that there is no interest of Mr Coulson in the property at 22 Portaferry Road, Newtownards, is clearly right in law. I can see no special circumstances to take it out of that, even if I was entitled to remove it. This is only a hearing in the interrogatories on the application of the bank itself. In those circumstances it follows a fortiori, that if Mr Coulson is not properly before the court on the issue of bringing proceedings for a stay, then a fortiori he cannot interrogate the Bank and so I refuse his application for leave to serve interrogatories formally and require the Bank to answer them.

[25] I may say that I think there was very considerable weight indeed in the further submissions contained in Mr McGarvey's written submissions in these matters being res judicata. I note his citation of the decision of the Court of Appeal in Rafferty & GB Assets Ltd upholding an earlier decision of my own and I would respectfully agree with the comments of the Lord Justice. For completeness I observe that even though Order 26 does say interrogatories can be served in any cause or matter, it may be that even if I had not found in the Banks' favour in regard to locus standi, I would have thought this case an exception to that rule and that the

Rule should be interpreted not to apply to a second stay of enforcement application because that would be in breach of the Article 6 rights of the plaintiff Bank and in the breach of the injunctions to be found in Order 1 of the Rules of the Court of Judicature, but I needn't address those matters formally.

[26] I refuse the application for interrogatories.