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Judgment: approved by the Court for handing down | *Delivered:* **08/11/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2015 No. 117874

IN THE MATTER OF LAND AND PREMISES SITUATE AND KNOWN AS 34 LOMOND AVENUE, BELFAST, COUNTRY ANTRIM BT4 3AJ

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BETWEEN:

JULIAN SMITH
AND
ANDREW HUGHES

Plaintiffs;

-and-

DAVID BLACK
AND
PERSONS UNKNOWN

Defendants.

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HORNER J

A. INTRODUCTION

[1] The plaintiff's claim to be the Receivers appointed under a mortgage dated 12 March 2004 between Capital Home Loans Limited ("CHLL") and Places 4 You Limited ("the Company"). CHLL lent to the Company capital sums of £63,000 and £16,000 which were secured on 34 Lomond Avenue, Belfast ("the Property") under the mortgage. CHLL appointed the plaintiffs because they claimed that the Company was in breach of the conditions of the mortgage by failing to pay the monthly instalments as they fell due. The defendant claims to be in possession of the Property pursuant to a written tenancy agreement entered into between him and the Company dated 3 January 2014. The proceedings, which were issued by the plaintiffs, started off as an Order 113 summary claim but, when it became clear that

there were disputed matters of fact, the court ordered the plaintiffs to serve a statement of claim. The defendant then served the defence. Essentially this is now a trespass action. The court is required to determine which party is entitled to possession of the Property.

B. BACKGROUND FACTS

[2] It is undoubtedly true that the Company failed to make monthly instalments it was required to make under the mortgage. On 5 September 2015 there were outstanding mortgage arrears of £5,812.62. The balance due on the mortgage was £88,357.08. In light of the Company's breach of the mortgage conditions CHLL as it was entitled to do under the mortgage appointed the plaintiffs as receivers on 9 October 2015. The plaintiffs accepted the appointment as receivers on 10 October 2015.

[3] Before the appointment of the receivers the Company had placed the Property on the market in the early summer for the sum of £84,950 with Ulster Property Sales. MacKenzie and Dorman had been instructed to act as its solicitors in the sale. There had been an offer of £82,500 but the defendant objected to the sale and there appears to have been an unpleasant scene at the estate agents' offices when he refused to leave until he was given access to the Property.

[4] During the summer of 2015 there were regular phone calls between the defendant and CHLL. There were also phone calls between CHLL and Naomi O'Hare, his mother. Many of these calls were recorded and have been transcribed.

[5] The defendant is self-representing. He is now the registered legal owner of the Company being the sole shareholder and director. He claims that he was given a written tenancy in January 2014 by the Company at which time Naomi O'Hare was still registered as the sole shareholder and director, although she had allegedly transferred ownership of the Company to the defendant some years before. The written tenancy is due to end on 5 June 2017 when the defendant's daughter reaches age 21 years. The registration of the defendant as the director and shareholder of the company in June 2015 was apparently pursuant to that transfer of ownership which allegedly took place between the defendant and his mother in 2010, 2011 or 2012 according to his mother. The defendant is clear that the agreement took place in 2012. This transaction involving as it did the ownership to the Company had been completely forgotten by Mrs O'Hare, it is claimed, until she was reminded of it shortly before the Defendant had the Company's registration details changed to reflect his ownership of the Company.

[6] Matters are further complicated by the fact that on 21 July 2015 the defendant decided to change his name by deed poll from Patrick Thomas Gregory O'Hare (who was also known as Gregory O'Hare and Patrick O'Hare) to David Black. He obtained a passport under the name of David Black on 31 July 2015 replacing his old

passport in the name of Gregory O'Hare which was due to expire on 21 May 2023. The confusion that his name change caused cannot be underestimated. This was compounded by the defendant's refusal to answer or deal with correspondence sent to the Property by the plaintiffs because he feared that they might be part of a fraud. I do note that despite changing his name by deed poll and obtaining a new passport the defendant was still communicating with CHLL when it suited him under the name of Patrick O'Hare in September 2015 e.g. see the letter of 2 September 2015 to CHLL's Consumer Services. Whether this change of name was a determination following his divorce and bitter matrimonial struggle with his ex-wife to draw a line in the sand and move on, as the defendant claims, or whether it was a deliberate and calculated attempt to make any proceedings for possession much more difficult for CHLL and/or any receivers it might appoint is a matter I will return to later in this judgment.

[7] In any event the defendant claims that he is entitled to occupy the Property pursuant to a written tenancy agreement requiring them to pay £50 per month. (There is no money payable for rates under the tenancy agreement although the defendant has voluntarily been making a contribution to the rates). On any view this rent is substantially less than what the market rent should be. The market rent may up to ten times what has to be paid under the tenancy agreement. The defendant has claimed that the low rent is to reflect his commitment (not recorded in the lease) to effect improvements to the Property. It is not in dispute that under the mortgage, which is described as "buy to let", the Company is authorised to grant a lease.

[8] The defendant has consistently asserted in correspondence and in these proceedings that he disputes the validity of the appointment of the plaintiffs as receivers and challenges their right to bring these proceedings.

[9] Accordingly the two broad issues before this court which required a termination are:

(i) Does the defendant have a written tenancy agreement with the company for the property dated January 2014 which expires in June 2017 and which predates any purported appointment of the receivers? (ISSUE 1)

(ii) If not, do the plaintiffs have the necessary locus standi and title to institute these proceedings as receivers to eject the defendant from the Property? (ISSUE 2)

C. PERSONAL LITIGANTS

[10] In the Chancery Division, as in other divisions there have been an increasing number of persons appearing who are self-representing. Some of these personal litigants are the victims of the property crash and the recession which followed.

Some of these personal litigants have been unable to obtain legal aid because of the changes made to the qualifying limits for legal assistance. In some cases the personal litigant has deliberately chosen to make his case direct to the court without any legal assistance.

[11] The demands placed by personal litigants on the litigation process are considerable. The common law system being an adversarial one, with the judge having to choose which side has better argument on the evidence and/or the law is ill-equipped to deal with the litigants who do not know the law and do not understand the court process. The greater numbers of personal litigants place an increased pressure on precious court resources, on the court administration and on the court itself, because quite understandably these personal litigants very often have neither legal training nor any legal background. Consequently cases last much longer and other cases which should be heard are unable to secure a court hearing. Personal litigants are also easy prey to individuals or organisations offering an easy answer to their legal problems. This matter has been the subject of judicial comment in the comprehensive and carefully researched judgment of the Associate Chief Justice, J D Rooke of the Court of Queen's Bench of Alberta, Canada in Meades v Meades [2012] AB QB 571.

[12] It is not the role of the judge to assist one side in the common law system, even if that party has no legal representation or legal training, either because the party cannot afford legal assistance or cannot secure help from the Bar's Pro Bono Unit or simply because that party does not want any legal help. The judge has to tread carefully in the assistance he offers to a personal litigant. For the judge to be seen to be assisting one of the parties is to compromise his or her neutrality and to leave the judge open to accusations of bias. It may be difficult to draw the line over which a judge should not step in offering assistance, but it is a line which must be drawn if the adversarial process is not to be subverted.

[13] Where a personal litigant is defending a claim, it is the responsibility of the judge to look at the arguments raised by that personal litigant in his defence and in any skeleton argument he may have submitted to the court. In addition to such issues which are raised in the defence and/or the skeleton argument, the judge should also consider obvious issues raised in the papers. In this case the court was dealing with a "buy to let" mortgage. On the face of the general conditions, the opportunity to let the property was excluded. I raise as an obvious difficulty and Mr Gibson on behalf of CHLL dealt with it by referring me to the facility letter. But it is not the role of a judge to go hunting in the undergrowth for possible arguments that might be made on behalf of the personal litigant. That is to go too far. It imperils the judge's independence.

[14] Of course, the Rules of the Supreme Court (NI) 1980 apply equally to unrepresented litigants as they apply to represented litigants. In Magill (Mary Bernadette) v Ulster Independent Clinic and others [2010] NICA 33 Girvan LJ giving

the judgment of the court examined the position of personal litigants and how the Rules should be applied to them. He said at [16]:

> "Mrs Magill also emphasised that as a personal litigant she was at a disadvantage compared to litigants professionally represented and the submission appeared to suggest that that fact should in some way ease her task in seeking an extension or resisting an order for security. On her own case she did take advice about a potential appeal but irrespective of that fact, a personal litigant cannot have an unfair advantage against represented parties by seeking to rely on inexperience or a lack of proper appreciation of what the law requires. The application of legal principles poses a duty on the court to examine cases objectively without fear or favour to any party, represented or unrepresented. While courts are conscious of the difficulties faced by a personal litigant representing herself and will strive to enable that person to present her case as well as they can, the dictates of objective fairness and justice preclude the court from in any way distorting the rules or the requirements of due process because one party is unrepresented".

The position is identical in England and Wales. Personal litigants are required to abide by the Civil Procedure Rules. Master Matthews said in Jones v Longley [2016] EWHC 1309 (CH [56]):

> "There are not in our system two sets of rules, one for those who employ lawyers, and one for those who do not. There is only one set of rules, which applies to everyone, legally represented or not. The courts cannot and do not modify the rules for those who are not represented …"

He went on to say that although at the margins a personal litigant may be offered a little more leeway than a party who is legally represented, "there are no special rules for litigants in person as compared with those litigants who are represented".

[15] Any party bringing proceedings must prove his case to the requisite standard. It is fundamental that the party should prove that he has the necessary standing to bring the claim. That party should also be able to prove its claim on the merits. This applies both to the represented and the self-represented alike. However, where the defendant is a personal litigant, there is often little prospect of agreeing with the personal litigant matters that would normally be agreed if that person was legally

represented. Accordingly, it is incumbent on counsel (and counsel's instructing solicitors) to ensure that all necessary proofs are directed because just as personal litigants are not entitled to be treated more favourably neither are parties who are legally represented. It is not the role of the courts to fill in gaps in a party's case when he is legally represented.

ISSUE 1

[16] The defendant says that he has a written tenancy of the Property given to him by the Company. The plaintiffs invite the court to conclude that he has no such thing and that the "tenancy" relied upon is an invention created after the plaintiffs' demand for possession. A tenancy agreement apparently signed by the defendant and his mother on behalf of the Company dated 3 January 2014 was produced to the court. Mrs O'Hare gave evidence of having signed the agreement to corroborate the defendant's version of events. It was surprising that someone, who on his version of event was the owner of the Company, it having been transferred to him some years before, would enter into a written agreement to pay a rent for the Property of about one-tenth of the going market rate. A further tenancy agreement between the Company and the defendant was produced dated 1 January 2008. However, there is a material difference in that this contained a Covenant at paragraph 2.4 not to leave the Property vacant for more than 30 consecutive days. This Covenant was missing from the later lease. The defendant knew that the plaintiffs could prove that he was absent from the property for substantial periods of time after January 2014. However, the defendant struggled to explain why this term was deleted from the later agreement if the omission was not made in the summer of 2015 with the benefit of hindsight. In other words, he was unable to provide any credible explanation as to why the parties to the lease would have concluded at the beginning of January 2014 that he would be away from the Property for periods longer than 30 consecutive days.

[17] I have no doubt that the claim that there was a written tenancy which predated the appointment of the plaintiffs is a fiction. My reasons are many and various. I will set out the main ones. They are:

(i) I had the opportunity to observe the plaintiff twist and turn in the witness box. Superficially he appeared to be in control but it was obvious from his manner and demeanour when he was searching for an answer to a difficult question, that he was content to tell an easy lie. It made uncomfortable viewing.

(ii) He was in regular contact on the phone with CHLL over the summer of 2015 but he did not see fit to tell them, even though he knew that they were intent on repossessing the property that he had a written tenancy. He did not inform either CHLL or the plaintiffs until he sent an e-mail of 27 October 2015. No satisfactory explanation for this omission has been given.

(iii) Although he was a tenant paying a monthly rent of £50, his payments into the account did not reflect this term of the lease. They appear to be sufficient initially to keep the account in funds to meet the direct debits payable to CHLL under the terms of the mortgage. The defendant says that this was to reflect the fact that part of the rent was that he would fix the property up but that he had failed to do so. To make up for this he made additional financial contributions. On 27 June 2013 the defendant had confirmed by letter that a kitchen and bathroom were completed along with the installation of a wooden floor. There were only small repairs outstanding which would be completed by the end of August 2013. The defendant says that this was untrue. He failed to provide a satisfactory explanation of why he wrote the letter of 27th June 2013 in the terms he did.

(iv) No utility bills could be produced for the Property for the relevant times when he claims he was in occupation.

(v) His claim as to why he changed his name by deed poll so as to wipe the slate clean following a bitter matrimonial dispute with his wife does not fit the dates. The judgment of the Court of Appeal was handed down in 2014. But he waited until CHLL was attempting to obtain possession of the property before changing his name when he must have known that such a name change would cause maximum confusion.

[18] The attempt of his mother to shore up her son's case was embarrassing. I do feel that the baleful influence of her son was at work and therefore she does have some excuse for trying to mislead the court. By the end of her evidence she was so confused that the defendant had to attempt to explain all her inconsistencies and to try and fill in the holes in her evidence, but he manifestly failed to do so. My reasons for not believing her include:

(i) She claims that she gifted all the shares in 2010, 2011 or 2012, she simply did not know the date of her largess. She says that she forgot all about this transaction. That is why she did not mention it to CHLL. She only remembered this at the end of August 2015. She had phoned CHLL on 18 August 2015 to say that her son had removed her from the Company via Company's House and had registered himself as director and that he was now the sole shareholder. There was no satisfactory explanation offered as to how such lapse of memory occurred and how this ties in with the date of the change of the Company's registration details.

(ii) She told CHLL repeatedly that there were no tenants in the Property. The defendant's explanation for this was that she was confusing

tenancy and occupation. She did not consider the defendant to be in occupation and thus she did not consider he could be a tenant. Needless to say I do not accept the defendant's explanation for his mother's inconsistent statements.

(iii) She did not tell either the solicitor who was acting on her behalf in the sale of the Property or the estate agent who was selling it and who had agreed a sale that her son had a tenancy that ended in 2017. There was no explanation for these omissions on her part.

I felt sorry for Mrs O'Hare as she struggled in the witness box, trying to provide support for her son but floundering badly. Her evidence contradicted that what was recorded in the phone calls made to CHLL in the summer of 2015. I excused her of any real blame because I believe that she is likely to have been placed under intolerable pressure to support her son. I note that on 18 August 2015 she told CHLL that she had changed the locks on her home to prevent the defendant from getting in and taking paperwork. The defendant has no such excuse. So I conclude without hesitation that neither Patrick O'Hare nor Gregory O'Hare nor David Black enjoy a current written tenancy in respect of the property.

ISSUE 2

[19] The defendant raised a number of arguments about the appointment of the receivers. He challenged their appointment and their right to eject him from the property. This was an issue put fairly and squarely before the court. This meant the plaintiffs had to prove that they had the necessary title. The chain of title relied upon by them was that:

(i) CHLL were the mortgagees of the property.

(ii) CHLL by deed gave to Wilson Nesbitt the Power of Attorney to make Deeds of Rectification and to make a Deed of Appointment of Receiver.

(iii) Wilson Nesbitt exercised this power and appointed the plaintiffs as receivers on 9 October 2015.

[20] It is important to point out that Mr Kimber, CHLL's Head of Operations gave oral testimony. He did not deal with the grant of the Power of Attorney or the plaintiff's appointment save to say that he did not know how the receivers were appointed. Mrs Crotty in her affidavit does not deal with the Power of Attorney issue at all. She also did not give any oral testimony when, rather bizarrely, she was called to give evidence by the defendant. A copy of the document entitled "Power of Attorney" was handed into the court at some stage. It seems to have been after the evidence had closed.

[21] It is common case that the Power of Attorney can only be conferred by deed: see Section 1(1) of the Powers of Attorney Act (NI) 1971. The document on its face appears to comply with the requirements of a deed set out by Deeny J in Santander UK Plc v Anthony Parker (No. 2) [2012] NICh 20 and in particular see paras [5]-[15].

[22] However, the deed is signed by persons whose signatures are indecipherable. They are described as being Director/Secretary. There was no evidence led in this court that either of them was a Director or Secretary of CHLL at the relevant time. This was a fundamental proof to ensure that the deed granting the Power of Attorney was proved. It should have at least been raised with Mr Kimber and if he could not answer it, then it could have been a subject of affidavit evidence. Mr Gibson on behalf of the receivers complains it was never suggested the document was fraudulent or that Mr Kimber was an imposter or that Wilson Nesbitt were "also guilty of fraud themselves for they appointed the receivers on foot of a Power of Attorney granted to them which it was not accepted was validly granted …" He then went on to complain that the plaintiffs also had not proved that CHLL was a bank or that they had power to operate under FSMA 2000. But these matters were not put in issue by the defendant. The appointment of the receivers was. It was, or should have been a straightforward matter to prove the deed whether by affidavit evidence or by oral evidence. This was not done. It was a fundamental proof and it was ignored. The response of the plaintiffs and counsel is disappointing.

[23] In light of the finding above it is not strictly necessary for me to address the issue of whether the appointments not being by deed were of no effect. I am satisfied that under both the Act and the mortgage the appointment of receivers does not need to be by deed. The principles in relation to the appointment of receivers appear to be accurately set out at 20-16 of Kerr and Hunter on Receivers and Administrators (18th edition). However I have not had these matters argued before me. Mr Gibson submits that the appointment of receivers does not need to be in writing if the mortgage deed is silent on how the appointment is to be effected. I would prefer to have this matter argued before me before I reach a concluded view. However, where the appointment is made solely under the Conveyancing Act, Section 24(1) of the Act does require that the appointment is "by writing under his hand" : see also O'Neill on the Law of Mortgages at 8.08. Clearly, this appointment was in writing "under his hand".

[24] I do not have to decide what the effect of appointments, which are not made by deed, is. As Lord Evershed MR said in Windsor Refrigerator Co Ltd and Another v Branch Nominees Limited and Others [1961] Ch 37:

> "But even if some such matter arose, that would be a question to be decided after the appointment, for example, where the receiver, not having been appointed by deed, had in law the authority to do something which he thereafter purported to do. We are not at this stage concerned with that at all."

[25] It is also not necessary in light of my conclusion on the Power of Attorney for me to consider whether the deed, if proved, should be read strictly. Thus the Power of Attorney was given for relevant documentation, namely "Deeds of Rectification" and "Deeds of Appointment of Receiver". Accordingly, it might be argued that as the appointment of the plaintiffs as receivers was not by deed, those purporting to make it pursuant to this Power of Attorney did not have the necessary power to make the appointment: see paragraph 31 of Volume 1 of Halsbury's Laws of England. My provisional view, and I have not heard detailed argument on this, is that the deed should be read strictly.

[26] The defendant raised a further point namely that a party to a deed cannot be a witness. He relied on Seal v Claridge [1881] 7 QBD 516. However, attestation is not necessary, as was made clear in that case, unless it is required by an instrument creating a power or by some other statute; and where it is so required the provisions of the instrument or statute, whether expressed or implied, must be complied with. As Mr Gibson submitted the Deed of Appointment was executed as a deed by Kathryn Elizabeth Spratt as Attorney for CHLL and witnessed by Oonagh Monaghan on 9 October 2015. Oonagh Monaghan was not a party to the deed. Further the Deed of Rectification was signed by Natasha Ferson as Attorney for CHLL and Kathryn Spratt as a solicitor. Kathryn Spratt was not a party to the Deed of Rectification. No party has therefore witnessed the deed. Mr Gibson submitted that the defendant is confused as to identity and legal capacity. I agree.

D. FURTHER ARGUMENT

[27] The defendant claimed that he was in a position to pay the arrears and wanted to pay the arrears due on the mortgage but that CHLL would not permit him to do so. Instead, he alleges that they were intent on appointing the plaintiffs as receivers and selling the property. I am satisfied that:

(a) There was a failure by the Company to make due payments under the mortgage and there was a breach of the mortgage entitling CHLL to seek possession whether by appointing receivers or otherwise.

(b) The defendant had no intention whatsoever of paying off any arrears on behalf of the Company or at all. He had ample opportunity to do so. For example on 4 September 2015 the receivers wrote to the Company pointing out that it was in arrears and that a director who was a guarantor had been removed without CHLL being informed. The defendant's answer was that he had no reason to believe that these were not imposters. But the letter gave the number of Kayleigh Carey of CHLL and he was encouraged to ring it to discuss potential resolution. He never did. Once again the defendant's claims failed to reflect reality.

E. PREVIOUS JUDGMENTS

[28] During the course of the hearing I asked to see copies of the judgments of Master Redpath and Weir J in the defendant's matrimonial disputes. The reasons for me doing so were twofold. Firstly, it had been suggested the defendant had been dishonest in his dealings before Master Redpath. It was also suggested that he had made inadequate discovery in the matrimonial proceedings. I have considered both judgments and am satisfied that there is no truth in these suggestions. While the defendant's appeal was not the unalloyed success the defendant had claimed it to be before me, there was no suggestion in either judgment that the defendant had misled the court or that documents had been "buried" by him. Weir J did criticise the defendant but this was for failing to take a more realistic approach to the matrimonial litigation. He criticised him for the "elaborate and attenuated manner which he conducted the appeal". However, there was no suggestion that he had done so dishonestly. I therefore reject any suggestion that the defendant had previously misled the court when conducting his matrimonial litigation.

F. CONCLUSION

[29] On Issue 1 I find that the defendant had no tenancy of the property written or otherwise. On Issue 2 I am satisfied that the Company was in breach of the terms of the mortgage. However, the title of the plaintiffs to act as receivers has not been proved to the court's satisfaction. Accordingly the plaintiffs do not have the necessary title to eject the defendant from the premises. However, it necessarily follows that CHLL or such receivers as they can prove to have been validly appointed, have the right to seek summary possession of the property under Order 113 should they seek to do so, the defendant having no tenancy agreement with the Company.