Master 31

30/06/2005

2003/32447

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between

MELBOURNE MORTGAGES LIMITED

Plaintiff

and

PETER O'DUFFY

Defendant

MASTER ELLISON

[1] This is an application by the Defendant by summons dated 18 February 2005 to set aside an order made on 28 January 2004 whereby he was required within 28 days after service of the order on him to deliver to the plaintiff mortgagee possession of the dwelling known as 11 Lisdarragh, Newry.

[2] There appears from the affidavit evidence of the defendant to have been some confusion between him and his solicitors on record in these proceedings at the relevant time, as a result of which the defendant was not notified of the fact that at a hearing on 15 January 2004 I had adjourned the plaintiff's application for possession until 28 January 2004. The defendant himself had clearly been aware of the earlier hearing as he had forwarded by fax a handwritten letter dated 14 January 2005 to me in which he explained that due to work commitments he could not attend that hearing and that his (then) counsel who was on his honeymoon would also be unable to attend. The defendant's letter contained a number of other points and he was

requesting an adjournment for a period of not less than 30 days, but the adjournment which in the event I granted after hearing argument from the plaintiff's solicitor was for a shorter period than that requested by the defendant. However, I am satisfied that the plaintiff's then solicitors duly notified the defendant's then solicitors of the adjournment and that the order for possession which was made on 28 January 2004 (when the figure for arrears of monthly instalments was stated to be £7,375.40 and the date of last payment 23 May 2002) was regularly made.

[3] That said, if sufficient reason were shown I would be obliged to set aside an order for possession which had been made in the absence of a defendant. (Order 28 rule 4 (1) of the Rules of the Supreme Court (Northern Ireland) 1980 provides among other things that where the court makes an order on foot of an originating summons 'against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just'.)

[4] Accordingly the rest of this judgment will address whether the defendant has shown sufficient reason for the order for possession dated 28 January 2004 to be rescinded.

[5] At the hearing of submissions in this application on 13 May 2005 Mr Humphreys of Counsel appeared for the plaintiff instructed by Wilson Nesbitt Solicitors and Mrs Anyadike-Danes of Counsel appeared for the defendant instructed by Mills Selig Solicitors.

[6] Broadly, the arguments contained in the affidavit evidence and the submissions of Counsel concerned whether the regulated credit agreement and

mortgage deed dated 10 January 2002 are enforceable having regard to the wording of the regulated agreement and the provisions of sections 60 (form and content of agreement), 61 (signing of agreement), 65 (consequences of improper execution), 106 (ineffective securities), 113 (Act not to be evaded by use of security) and 127(3) (to be quoted shortly) of the Consumer Credit Act 1974 ('the 1974 Act') and Schedule 6 (prescribed terms which must be included in regulated agreements) of the Consumer Credit (Agreements) Regulations 1983 ("the 1983 Regulations"). If the credit agreement and mortgage are unenforceable then my order dated 28 January 2004 was erroneous and should be rescinded as having purported to give effect to a mortgage which cannot be enforced by judicial process. The defendant relies not merely on the legislative provisions I have cited but also on judgments in two recent cases namely Wilson –v- First County Trust [2001] 3All ER 229 and Melbourne Mortgages Ltd –v- Carson and McDowell Solicitors [2004] NI QB 82. In Wilson, the Court of Appeal of England and Wales held that a loan agreement, which stated the amount of the loan to be £5,250.00 inclusive of a 'document fee' of £250, was unenforceable because it failed to include correctly one of the 'prescribed terms' as specified in paragraph 2 of Schedule 6 to the 1983 Regulations, ie a term stating the amount of the credit. The document fee of £250 was an item of charge for credit which item could not properly be described as credit and therefore the amount of credit was misstated. A key legislative provision is section 127 (3) of the 1974 Act which reads as follows (the emphasis being mine): -

> "127(3) - The Court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner)."

[7] The effect of this is that if a regulated agreement is to be enforceable it must contain all of the prescribed terms (although the court may in effect, by making an "enforcement order," condone the breach of other requirements including an omission to include other agreed terms.)

[8] In Carson and McDowell the plaintiffs (including the plaintiff in the represent case) were suing a firm of solicitors for breach of contract and negligence for having failed to advise their client companies of the import of the decision in Wilson.

[9] As a result of that failure, a considerable number of agreements used by the plaintiff were found to be unenforceable because, like the regulated agreement in Wilson, they erroneously included in the statement of the amount of credit an item of expenditure (ie in Wilson a document fee, in Carson and McDowell a broker's fee) which ought to have been regarded as part of the total charge for credit as opposed to part of the credit itself. The Honourable Mr Justice Deeny held in Carson and McDowell that the solicitors were indeed liable as they had failed in their duty to keep up to date with developments in the law and advise their clients accordingly.

[10] I should mention as part of the background to the Carson and McDowell case that I had had reason to query the appropriateness of a number of applications for orders for possession made by this plaintiff and other associated plaintiff companies in other mortgage actions where the financial details as set out in the regulated agreements began with the following item under the shoulder note 'The Loan and Monthly Payments': -

"A Amount of Loan (*including Broker's Fee)*"

[11] This approach was defective because it expressly and erroneously combined the statement of the amount of the credit with an item, the broker's fee, which by reason of regulation 5(1)(d) of the Consumer Credit (Total Charge for Credit) Regulations 1980 (as amended) should not have been treated as credit because (since 1989) credit-brokerage fees fall within the total charge for credit in all cases. Nowhere else in the financial details set out in those agreements was there a statement which could be regarded as a correct statement of the amount of credit. The agreements were clearly flawed by reason of the import of the Wilson judgment and the relevant provisions of the 1974 Act and 1983 Regulations including the mandatory requirement I have mentioned that all of the 'prescribed terms' be included in a regulated agreement.

[12] I turn now to the financial details set out in the regulated agreement and mortgage deed which the defendant appears to have signed on 1 January 2002. I shall set out in full the details given under the shoulder note 'The Loan Monthly Payments and Related Particulars': -

"A.	LOAN	£14,500.00
B.	YOUR BROKER'S FEE (Not a term or condition of the loan)	£300.00
C.	PROTECTED PAYMENT COVER PREMIUM (Optional)	£0.00
D.	LEGAL AND DOCUMENTATION FEE	£0.00
E.	TOTAL LOAN (A+B+C+D)	£14,800.00
F.	MONTHLY INSTALMENT	£368.77
G.	NUMBER OF MONTHLY INSTALMENTS	60
H.	APR (Annual Percentage Rate) Variable in accordance with paragraph 4.1 overleaf	19.7%
I.	LENDER'S RATE OF INTEREST EQUIVALENT TO AN APR OF	1.4% PER MONTH 18.5%

J. The Borrower shall repay the total loan by the number and amount of monthly Instalments set out at F and G each of which must be received by the Lender by the same day of the month as the day on which this Credit Agreement comes into effect. (See Clause 3.1 overleaf), or if there if there is no such day, on the last day of the

month. The first repayment must be received by the Lender in the month after this Credit Agreement comes into effect.

K. When calculating the APR in Box H above, no account has been taken of future variations in the Rate of Interest which may arise in accordance with Clause 4.1 overleaf. The APR as stated in Box H includes the fees referred to in boxes B and D above."

[13] This approach differs from that employed in the other types of credit agreement to which I have referred. In the present case, the amount of the loan or credit is clearly stated at 'A' as being £14,500. There is no ambiguity at all about that statement which appears to me to be a correct 'statement of the amount of credit' and does not purport to include any item which is required by the legislation to fall within the total charge for credit.

[14] The defendant by his Counsel is arguing that the subsequent reference at 'E' to 'TOTAL LOAN', which is clearly arrived at by adding the amount of the loan or credit together with the other items, is an erroneous and misleading statement of the amount of credit. My view is that the inclusion of the words 'TOTAL LOAN' at 'E' is less than ideal and it would have been better if the word 'LOAN' had not been included at 'E' since it may have the potential to cause some confusion in the reader's mind as to which of the statements, 'A' or 'E', represents the statement of the amount of credit. However, any such initial confusion may readily be dispelled on further reading of the financial particulars, ie the last sentence at "K" which appears to me to clarify that the broker's fee is a charge for credit as it is included in the APR. (This contrasts with the reference to the APR in the form of agreement impugned in the Carson and McDowell cases, where it was stated that the APR excludes the broker's fee.)

[15] In his affidavit evidence the defendant also challenges the accuracy of the representation at 'B' above to the effect that the broker's fee was not "a term or condition of the loan"; I have some sympathy for the view he expresses inasmuch as the documentation he exhibits to his affidavit tends to suggest that if the broker's fee is not paid or added to the amount on which interest will be charged, the loan will not be advanced. However, by the relevant regulations under the 1974 Act the broker's fee invariably falls under the total charge for credit as opposed to being considered as part of the credit or loan, and the terms of the regulated agreement which fall to be considered in this judgment are not inconsistent with the broker's fee being part of the charge for credit.

[16] The key point is that there is a statement in the credit agreement which correctly represents the amount of loan or credit as being £14,500, that statement is in itself plain and entirely unambiguous and there is nothing either in the financial details I have quoted above or elsewhere in the agreement which could properly be considered to subvert the meaning of that statement. Accordingly I find that the agreement is not in breach of the mandatory requirement that it contain a prescribed term which states the amount of credit.

[17] I am satisfied that the Order which I made on 28 January 2004 for delivery of possession of the mortgaged property was made correctly and regularly. Accordingly the order I shall make will be to dismiss the defendant's application to have the order for possession set aside.