

Neutral Citation: [2016] NICH 20

Ref: **HOR10153**

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

Delivered: **28/06/2016**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

NORTHERN BANK LIMITED

-v-

**COLM McAULEY
AND
ANN McAULEY**

HORNER J

[1] I propose to deliver an ex tempore judgment. I reserve the right to provide a more detailed written judgment setting out my reasons in detail in the event of an appeal for the benefit of the Court of Appeal. But this matter has been delayed sufficiently for a variety of reasons and as the end of the term beckons I consider it appropriate that I give my decision now.

[2] The chronology is as follows. On 17 September 2003 the defendants charged the lands comprised in Folio 3207 County Armagh in favour of the plaintiff. On 17 November 2003 the defendants charged the lands comprised in Folio 31483 County Armagh in favour of the plaintiff. On 28 March 2007 the defendants applied to the plaintiff for bridging finance to enable them to purchase Derryhaw House, Tynan being the lands comprised in Folios 13491, 1731, AR14073, AR14074, AR14075, AR14158, AR108811 and AR1459 County Armagh, which I will refer to as the Derryhaw land.

[3] On 3 April 2007 the plaintiff offered a bridging loan facility to the defendants in the sum of £1,450,000 for the purchase of the Derryhaw land. The defendants accepted the plaintiff's offer of a bridging loan facility on 16 May 2007 so as to permit them to purchase the Derryhaw land. On 18 May 2007 the defendants' solicitors informed the plaintiff that the defendants had received "an unconditional offer to purchase" the lands comprised in Folio AR21522 County Armagh and requested drawdown of funds to enable the defendants to complete the purchase of the Derryhaw land. On 30 August 2007 the plaintiff offered a loan facility to the

defendants in respect of Folios AR2152 and AR109849 County Armagh ("Tassagh") to restructure an existing bridging loan as a capital and interest repayment loan. On 10 September 2007 the defendants accepted the facility dated 10 September 2007 and on 12 September 2007 the plaintiff restructured the bridging facility in respect of Tassagh being the sum of £430,000 repayable over a term of 15 years by monthly instalments by way of variable rate business loan account. On 23 September 2008 the defendants charged the Derryhaw land in favour of the plaintiff. On 25 September 2008 the defendants charged the lands comprised in Folios AR21522 and AR109849 County Armagh (that is Tassagh), in favour of the plaintiff. On 16 July 2009 the plaintiff offered a facility to the defendants for restructure of the bridging loan in respect of Derryhaw land. This was accepted on 12 August 2009, subject to an amendment dated 8 September 2009, which was then accepted by the defendants on 15 September 2009. On 2 November 2010 the plaintiff demanded repayment of the defendants' liabilities to it and on 6 June 2014 the plaintiff commenced proceedings for possession of the above mentioned folios in respect of which it has charges. So that is a brief summary of the background facts.

[4] The present indebtedness of the defendants is £396,454 in respect of the first account; £1,942,462 in respect of the second account. The total indebtedness amounts to £2,338,928. There are 55 monthly instalments in arrears in respect of account number one and 66 monthly instalments in arrears in respect of account number two. No payment has been received since 2 November 2010 when the accounts were called in. The amount of the debt is not contested. It is not disputed that the money was lent or the money has not been repaid. The main complaint is that the bank advanced money namely £1.45m in respect of the purchase of the Derryhaw land when for various reasons it should not have done so.

[5] The defendants have borrowed heavily at the time the property market was reaching its zenith. This has had disastrous consequences for them. They are in many ways the victims of forces beyond their control. The difficulty they face is that no matter how sympathetic the court is to them and their predicament, money has been borrowed, secured on their properties and they remain and will remain heavily indebted to the plaintiff without any real prospect of paying off what they have borrowed on the basis of the evidence before the court today.

[6] It is fair to record that a substantial part of the appeal was concerned with an agreement entered into by the defendants when each had separate legal representation. This agreement dated 30 November 2015 provided that the defendants should offer "all the properties secured to the plaintiff save the premises at Aghavilly Road on the open market for sale on or before 31 January 2016". It also provided that the defendants should authorise the agent to disclose information "regarding the sale of the properties to the plaintiff and its solicitors". Further that the defendants should act on the basis of the agent's advice. It was also provided that the matter be reviewed on 11 February 2016. The terms were signed by Mr Wilson, a solicitor on behalf of King and Gowdy who acts for the plaintiff and by the defendants themselves. Although they were separately represented the

agreement was not made a consent order of the court because the defendants did not want this. Instead proceedings were adjourned to allow the properties to be sold. In fact, the properties contrary to the agreement that was entered into, were not marketed for sale. There was then a considerable debate in this court about the effect of the agreement and its terms. The plaintiff chose not to sue on those terms which did not become an order of this court. Mr Wilson of King and Gowdy claimed that the order was made by consent. The order of the Master does not say so. I explained that if there was a mistake then the slip rule could be invoked but that was a matter for the Master and not this court. However when the matter was referred to the Master he refused to amend his order.

[7] Accordingly this has been a rehearing with the bank being required to prove its case against the two defendants who are both personal litigants. I adjourned the appeal to allow the defendants to obtain representation from the Bar Pro Bono Unit or from a solicitor but this has proved impossible. There is no need for me to speculate but it is clear that there is no real prospect of the respondents ever obtaining legal representation. Even yesterday there was a suggestion that a firm of solicitors might be interested in acting, but this has been all too often the story told to the court. The appeal deserves to be resolved.

[8] The first named defendant, Mr McAuley, at the court's invitation has filed a further affidavit. In it he has explained, inter alia, how in order to get the Derryhaw land in an auction he bid £1.4m in February 2007 just as the property market here was about to peak. He complained that the vendor was in breach of contract and that his wife, the second respondent never signed the contract for sale. He complains that the vendor has breached its contract in a number of different ways and he complained about the performance of his solicitor and the auctioneer.

[9] He complains that the loan monies were released and that they were paid over the by solicitors to the vendor. He claims that he was prepared to walk away from the purchase of Derryhaw land. He is very censorious of the performance of the solicitors who acted for both him and his wife at the time and he complains about breach of contract and the trespass of the Grimleys who were the vendors. Clearly it was the defendants' plan to purchase Derryhaw land and with 100% bridging finance loan to improve the land and sell part of it on a rising market. But this was thwarted by the vendor, he claims, who spoiled any chance of a re-sale. Unfortunately the market had moved against them in the interim and the falling market rendered this plan for resale hopelessly optimistic.

[10] There was also the question of the sale of Tassagh which was zoned for housing and which was to take place for an agreed for £1.2m to Mr Paul Jordan. A sale did not take place and the zoned lands subsequently sold to a different purchaser at a much lower price than what had been originally agreed. Both the defendants claimed that the offer of finance bridging of £1.425m to allow them to purchase the Derryhaw land was subject to a condition that there was to be a separate contract for the sale of the Tassagh lands.

[11] Two points arise. Firstly the condition in respect of the sale was for the benefit of the plaintiff alone and could be waived by the plaintiff. But secondly, and more importantly, the defendants' solicitors wrote to the plaintiff on 18 May 2007 informing it that the defendants had an "unconditional signed offer to purchase" the lands comprised in Folio AR21522 and requested a drawdown of the funds to purchase the Derryhaw land. However the sale as I understand it, was never completed.

[12] As far as the court can see there had been a number of different defences alleged. These include:

- (1) Mr McElhone, the solicitor, should not have permitted the drawdown of the bridging finance. However this is a matter entirely between the defendants and their solicitor and they are able to sue him if they wish and claim any loss from him.
- (2) The loan should never have been offered by the plaintiff. However there is no tort of improvident lending by a bank.
- (3) The defendants had been betrayed by the person who sold them the Derryhaw land who sabotaged their future plans. This is a matter between the defendants and the vendor. As I understand it proceedings were issued but these appear to have been lost and the defendants ended up having to pay the vendor's costs.
- (4) There has been a failure to give notice to the occupants of the property. But there is no reliable evidence that any of the occupants had any legal or equitable interest in the property and secondly there is evidence that the adult children no longer reside in the property although this is not clear. I also note from the affidavit of Mr Blackwood Hall that the two elder children who were over 17 years of age did execute deeds of consent and postponement.

[13] There is then an argument in respect of undue influence. However some of the property was jointly owned and some was solely owned. The money was lent jointly and the properties were charged on foot of the joint indebtedness. There is no evidence of undue influence which would vitiate the loan. In any event there is no evidence of any manifest disadvantage to the second respondent and I have referred to the Northern Bank v Morgan at 707C-D.

[14] Then in relation to the issue of undue influence I refer to the case of Etridge and at paragraph [48] the court says:

"As to the type of transaction where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward

case. The bank is put on inquiry. On the other side of the line is a case where money is been advanced, or has been advanced, to the husband and wife jointly. In such a case the bank is not put in on inquiry unless the bank is aware the loan is been made for the husband's purposes as distinct from the joint purposes. This is decided in CIBC Mortgages v Pitt."

And then again at paragraph [154]:

"The onus will, of course, rely on the person alleging the undue inference proving at first instance sufficient facts to give rise to presumption. The relationship relied in support the presumption will have to be proved."

And then it goes on to further discuss matters at paragraphs [155] to [157].

[15] I have not seen any evidence in this case of actual or presumed undue influence and I note that both respondents were legally represented when they reached their agreement with Mr Wilson of King and Gowdy on behalf of the plaintiff. Although I say that that agreement does not apply or does not bind them in respect of these proceedings but is important background evidence.

[16] However when the hearing ended there were two matters which did give me cause for concern. First of all the family dwelling house is apparently at 35 Aghavilly Road and is comprised in Folio 3207 County Armagh. For reasons which I need not go into the originating summons does not contain any legend in accordance with Order 88 Rule 4A which provides that where a plaintiff claims in a mortgage action delivery of possession of land which comprises or includes the dwelling house because of failure to pay monies secured by a mortgage, he shall when serving a copy of the notice in any summons for such a claim or application also serve on the defendant a notice in Form 10A in Appendix A. Under Order 88 Rule 3 the originating summons by which a mortgage action has begun shall be endorsed with or contain a statement that the plaintiff claims possession of the mortgaged property and that the property consists or includes a dwelling house, and, if so, whether it is one to which the Rent (NI) Order 1978 applies.

[17] These were omissions on the part of the plaintiff. Mr Blackwood Hall provides an explanation as to why this did not take place in his affidavit of 27 July 2015 at paragraphs [3] where he says that upon receipt of the affidavit of the second defendant he instructed Messrs Osborne King to see if in fact there was a new dwelling house built on Folio 3207. He was advised by Mark Caron of Osborne King and believed that he consulted an aerial photograph of the land in Folio 3207 County Armagh and found that in fact a dwelling house, which I assume is No. 35 Aghavilly Road, Armagh, had been constructed on that folio. When he gave

instructions to the plaintiff's solicitors to commence these proceedings he was unaware of this and believed that 35 Aghavilly Road was not contained within the plaintiff's security. Accordingly statements made in the originating summons and grounding affidavit were correct to the best of his information, knowledge and belief when he swore the grounding affidavit. However no amending originating summons has been served. The position is set out in a letter of 21 June 2016 provided to the court by Mr Wilson of King and Gowdy. The position was that the second-named respondent alleged for the first time that there was a dwelling house on Folio 3207 County Armagh occupied by the defendant and three children on 8 July 2015. This was checked by Caroline Black of Secureway and she was informed by the second-named defendant that it was occupied only by the defendants. On 30 July 2015 the defendants' son, Liam McAuley, appeared at a review on this matter representing himself and his four adult siblings. The bank was only aware of a dwelling house being constructed in Folio 3207 over a year after proceedings had been commenced. The dwelling house was erected by the defendants in breach of a covenant contained in their charge to the plaintiff. Following that, one of the alleged occupiers of Folio 3207 did appear at the review to confirm that his four siblings were aware of the proceedings. It was accepted by the defendants at the hearing on 17 June 2016 that the five adult children do not have an equitable interest in Folio 3207 County Armagh. However it is agreed that no notice as per Form 10C has been served by the plaintiff on the defendants or on the occupiers of 35 Aghavilly Road, Armagh.

[18] In view of the dangers that can arise from not following the rules and not proceeding on affidavit, and I refer specifically to the original suggestion made in this case that the order before the Master should be treated as being made by consent, I decline to make an order in the circumstances in respect of the dwelling house, that is in respect of Folio 3207, alone. The plaintiff should only proceed in accordance with the rules. The defendant should be aware that if the plaintiff reissued proceedings in accordance with the rules then unless a defence on the merits can be made out an order for possession will almost certainly follow. So this may only be a short stay of judgment. I reach no conclusion on this issue.

[19] In this particular case having considered all the various arguments I am satisfied that the plaintiff has made out its case in respect of all the lands bar Folio 3207 County Armagh which contains the dwelling house at 35 Aghavilly Road. I make an order for possession in respect of those lands which are subject to the charges referred to in the originating summons. I make no order in respect of the dwelling house comprised in Folio 3207, County Armagh also known as 35 Aghavilly Road.