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*Judgment: approved by the Court for handing down*

| *Delivered:* | 11/01/13 |
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**2008/No 27739**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**BETWEEN**

**NORTHERN BANK LIMITED**

**Plaintiff**

**and**

**LAWSON MARTIN AND CLIVE JAMES RICHARDSON**

**Defendants**

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**DEENY J**

[1] The Plaintiff herein, the Bank, was at all material times to this action an equitable mortgagee of lands and premises situate at and known as Coral Cottages, Cranfield Road, Rostrevor, Co Down, comprised within Land Registry Folios No: DN11053 and DN10628. The Bank had an equitable deposit of the title deeds to these folios to secure loans to Thomas Michael McGreevy and Anthony Hughes.

[2] The Bank on 7 December 2006 obtained an Order from the Chancery Master. He found that the monies owing to the Bank were well charged on the interest of Messrs McGreevy and Hughes in the said lands described above. There was at that time due to the plaintiff Bank a sum of £285,000 with interest. The defendants in that action were given 28 days to pay that sum with interest but in default it was ordered that those defendants should deliver to the plaintiff possession of the said lands which should be sold out of court. All necessary parties were obliged to join in executing the deed or deeds of conveyance to the purchaser or purchasers of the said lands. Other consequential provisions were made.

[3] The Bank then sought to sell the premises and by an agreement in writing dated 7 September 2007 the plaintiff agreed to sell as vendor and these defendants and each of them agreed to buy as purchasers the said lands in consideration of the sum of £810,000. In the event the defendants did not complete and the plaintiff brought proceedings for specific performance of that agreement of 7 September 2007

or damages in lieu by a specially indorsed writ of the 12th of March 2008. The matter came on for trial before me in the Chancery Division on 11 May 2009. Both parties were represented by solicitors and counsel. The matter resolved on the basis of being stayed, both as to the claim and the counterclaim, upon the terms set forth in a schedule to the Order (Tomlin Order). The terms included liberty to apply to enforce the said terms. The schedule was quite a detailed one but the gist of it was that the property comprised in the original contact was to be marketed again by the plaintiff and if they could not get a party ready, able and willing to complete at a purchase price in excess of £400,000 plus value added tax the defendants would purchase at that price. Clause 4C of the schedule provided, inter alia, the following:

> "The plaintiff will furnish to the defendant upon completion a VAT invoice or such other documents as are required by HMRC to permit the defendants to recover the VAT paid."

[4] The terms of the schedule were stated to be a memorandum and special conditions to which the general conditions of sale of the Law Society of Northern Ireland (3rd Revision) applied. In the event the sale again did not complete. While there might be some dispute between the parties the essence of the matter was that the defendants said that they were apprehensive that they would not be able to recover from Her Majesty's Revenue and Customs the VAT on the sum of £400,000 although the parties had agreed that this recovery would be part of the transaction. One of the registered owners, Thomas McGreevy, had been registered for VAT. He had become bankrupt. His trustee in bankruptcy, Mr Greg Sterritt, had effected deregistration. The defendants took accountancy advice through their solicitors which identified this as a problem. They put forward a proposed solution, although it is fair to say that it would have been very difficult of achievement given not only that Mr McGreevy was now bankrupt and deregistered but that his co-owner Mr Hughes had left the jurisdiction. In the events the sale did not complete. The plaintiff Bank then issued a further summons to enforce the terms of the compromise of 11 May 2009. The trial of that matter came on before me, again, on 1 June 20011. Again the matter was compromised. There was a new Tomlin Order. Again the action was stayed with liberty to apply. The court at the request of the parties approved a sale price of no less than £320,000 inclusive of value added tax. It will be understood that these events were taking place against the background of a sharp and continuing fall in the value of property from its peak in the summer of 2007. I set out the Schedule in full for completeness.

**SCHEDULE**

"1. The Plaintiff and the Defendant agree to vary the provisions of the Schedule to the Tomlin Order made in this Action on 11 May 2009 in the following terms:

(a) Clauses 4(a) and (b) are deleted;

(b) Substitute the following for clause 4(c):

"The Plaintiff will sell to the Defendants the Property for the sum of £320,000 (inclusive of VAT) to complete within 6 weeks, or if later, 10 days after the Court shall have approved the price of £320,000 (inclusive of VAT) and that the Plaintiff will provide on or before completion a valid VAT invoice from the supplier sufficient to permit the Defendants or their nominee to recover the VAT."

(c) Add the following clause 4(f):

"For the avoidance of doubt, the Defendants acknowledge that no further searches or property certificates will be provided by the Plaintiff and General Conditions 2.3 and 2.6 are accordingly excluded."

2. The Defendants acknowledge responsibility under paragraph 5 of the original Tomlin Order.

3. There shall be no order as to the costs of this Application.

4. For the avoidance of doubt the Defendants and their nominees referred to at 1(b) above shall be validly registered for the purpose of reclaiming the VAT in this transaction.

5. For the avoidance of doubt these terms and the Tomlin Order as amended are in full and final settlement and are in substitution for all previous agreements."

[5] The court had the benefit of helpful written and oral submissions from Mr William Gowdy for the Bank and Mr A. J. S. Maxwell for the defendants. There

was one principal point and one secondary point at issue. In the course of the oral argument on the morning of 13 December 2012 the principal point turned, as before, on the recoverability of VAT by the defendant purchasers. In particular Mr Maxwell contended that his clients were entitled to rescind the contract to purchase the lands, as they had purported to do, because the plaintiff had not provided on or before completion a valid VAT invoice from the supplier sufficient to permit the defendants or a nominee to recover the VAT. He acknowledged, as he had to, that in the light of a series of subsequent letters from HMRC it was now clear that HMRC would accept the invoice put forward by the Bank on 29 July 2011 to recover the VAT. But he argued not only that the retrospective clarification of that did not assist the plaintiff but that in any event the invoice which they furnished on that date was from the Bank itself and that it did not comply with the agreement of 1 June 2011 because it was not "from the supplier". I may observe at this stage that one has considerable sympathy with the defendants' advisers in this regard but the question the court will have to determine is whether indeed the Bank had complied with their obligations under the contract for sale as varied by the agreement at 1 June 2011. As can be seen from the Schedule set out above the Tomlin Order of 1 June 2011 was a variation of the provisions of the earlier Tomlin Order of 11 May 2009.

[6] Following the second settlement of the action on 1 June 2011 Mr Stephen Gowdy of King and Gowdy, solicitors for the Bank, wrote to the Value Added Tax Written Enquiries Team of HM Revenue and Customs. He referred to earlier letters from them of 23 July 2010 and 25 October 2010 but counsel accepts that they do not assist the plaintiff. Stephen Gowdy recapped the factual situation in the case in an accurate way and asked for guidance from HMRC as to the appropriate VAT invoicing which could be affected "so that the purchaser, which is a VAT registered entity, would be in a position to reclaim the VAT". The two defendants in fact intended to use a limited company (C.R.L.M. Development Ltd.) as the purchaser which either was or was to be registered for VAT.

[7] The next event which occurred was that on 25 July 2011 the defendants served a notice to complete. Subject to the subsidiary point to which I will turn in due course they were entitled to do so. The Bank had not within 6 weeks of 1 June sent a VAT invoice and the defendant purchasers were entitled to make time of the essence. This they did by their notice to complete giving the Bank until 1 August.

[8] Whether prompted by the plaintiff's solicitors or by chance the important clearance letter of HMRC came into Mr Stephen Gowdy bearing the date of 29 July 2011. It does appear that it was received by him on that date, whether by fax or email.

[9] It addressed the disposal of the "part completed buildings at Coral Cottages, Kilkeel, Co Down". Unfortunately for all concerned, the author of the letter, Mrs Antoinette Cullander, a Written Enquiries Officer, introduced an erroneous factor, the origin of which either is not known to the parties or was not disclosed to the court but which did not originate from either party. She thought that the properties

in question had been owned, and indeed, so far as registration was concerned, were still owned by Blue Harbour Properties Ltd (BHP). She refers to this at several points in her letter. However, Mr William Gowdy submitted, and Mr Maxwell, rightly it appears, was not minded to dispute that although that was confusing to a reader of the letter, the conclusion that she conveyed from the revenue was still valid. I so find.

[10] In that letter Mrs Cullander expressly said that:

> "In view of the complex nature of this case, I have liaised with colleagues within the units of expertise and I can now advise you accordingly."

She goes on:

> "Therefore, under this [court] order and considering the above facts, your client, in addition to holding the deeds, has possession of their property. This being the case, when the property is sold it is your client who is making the supply; which means that your client should issue the invoice subject to the normal invoicing rules."

Later in the letter in what appeared to be pro forma paragraphs she confirms that such a clearance would normally be binding on HMRC subject to certain exceptions to be found at a computer link. I am satisfied by the submission of Mr William Gowdy that those exceptions do not apply here and that therefore this letter was binding on HMRC. The latter have confirmed this in several subsequent letters.

[11] The solicitors for the plaintiff then sent the invoice from the bank as supplier to the solicitors for these defendants but, regrettably, did not send with it, by fax or email, the letter of HMRC. Counsel had no explanation for this omission to inform their colleagues of the reason for the Bank providing the invoice. It is true to say that when it was later sent, in September, it did not prove persuasive, partly because of the erroneous reference to Blue Harbour.

[12] I have briefly indicated the thrust of Mr Maxwell's submissions at paragraph 5 above. I take all of his written and oral submissions into account. He argues that the VAT invoice was not "from the supplier" and therefore not valid. He says that was the advice received from the defendant's taxation advisers although I note that the latter acknowledge in due course that the Revenue was at liberty to make exceptions to any general rule in this regard. The defendants rely on paragraph 7 of Schedule 4 of the Value Added Tax Act 1994. It reads as follows:

> "Where in the case of a business carried on by a taxable person goods forming part of the assets of the business are, under any power exercisable by another person, sold by the other in or towards satisfaction of a debt owed by

> the taxable person, they shall be deemed to be supplied by the taxable person in the course or furtherance of his business."

In this context that meant that Messrs McGreevy and Hughes were "deemed" to be the suppliers of the goods, which for these purposes included the folios in question. The subsequent receipt of HMRC advices in the letters of 29 July and 24 August 2011 and subsequently confirmed in their letter of 29 May 2012 does not alter retrospectively the right of the defendants to rescind in early August of 2011, it is contended.

[13] One has to carefully distinguish here between the perception of the matter at the time and the underlying legal reality. The parties were implementing the contract they made on 1 June 2011 as set out in the Schedule to the Order of the Court of that day. The new Clause 4(c) is set out above. It must be read in its entirety including the sub-clause in the second half. The obligation on the plaintiff to perform its duty under the contract was to "provide on or before completion a valid VAT invoice from the supplier sufficient to permit the defendants or their nominee to recover the VAT". As indicated it is manifestly clear now that they did that. The Revenue repeatedly confirmed in writing that it was a valid invoice that would be effective to recover the VAT. If necessary, I would be minded to find that the phrase "from the supplier" must be read subject to the overall purpose of the clause and sub-clause. Nor does it seem to me that there is anything strained in such a construction. The party that was supplying the property here to the defendants was the bank. They had the order of the court entitling them to do so. Messrs McGreevy and Hughes, although registered as owners, had a mere equity of redemption. The Bank was the only legal person which could act as vendor given the Order of the Court based on the surrounding circumstances.

[14] If it transpired that there was a difficulty about the invoice and it was not valid and effective to recover the VAT then the defendants had a perfectly good remedy. The Bank would then be in breach of contract and the defendants could sue either for rescission of the whole contract or damages to the extent of the unrecovered VAT as appropriate. The defendants could have, and, in my view, should have accepted the invoice without prejudice to their right to sue if it proved ineffective. I acknowledge that they were not encouraged to do so by the with-holding of the HMRC letter of 29 July. But even if it was not apparent then this was, I find, for the reasons given in this judgement, a valid VAT invoice furnished in time i.e. within seven days of the notice to complete.

[15] The defendant relies on the deeming clause in paragraph 7 of Schedule 4. This does present an apparent difficulty to the plaintiff. It is obliged to present an invoice "from the supplier". Paragraph 7 provides that the situation which exists here, where the Bank is selling the property in "satisfaction of the debt owed by the taxable person, [the property] shall be deemed to be supplied by the taxable person in the course or furtherance of his business". Therefore, the Act of Parliament has

deemed that the indebted legal owner is the party supplying rather than the party with the power of sale.

[16] Firstly, I observe that this point would appear to have arisen from the industry of Mr Maxwell as it is mentioned briefly at the end of paragraph 6 of his skeleton argument but does not seem to figure in the contemporary correspondence nor the affidavits of Peter Thompson and Rob McCain on behalf of the defendants; however if it is determinative in law that may not matter. Secondly, it must be borne in mind that the statutory clause is a deeming clause. Sometimes that is used in statutory provisions to say that something is what it is not. The word is used for at least four different purposes it would appear. See Lord Radcliffe in St. Aubyn (L.M.) v Attorney General (No.2) [1952] AC 15, at 53 and Viscount Simonds in Barclays Bank v IRC [1961] AC 509; [1960] 2 All ER 817, at 820.

[17] It was held in St Leon Village Consolidated School District v Ronceray [1960] 23 DLR (2d) 32 that whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context. Although not cited to it that view was favoured by the Court of Appeal in England in Godwin v Swindon Borough Council [2001] 4 All ER 641. That was a case about the service of proceedings within or without a limitation period. Lord Justice May, in delivering the principal judgement of the court, clearly contemplated that the deeming provision could be a rebuttable presumption, although on the facts in that case the court found otherwise. See paras [6], [46] and [48] of the judgement.

[18] Here one has the situation where one of the legal owners is bankrupt. The other is out of the jurisdiction. If the deeming provision here was binding in all circumstances it would, I am satisfied, have been difficult, if not wholly impracticable, to obtain the necessary invoice from Messrs McGreevy and Hughes for the VAT. I will take it that the trustee in bankruptcy would have co-operated. But, no doubt for perfectly proper and good reasons, he had effected a de-registration of Mr McGreevy's VAT status. He would therefore have had to seek to reverse that decision with whatever consequences, as to costs and otherwise, that might follow. Even if he succeeded in that Mr Hughes would have had to have been located and his consent to joining in an invoice obtained. Would he have co-operated even if he was obliged to do so? One simply does not know. It is possible that he would have required some benefit in return for so doing. A party in the position of the Bank could, therefore, be frustrated in mitigating the loss they had suffered by lending money to the legal owners of the land. I cannot think that it was the intention of Parliament, in enacting paragraph 7 of Schedule 4 of the VAT Act, to cause such an outcome and create such a strait-jacket. It seems to me that, as contemplated by the Court of Appeal in Godwin, I should treat this deeming provision as a presumption, for the convenience of all concerned, but which, nevertheless, can be rebutted. Here the rebuttal consists of the firm and repeated assurances of HMRC, with reference to their own published guideline documents,

on a clear and rational basis, that they will treat the Bank as the supplier for the purposes of a recovery of VAT. Such assurances are enforceable at law. See, for example, Bingham L.J., R. v Inland Revenue ex parte MFK Ltd [1999] 1 All ER 91 at 110.

[19] I address the matter in the alternative in case I am wrong in that conclusion. The court here is enforcing the contract between the parties set out in the schedule to the Tomlin Order of 1 June 2011. The relevant sub-clause at 1(b) of the Schedule does not require the Bank to provide simply "a VAT invoice from the supplier" and nothing more. As pointed out above the requirement is for "a valid VAT invoice from the supplier sufficient to permit the defendants or their nominee to recover the VAT". The clear intention of the parties is that the defendants will recover the VAT. The phrase "from the supplier" must be read in the light of that clearly expressed intention and subject to it. In the light of the HMRC letters of July and August 2011 and May 2012 it cannot be doubted that that object of recovering VAT will be achieved. Therefore, on a proper construction of the agreement between the parties here I consider that the Bank complied with its obligations under the agreement and that the deeming provision in Schedule 4 of the 1994 Act does not prevent the plaintiff succeeding here.

[20] The defendants say they were troubled by one other aspect of these matters. I do not need to rule on the contention of the plaintiff that in reality they did not want to go through with this third transaction even at the reduced price. For these purposes I am not making any finding adverse to the bona fides of the defendants and obviously not of their advisers. The difficulty arose from the Bank facility letter written to the Directors of CRLM Developments Ltd which was apparently the company that was to buy this property at Cranfield Road. The initials LM refer to the first defendant before me and CR to the second defendant. At page 5 of the facility letter by which money would be made available for this purchase one finds "Conditions Precedent". Number 3 reads:

> "Bank to receive confirmation from Company's Tax Advisers that VAT is reclaimable."

This was confirmation that the defendants' advisers were unwilling to give. However, as counsel pointed out this facility letter is not part of the agreement of 1 June 2011. It is not a good reason for failing to perform that contract. In any event one feels that this is rather overstated by the defendants. The Bank in question was the plaintiff. If the defendants' advisers had said this is the VAT invoice we have been given by you, the Bank, so we have to take it that it is reclaimable, it would seem more than a little surprising if the same Bank then rejected the loan because the invoice took that form. Certainly, if the defendants' advisers, as they could have done by September or even late August provided either the July or August letters from HMRC to the Bank it is inconceivable that this would have posed a problem. It seems that an earlier agreement may have incorporated something further but that was not the case with the agreement of 1 June 2011.

[21] In the light of the findings which I have made it is not necessary for the plaintiff to rely on its secondary argument. But, for completeness, I shall deal with it. For the defendants' notice to complete to be effective they had to be ready able and willing to complete themselves. Mr Gowdy submits that they were not because they had failed to serve the draft assurance required on foot of the two Tomlin Orders. The defendant's answer to that is simple. A draft assurance had been provided at an earlier stage of the transaction, albeit in the sum of £400,000 plus VAT rather than £320,000 including VAT. The contention by the plaintiff that the defendants were therefore in breach of the general conditions of sale, which applied, at 19.2 and 11.1 is misplaced. All that is required under general condition 11.1 is a draft assurance. All that the vendor's solicitors needed to do was to strike out the earlier figure and amend it to the up to date figure in the process of execution. It seems to me that the defendants are right in that submission and that this point would not assist the plaintiff.

[22] I find that the plaintiff succeeds because within the time fixed by the defendants' Notice to Complete they did provide an invoice which complied with the amended Clause 4 c, as set out in the Schedule to the Tomlin Order of 1 June 2011. I take into account the failure of the plaintiff to promptly and frankly supply to the defendants' solicitors the letter from HMRC of 29 July 2011 commending and approving the provision of such an invoice. This may sound in costs. I will hear counsel on that issue.