Neutral Citation No: [2021] NICh 2	*Ref:* **McB11451**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:* **2018/41796**
	Delivered: **15/03/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

THE PRESBYTERIAN MUTUAL SOCIETY LTD (IN A SCHEME OF ARRANGEMENT) ACTING BY PAULA WATSON AND JOHN HANSEN IN THEIR CAPACITY AS JOINT SUPERVISORS OF THE SCHEME OF ARRANGEMENT

Plaintiff/Respondent

and

WALTER DODDS

Defendant/Appellant

Peter Hopkins, of counsel (instructed by Arthur Cox, Solicitors) for the Plaintiff/Respondent
Mr Dodds the defendant/appellant appeared as a litigant in person
Mr Gowdy QC appeared for the Official Solicitor acting as *amicus curiae*

McBRIDE J

Application

[1] Mr Dodds, a litigant in person, by process dated 28 May 2019 seeks to have a possession order made by Master Hardstaff dated 22 May 2019 set aside as it was, "contrary to due process of law and false representation, pursuant to Order 2 rule 2 of the Rules of the Court of Judicature (Northern Ireland) 1980".

Background

[2] The defendant/appellant ("Mr Dodds") is the owner of a dwelling house and a farm of lands situate at Lackan Road and Cabra Road, Ballyroney, Banbridge, County Down comprised in Folios 25752, 23611 and 23491 County Down ("the house and lands").

[3] In October 2004, the Presbyterian Mutual Society advanced £410,000 ("the principal sum") to Mr Dodds on foot of a facility agreement. In his application for this loan, Mr Dodds described himself as, "self-employed delivering home heating oil and farm fuels". He stated that the purpose of the loan was to purchase the house and lands which included a number of building sites for which he had obtained planning permission. The loan was for a period of 3 years from 27 October 2004. Repayment of the principal sum and interest thereon was initially secured by way of an equitable mortgage. Subsequently on 11 March 2013, Mr Dodds executed a legal charge over the house and lands as security for repayment of the principal sum and interest thereon. The charge was registered against the house and lands on 15 March 2013.

[4] On 17 November 2011, Arthur Boyd was appointed as administrator of the Presbyterian Mutual Society. On 4 July 2011, John Hansen and Arthur Boyd were appointed joint supervisors of a scheme of arrangement between the Presbyterian Mutual Society and its creditors. On 29 January 2016, Paula Watson replaced Arthur Boyd as joint supervisor of the Presbyterian Mutual Society.

[5] The last payment made by Mr Dodds on foot of the loan agreement was on 29 January 2014. In July 2014, a demand was made by the joint supervisors for repayment of the balance. On 6 March 2018, a demand was made on behalf of the plaintiff to Mr Dodds for all sums outstanding. This demand has not been satisfied and the total monies are now due and owing, as the three year term of the loan has expired.

[6] The plaintiff sought and obtained the possession order in respect of the house and lands on 22 May 2019 ("the possession order").

Representation

[7] The plaintiff was represented by Mr Peter Hopkins of counsel. Mr Dodds appeared as a litigant in person. He did not appear at the hearing. Dr Damien McCullagh, Consultant Forensic Clinical Psychologist by a report dated 8 June 2019 concluded that Mr Dodds did not have capacity to represent himself due to his "cognitive and memory deficits." He advised Mr Dodds to seek legal representation. Given the implicit acceptance by Dr McCullagh that Mr Dodds had capacity to instruct a solicitor, the Official Solicitor declined to act as his guardian ad litem. The Official Solicitor did, however, agree to assist the court as *amicus curiae* and instructed Mr William Gowdy QC to act on her behalf.

Hearing

[8] The case proceeded by way of a hybrid hearing on 22 February 2021. Mr Dodds did not appear. He sent correspondence to the court dated 8 February 2021 and 22 February 2021. The correspondence dated 8 February was signed by

"Walter" and the correspondence dated 22 February 2021 was signed by "David (on behalf of Walter)."

[9] The letter dated 8 February 2021 was entitled "Common Law Letter of Rejection of Service of Documents." In this correspondence, Mr Dodds stated that the court lacked jurisdiction to hear the case and he requested that the hearing date be vacated for this reason. Further, on 15 February 2021, the Official Solicitor received a similar letter in which Mr Dodds stated that the Official Solicitor's skeleton argument was not served in accordance with the practice direction and accordingly the hearing date should be vacated for this reason. In the email dated 22 February 2021, David, on behalf of Walter, asked the court to confirm that the case was listed for review only.

[10] I have treated the letters of 8 and 15 February 2021 and the email dated 22 February 2021 as applications to vacate the hearing. I refuse that application. I am satisfied that the court has jurisdiction to hear this case for reasons which will appear later in this judgment. I further refuse the application to vacate the hearing on the basis that the Official Solicitor served the skeleton outside the time set out in the practice direction. The Official Solicitor served the skeleton argument in accordance with the directions of this court. Further, the Official Solicitor acts as *amicus curiae* and therefore makes points in aid of Mr Dodds. I therefore find that there is no prejudice to Mr Dodds in receiving the skeleton argument of the Official Solicitor less than 14 days before the hearing.

[11] I further reject the assertion that this case was listed for review rather than a hearing. I am satisfied that Mr Dodds was aware the case was listed for hearing as his letter dated 8 February 2021 asked for the "hearing date" to be vacated. I am therefore satisfied that Mr Dodds was aware the case was listed for hearing today.

[12] Further, I have heard the evidence of Mr Black who was called to prove service of the order dated 11 December 2020 which listed the case for hearing today. That order was served upon Mr Dodds by first class post on 16 December 2020. Mr Black gave evidence that by letter dated 18 February 2021, sent by courier service, Mr Dodds was advised that the case was listed for hearing today. The letter was delivered and the recipient was Mr Dodds. Accordingly, I refuse the application to adjourn the hearing on the basis that Mr Dodds believed it was listed for review only.

[13] I wish to record my thanks to counsel who attended remotely for their extremely carefully crafted concise and considered skeleton arguments. Further, I am grateful to counsel who through collaboration were able to distil the "live issues" which remained before the court. Mr Hopkins and Mr Gowdy agreed that the live issues before the court consisted of two preliminary and three substantive issues. The two preliminary issues were:

(1) Whether Mr Dodds' process before the court was an appeal or an application to set aside the possession order under Order 2 rule 2.

(2) Whether Mr Dodds' assertion of unfair terms under the Directive was to be taken as an assertion of an unfair relationship under the Consumer Credit Act 1974.

The three substantive issues were:

(1) Whether Mr Dodds' allegation as to the circumstances of the execution of the charge undermined its validity.

(2) If the court found an unfair relationship had been asserted, whether an unfair relationship arose.

(3) Whether the plaintiff had adequately proved that it retained title to the charge in light of the dicta in *Swift v McCourt*.

[14] I further wish to record that Mr Gowdy acting as *amicus curiae*, in both his written and oral submissions has, after he painstakingly read and analysed the dense and often impenetrable paperwork provided by Mr Dodds, identified and considered all the possible legal and factual arguments which could be made on Mr Dodds' behalf in support of his application to the court.

Evidence before the Court

[15] The plaintiff's evidence is contained in the affidavits of Paula Watson sworn on 17 January 2019 and 7 October 2020. Mr Dodds' evidence is set out in "A Special Motion for Discovery for Proofs of Claim" dated 11 February 2019, special affidavit dated 26 March 2019, special affidavit sworn on 30 April 2019 and a "special supplemental affidavit Number 2" sworn on 28 January 2021. In addition, a large number of other documents have been lodged either by Mr Dodds or by someone on his behalf between 18 July 2019 and 2 November 2020.

[16] The evidence and submissions made by and on behalf of Mr Dodds raise a large number of issues. Before considering these, it is necessary to deal first with the preliminary question whether the application before the court is an appeal or an application to set aside the possession order.

The nature of the Application before the Court

[17] The process dated 28 May 2019, Mr Dodds' affidavit dated 28 January 2021 and his notice of fraud all state that the application before the court is an application to set aside the possession order for irregularity under Order 2 rule 2 rather than an appeal of the possession order.

[18] Under Order 2 rule 2, an application to set aside must state the grounds of objection in the notice of motion. The process dated 28 May 2019 challenges the possession order on the basis that it was "contrary to due process of law and false misrepresentation". It does not give any clearer particulars of the alleged irregularity.

[19] The alleged irregularity is more particularised in the affidavit dated 28 January 2021 and the notice of fraud. In these documents, Mr Dodds contends that the case proceeded to hearing when it was only listed as a review. As a result, he states that he has been prejudiced because he was not prepared to deal with the substantive case at the hearing date on 22 May 2019.

[20] I have decided to deal with this case as an appeal rather than as an application to set aside as this enables the court to conduct a *de novo* hearing. This has the effect of curing any alleged irregularities and further enables the court to determine all the issues raised by Mr Dodds in the documents he has filed with the court.

ISSUES ON APPEAL

[21] The papers filed by Mr Dodds raise the following issues for consideration:

(i) Whether the court has jurisdiction to hear the case ["Jurisdiction"].

(ii) Whether the originating summons is void because it is unsigned ["Void Originating Summons"].

(iii) Whether the plaintiff has proved its claim ["Proof of Claim"].

(iv) Whether the charge is void ["Challenge to the charge"].

(v) Whether the loan/security contains unfair terms contrary to the Unfair Contract Terms Directive 93/13/EEC ["Unfair relationship"].

(vi) Whether the plaintiff was properly regulated in advancing the loan ["Statutory Regulation"].

(vii) Whether the plaintiff has established that it has title to the debt and security ["Title/Securitisation"].

[22] Before dealing with the issues which Mr Hopkins and Mr Gowdy identified as "live" issues between them, I intend to briefly set out my determination of the other issues raised by Mr Dodds, which Mr Gowdy accepted were without merit.

Jurisdiction

[23] Mr Dodds sought to advance an argument that this court had no jurisdiction to hear the claim. I reject that submission as the claim concerns a claim for possession of land situate in Northern Ireland on foot of a deed of charge which contains a non-exclusive Northern Ireland jurisdiction clause. I consider this submission to be totally without merit.

Void Originating Summons

[24] Under Order 7 rule 5(ii), the provisions of Order 6 rule 6 apply to the issue of an originating summons. Accordingly an originating summons must be signed by the solicitor for the plaintiff before issue. Although the originating summons does not appear to bear any signature, such a defect is, in accordance with Order 2 rule 1 an irregularity and as such "shall not nullify the proceedings". Accordingly I consider that this submission is misconceived.

Proof of Claim

[25] Mr Dodds puts the plaintiff on formal proof of its claim. In his first skeleton argument, the *amicus curiae* identified certain gaps in the proofs set out in the plaintiff's original affidavits. Following receipt of this skeleton, the plaintiff sought and was granted leave to file a supplemental affidavit by Paula Watson. This affidavit addresses all the issues raised by the *amicus curiae*. In particular, it provided evidence that Mr Dodds' solicitor accepted the terms of the loan and the loan was drawn down; it provided a statement of account in respect of the current outstanding balance; documents regarding appropriate interest rates were provided and the circumstances of the taking of the legal charge were set out.

[26] On the basis of the affidavit evidence of Paula Watson and as appears from the associated documents, Mr Dodds entered into a loan agreement and provided security by way of the charge over the house and lands. As appears from the statement of account, he drew down the loan and then failed to repay the loan in accordance with the agreement. I further note that Mr Dodds did not at any time prior to 28 January 2021 deny that he executed the charge or that he was the registered owner of the lands subject to a registered notice of disposal and notice of charge in favour of the plaintiff. In all the circumstances, I am satisfied that the plaintiff has proved the claim.

Statutory regulation

[27] The regulatory status of the loan needs to be considered as of 27 October 2004 and 11 March 2013. Article 61 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as of 27 October 2004 defined a regulated mortgage contract as follows:

> "Regulated mortgage contract" means a contract under which –
>
> (i) a person (`the lender') provides credit to an individual or to trustees ('the borrower'); and
>
> (ii) the obligation of the borrower to repay as secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom, at least 40% of which is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person."

[28] The security given in 2004 was by way equitable deposit and therefore in accordance with the legislation the mortgage contract was not regulated.

[29] As of 11 March 2013, the security was a first legal mortgage. The evidence is that the dwelling house and curtilage did not correspondence to at least 40% of the land held as security as the security included a 53 acre farm. Therefore the relationship between the plaintiff and Mr Dodds was never a regulated mortgage contract.

[30] The second question which arises is whether the relationship was a regulated agreement within the meaning of Section 8 of the Consumer Credit Act 1974.

[31] As of 27 October 2004, the financial limit on a regulated agreement was £25,000. Given the amount of the loan, the loan agreement was not a regulated agreement as of that date. When the financial limit was removed, some exceptions remained. In accordance with Section 16C, the evidence that less than 40% of the land was occupied as a dwelling means that the agreement was and remained an exempt agreement. Accordingly, the agreement was not a regulated agreement under the Consumer Credit Act 1974.

Unfair Contract Terms Act

[32] Mr Dodds submits that there are a number of unfair terms in the contract. The Consumer Rights Act 2015 implements the Unfair Contract Terms Directive 93/13/EEC. These provisions apply to a contract between a consumer and trader. A consumer is defined as "an individual acting for purposes that are wholly or mainly outside the individual's trade, business, craft or profession." As appears from the loan application, he purchased the house and lands to enable him to sell sites and to farm the land and also possibly carry on business of oil distribution. On the basis of all the evidence before the court and in particular based on the

information set out on his loan application form, I consider that the defendant did not enter into the contract as a consumer.

[33] If I am wrong in this conclusion and Mr Dodds is a consumer and the court was to further accept that the terms in the contract which Mr Dodds refers to were in fact unfair, the effect of this would be that those terms would not be binding on him as a consumer. None of the terms relied upon by Mr Dodds, however, are relevant to the question whether the court can or cannot make a possession order. Accordingly, even if the court ruled those terms were unfair this would not assist Mr Dodds in setting aside the possession order.

Challenge to Charge

[34] In his affidavit dated 28 January 2021, Mr Dodds averred that he signed a sheet of paper produced by a solicitor. He states that he was not given any explanation as to its content and was unable to read it as he did not have his reading glasses with him. He asserts that if he had known it was a legal charge he would not have signed it. He further states that he lacked capacity and was not in a fit state to sign legal documents as he was under out-patient care for mental health issues.

[35] Mr Dodds did not attend court and did not give oral evidence about this matter. Consequently, he could not be subject to cross-examination by Mr Hopkins and his evidence in this regard was therefore untested. Mr Dodds gave no explanation for his failure to attend court.

[36] I place little weight on the evidence of Mr Dodds in respect of this matter as he failed to attend court without explanation; his evidence was untested; and this issue was only raised in his most recent affidavit in January 2021 despite the fact he had been providing affidavits and documentation to the court for several years prior to this.

[37] The question for the court to determine is whether these allegations amount to a plea of *non est factum*. If such a plea is made out, the charge would be void as against Mr Dodds.

[38] This doctrine was considered by the House of Lords in *Saunders v Anglia Building Society* [1971] AC 1004. The House of Lords rejected the plaintiff's plea of *non est factum* because the debtor had signed what was obviously a legal document on which money was advanced to her on the faith of it being her document.

[39] For the doctrine to apply the person must establish that there was a radical difference between what he signed and what he thought he was signing. The doctrine does not apply where the person signing the document has failed to take the trouble to find out at least the general effect of the document he is signing.

[40] Mr Dodds' case is that he did not know what he was signing. He does not, however, give any evidence to explain what he thought he was signing. In the absence of such evidence to amplify what Mr Dodds thought he was signing, there was no evidence before the court upon which it can find that the plea of *non est factum* is established. Accordingly I reject this ground of appeal.

Unfair relationship

[41] Mr Gowdy acting as *amicus curiae* submitted that an argument could be made that an assertion of an unfair relationship had been raised by Mr Dodds at paragraph 9 of his affidavit sworn on 11 February 2019. Paragraph 9 states:

> "that the respondent does require; under 93/13 EEC the unfair terms in a contract directive of the European Union; that; all acting justices; of their and obligations within their acting roles; to assess for their motion; the alleged original contract documents; and title; that claim this alleged claim; and do say the alleged contract of this claim; is flawed in the extreme; and the bono fides of the contract; grounding this claim; need more verification; for validity …"

[42] Mr Gowdy submits that the reference to "unfair terms" and "flawed in the extreme" could be construed as an assertion of an unfair relationship. In contrast Mr Hopkins submitted, even giving latitude to an unrepresented personal litigant, such an assertion could not be construed from this paragraph. He referred to the fact that this assertion was only made in his first affidavit. Although Mr Dodds has since filed a number of affidavits over a number of years, he has never elaborated upon it and it was then not pursued in Mr Dodds' most recent documentation provided to the court.

[43] In accordance with the dicta in *Bevin v Dattum Finance Ltd* [2011] EWHC 3452 (Ch), once an assertion is made the lender then bears the burden of proof in proving the credit relationship is fair. It is therefore important to determine whether Mr Dodds has made an assertion of an unfair relationship. If I were to find the assertion was made out Mr Hopkins in these circumstances may seek leave to file further evidence to deal with the assertion and the court would have to consider that request before proceeding further.

[44] I am satisfied that Mr Dodds has not made an assertion of an unfair relationship under the Consumer Credit Act. Whilst the documents filed by Mr Dodds are difficult to decipher and understand and whilst I accept Mr Gowdy has painstakingly, in his role as *amicus curiae*, sought to present all possible arguments to the court on Mr Dodds' behalf, I do not find that paragraph 9 can be read as making an assertion of an unfair relationship. Paragraph 9 does not refer to either an unfair relationship or to the Consumer Credit Act. It simply refers to

unfair terms which Mr Gowdy has conceded is an argument which is not engaged in this case and is an argument which I have already dismissed. Further I find the reference to "in the extreme" does not refer to an unfair relationship. Even though latitude is to be given to personal litigants, there needs to be some basis for finding the assertion of an unfair relationship. I find the reference to "in the extreme" and to "unfair terms" to be too tenuous to be an assertion of an unfair relationship.

[45] Secondly, looking at all the documents filed in this case over many years, which includes six affidavits, skeletons and other numerous documentation, no argument has ever been put forward in any of these of an unfair relationship. Many other legal arguments can be deduced from this paperwork even though not expressed in a correct legal format or language. I do not, however, find any express or implied reference in all of this documentation to an unfair relationship. I therefore find that such a relationship has not been asserted either in substance or form. As noted in *Bevin*, unless an unfair relationship is asserted the court cannot take this point of its own motion. Accordingly, I reject the submission that there was an unfair relationship.

Title/Securitisation

[46] In his affidavit sworn on 11 February 2019 at paragraph 17, Mr Dodds puts the plaintiff on proof that title to the charge has never been "securitised, sold … or swapped."

[47] The locus standi of a plaintiff to bring an action in circumstances where its title is challenged is a matter which has been before the court on a number of occasions. In a bid to balance the interests of the borrower who has no knowledge of the lender's arrangements and to avoid exposing lenders to protracted and expensive applications for interrogatories, specific discovery and/or calling witnesses to prove whether it has parted with title, Horner J in *Swift Advances plc v McCourt* [2012] NICh 33 set out some "further thoughts" on the course to be adopted in a case where an issue is raised about the lender's locus standi. He suggested the following course should be adopted after lists of documents have been exchanged by both sides:

> "Firstly, there should be an inspection of those documents in the list of each party. Secondly, the solicitor acting for the financial institution should warn the proposed deponent on behalf of the financial institution of the serious consequences he or she bears personally, and the consequences for his or her employer, if he or she swears an affidavit that is false in any respect. Thirdly, the solicitor should confirm to the court that the deponent has been so advised before the affidavit is sworn. Fourthly, the deponent on behalf of the financial

> institution should then swear the affidavit dealing with the plaintiff's title to seek an order for possession."

[48] I consider this guidance is a sensible, robust and proportionate method of dealing with a challenge by a borrower to the lender's locus standi. I therefore consider that this guidance ought to be followed in all cases when a borrower raises a question about the lender's locus standi to obtain a possession order. In the present case, there has been no exchange of lists. Such an exchange does not happen automatically under Order 88 but in a case where locus standi is challenged and as appears from the *Swift* guidance, I consider lists ought to be exchanged and thereafter the steps set out in *Swift* followed.

[49] Mr Hopkins submitted that the court could, even where the *Swift* guidelines were not followed, in certain circumstances still make an order for possession. In particular, he submitted that in circumstances such as the present where the plaintiff was the registered owner of a legal charge it had a right to seek an order for possession. To support this proposition he relied on paragraph 109 of *Paragon Finance Plc v Pender (2005) 1 WLR 3412* when Jonathan Parker LJ stated as follows:

> "It is common ground that Paragon, as registered proprietor of the legal charge, retains legal ownership of it. One incident of its legal ownership – and an essential one at that - is the right to possession of the mortgaged property."…The right to possession conferred by the legal charge remains exercisable by Paragon as the legal owner of the legal charge, notwithstanding that Paragon may have transferred the beneficial ownership of the legal charge to the SPV"

[50] Whilst the court accepts the legal owner of the charge is a proper party to bring possession proceedings, that is not the end of the court's enquiry. As Jonathan Parker LJ went on to say at paragraphs 110 and 111 of *Paragon*:

> "[110] It follows, in my judgment, that Paragon so long as it remains the registered owner of the legal charge is a necessary party to any charge to possession….
>
> [111] The only question then is whether the SPV should have been joined in the proceedings as an additional claimant."

In *Paragon*, the court ultimately held that joinder of the equitable assignee was unnecessary. This was because on the facts of that case the SPV expressly authorised Paragon to exercise such rights on its behalf.

In *Bexhill (UK) Ltd v Razzaq* [2012] EWCA Civ 1376, the Court of Appeal set out at paragraph 58 the general rule in respect of the need to join the equitable assignee:

> "The general rule is that it is the equitable assignee who has the right to sue …"

Accordingly, in *Bexhill* the court held that the assignee needed to be joined as a party.

[51] In my judgment, the fact the plaintiff is the registered owner of the legal charge is not in and of itself sufficient to dispose of the locus standi issue as, depending on the arrangements made, the equitable assignee of any charge may need to be joined as a party. Accordingly, the court needs the title to be investigated in the manner set out by Horner J in *Swift v McCourt*.

[52] Mr Hopkins further submitted that the court could dispose fairly of the case at this stage because Paula Watson averred, "the joint supervisors have not disposed of the security."

[53] In my judgment, this averment is not sufficient to comply with Horner J's guidance. The averment is limited to her knowledge of what the joint supervisors have done. She cannot speak to what the Presbyterian Mutual Society may have done regarding the disposal or otherwise of the security. She is not therefore able to aver that the plaintiff has not at any time disposed of the security. Consequently, I am not satisfied that the averment deals adequately with the question of title.

[54] The court therefore directs that the guidance of Horner J is strictly complied with and the court will hear counsel regarding a timetable for the steps set out by Horner J to be followed.

[55] Given the length of time it has taken for this case to come to hearing, rather than remitting this matter to the Master, I will relist the matter for hearing on the title issue before this court. This court will then hear this matter on a date convenient to the parties.

[56] In the interim period, it is open to Mr Dodds to consider making a proposal so the court can at the adjourned hearing consider whether to exercise its discretion either to adjourn or stay the proceedings or to otherwise suspend any order for possession.