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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

2014/005393

CHANCERY DIVISION

PREFERRED MORTGAGES LIMITED

v

STEPHEN McCOMBE

MR JUSTICE DEENY

[1] I have before me this morning an application by Mr Stephen McCombe for an extension of time in which he and his wife, Mrs Lynn McCombe, may appeal from the Order of Master Hilary Wells of 19 September 2014.

[2] The matter arises in the following way. The proposed respondent to the putative appeal, the original plaintiff in the action, Preferred Mortgages Ltd, have a mortgage on the dwelling house of the proposed appellants at Ballymore Road, Tandragee, Co Armagh, being lands comprised in Folio AR8672. The plaintiffs have been the owners of this property since 1997 but they consented to a charge on the property to secure a loan to them by the lender here of some £61,415 on 5 April 2006. For some years they paid the mortgage on that property; the monthly repayment was of £174.41. However, the last payment on the mortgage was made on 31 July 2013 and since then no further payments have been made. The plaintiff lender then issued proceedings which led ultimately to the hearing before the learned Master on 19 September 2014 and an order for possession was made in favour of the lender.

[3] Appearing before me today Mr Stephen McCombe said that he ceased to make the payments because he believed that the lender was not now the owner of the charge because he had been asked to make payments to a separate entity and he was therefore taking that point against them. Under some gentle questioning from

the court it was established that he had been in full time employment at the time this loan was taken out in 2006 but was now only in part-time employment as was his wife, the second defendant. He was appearing on her behalf in person this morning as well as on his own behalf although I will have to come back to that matter briefly. The issue of an extension of time for any appeal has been dealt with in the enduring judgment of Lord Lowry in Davis and Northern Ireland Carriers [1979] NI 19. While other judges and I have commented on this judgment it remains not only the binding authority on me but one of assistance to judges at first instance. I remind myself, however, that at the end of the day the duty of the court is to exercise its discretion to avoid injustice and that the court will do.

[4] It is right to say that Mr William Gowdy in his helpful submissions on behalf of the lender also drew attention to a decision of Lord Justice Campbell sitting as a judge of the Chancery Division in S (A minor) and Denver [1999] NI 322, which therefore was more recent than that of Davis, in which he refused to extend time despite the fact that the effluxion of time, the delay, was only of one day and I take that case into account as well.

[5] I think it perhaps most convenient for dealing with this matter ex tempore, as I consider it appropriate to do, to go through the helpful principles enunciated by Lord Chief Justice Lowry in his judgment in Davis and see where they take us. The first principle enunciated by the Court of Appeal per Lord Lowry is this:

> "Whether the time is already sped: a court will look more favourably on an application made before the time is up."

In that regard Mr Gowdy submits that must be in favour of the respondent because no application was made until after the time had sped. That is correct but it is my duty to look at a slightly unusual circumstance here. Happily, Mr McCombe has been a frank and candid and honest party before the court and there is no dispute as to facts between him and Ms Connie Keating of Messrs McKinty & Wright, the solicitors for the lender. I mention this because it does appear that the learned Master at the conclusion of her judgment finding against Mr McCombe was asked by him about an appeal and she said that she thought he had 14 days in which to appeal. But she wisely attached to that observation, which was not in fact correct, she suggested to him that he look at the matter further. It is right to say that she seems to have suggested he attend the Chancery Office to request guidance on the appropriate procedure.

[6] It is necessary for me to make two observations. Firstly, it is not the duty of the court officials to give legal advice. They may well be familiar with these time limits and be able to assist but they cannot be under any duty, and are not under any duty, to do so. There are different time limits for different cases and of course some of the court officials have much more experience than others. The correct advice to the litigant in person, in so far as the court choses to give advice, would be to consult the Rules of the Court of Judicature [and/or The Guide for Litigants in Person] and

ensure that any appeal is put in properly in accordance with those provisions. Here the relevant provision is at Order 58 Rule 1 and in fact the Notice of Appeal ought to have been issued within 5 days after the judgment. This was not done by Mr McCombe. He only issued it in the Chancery Office on 2 October which seems to be 6 days out of time. Furthermore, as I have indicated, he candidly admitted that he had not taken the Master's advice to go and consult the court offices before preparing his Notice of Appeal and nor, implicitly, did he consult the Rules of the Court of Judicature.

[7] I observe further that his position is worsened in as much as it is quite clear he ought to have served this Notice of Appeal on Messrs McKinty & Wright, the solicitors for the lender, but he omitted to do so. It is to their credit that they observed that the case was in my list on the return date of 16 October and attended on that occasion and took the time point. I then fixed the matter for today, 3 November, to rule on the extension of time. Although the matter was spent I think the court cannot ignore the fact that the litigant in person was advised incorrectly, albeit in very qualified terms, as to the time for appeal and that he did in fact appeal within the 14 days that was inadvertently suggested to him might be the correct period in which to appeal.

[8] I now turn to the second principle enunciated by Lord Lowry in Davis:

> "When the time limit has expired, the extent to which the party applying is in default."

Well as I have indicated and it is very relevant here Mr McCombe is only modestly in default and again the matter of the inadvertently incorrect advice to him may be relevant in this second heading. If the first heading is somewhat in favour of the respondents the second principle is in favour of the putative appellate Mr McCombe and indeed his wife.

[9] The third principle enunciated by Lord Lowry is as follows:

> "The effect on the opposite party of granting the application and in particular whether he can be compensated by costs."

Happily for Mr McCombe this is not a case where the property over which the order for possession has been made is already in negative equity, ie the lender is already at an irretrievable loss and further proceedings even if it is successful will simply increase the extent of its loss. The total amount owing on the property, I was told from the Bar, was now £67,380 and a recent drive-by valuation suggested that it might be worth some £75,000, so it is not a case of negative equity. While Ms Keating was entitled to say that the property market is still depressed, it does nevertheless appear as far as the court can judge to have, at least, ceased to fall further and it seems to me therefore that so far as the third principle is concerned an

extension of time is unlikely to cause irretrievable prejudice to the respondent and therefore falls in favour of the putative appellant. Furthermore an order for costs may be enforceable.

[10] The fourth principle is:

> "Whether a hearing on the merits has taken place or would be denied by refusing an extension".

Mr Gowdy is quite right in saying there has been a hearing on the merits. It is clear, although there is no written judgment, from the Master's notes and the affidavit evidence before me that there was a careful hearing on the merits in this matter and that principle therefore falls in favour of the respondent plaintiff.

[11] The fifth principle reads:

> "Whether there is a point of substance to be made which could not otherwise be put forward."

Mr McCombe without the leave of the court put in a further affidavit on 15 October 2014 setting out various matters. I expressly asked him what his points of substance were here. His first point of substance which he said was a big issue to him was whether Preferred Mortgage was the owner of the charge: "he would like to know if they are". If this were the only point I would be loath to extend time to a party to pursue it. This has largely proved to be a chimera for borrowers. The guidance, including the persuasive authority of the Court of Appeal in England, is that the holders of the registered charges are entitled to pursue them even if they prove to be the wrong party. If the court declined to enforce the charge the owner of the charge would still be entitled to enforce the charge. The debt would still be owing, so it is not an issue in which I would have much sympathy with the defendant appellants.

[12] Mr McCombe then in response to a direct question said a second issue was that his wife did not have independent financial advice at the time of the transaction.

As counsel for the lender points out there is literally no evidence of that. This lady has never sworn an affidavit during the relatively extended period during which these proceedings have been ongoing. They were commenced by a summons of 16 January 2014. She does not appear from the notes of the Master to have appeared before her and she did not appear before me either on the last occasion or today. If she were taking some point of that nature it would not be appropriate for Mr McCombe to appear on her behalf. I do not think I will say anything more about the matter in case I am adjudicating upon it but it is certainly not a strong point to be made in favour of the application for an extension of time at this very late stage. So it seems to me that it is rather equivocal whether there is a point of substance but I could not completely rule it out at the present time particularly bearing in mind the

correspondence to which Mr McCombe has referred that has emanated from the lender.

[12] The sixth principle set out in Davis is:

> "Whether the point is of general and not merely particular significance."

It seems to me that it is most unlikely that there is a point of general significance there and that that is in favour of the respondent. So too is the seventh principle that the Rules of Court are there to be observed. It can be seen therefore that there are a number of factors in favour of the respondent here justifying them in taking the point against the putative appellants. Those points are well made. However, I have to exercise an overall discretion in the matter bearing in mind these principles several of which are in favour of the putative appellants. It seems to me that I would not have extended time here were it not for the combination of particular factors in favour of the defendant appellants here, namely, the inadvertent reference to the wrong time in which an appeal can be lodged, the modest delay involved of less than a week and, as emerged in the course of the hearing, the modest arrears on the dwelling in question. Apparently, the arrears still only stand at £2,265.43.

[13] It seems to me a proper case in which to take into account, albeit with appropriate care, the provisions of the European Convention on Human Rights and in particular Article 8, the right to family life. This has been the home of this couple for some 17 years and they did meet their mortgage requirements for a period of some 7 years in connection with it and it would be most unfortunate if they were to lose the home over this relatively modest sum of money. It seems to me that Article 8 can be taken into account although I bear in mind the majority judgment of the House of Lords in Harrow London Borough Council and Quazi [2004] 1 AC and in particular Lord Scott of Foscote's observations at 10:29(v). I also take into account the judgment of Mr Justice Girvan, as he then was, in for example Re Guidera [2001] NI 71.

[14] Here we have a situation where it is appropriate to remind the litigant in person that the court is not sitting under a palm tree dispensing some kind of justice at large. The court has to act within the doctrine of precedent and the appropriate legislation. Mr McCombe has not filled in the Form 10A provided for persons in his position setting out both his outgoings and the income of the household to try and assess their capacity to meet a mortgage. As I say, here the mortgage is a relatively modest one with a monthly payment of £174.00 and arrears of £2,265. If the court were dealing with this matter and were ultimately to be against the McCombes on the points that are attractive to Mr McCombe at the present time, the court would still have to take into account the provisions of the Administration of Justice Act 1970, Section 36 and the Administration of Justice Act 1973 Section 8. The court, as I say, does not have an unfettered discretion but it could grant a stay of an order of possession such as the one currently in force here and not stayed at this moment in

time "if it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage…"

[15] I take this opportunity to make an observation about the relevance of a reasonable period here. Counsel will have heard me comment on this on cases before but it has not yet been included in any reported judgment. It seems to me that the court in addressing what is a reasonable time for the repayment of arrears is entitled and is obliged to take into account the European Convention on Human Rights with in particular the right to family life. It seems to me that a reasonable time might be something that reflects a range of factors. It may include the time for the mortgage itself and, of course, mortgages tend to be of long duration. It may take into account the acts or omissions of the lender: did they lend without ever having somebody visit the premises, or without ever visiting the borrower, without ensuring that they were obtaining good security? Those may be relevant factors but I am not saying they are relevant in this particular case in regard to this particular lender or this particular loan.

[16] It may be that a reasonable time can and should take into account the circumstances of the borrower i.e. if the loan was taken out in good faith at a time when the borrower was in full-time employment and they later lost that employment but had some income from which to make some attempt to repay arrears that may well be something that is taken properly into account. As I have already observed the McCombes here have had a reduction in income but happily not a complete extinction of income. I do not know whether they are entitled to or have sought either housing benefit or tax credits from the state authorities. I could only say that it seems to me that it may be more fruitful for Mr McCombe and his wife to look at that way of resolving their difficulties rather than the issues that are currently being put forward by them, that is by an effort in good faith to pay the monthly instalment on their mortgage with, in addition, some element of the arrears, commensurate with their means.

[17] I conclude therefore by thinking that this is a matter in which there is something to be said on both sides. I propose to grant the extension of time, but I do so on a conditional basis, and the two conditions I impose on the putative appellants are these. Firstly, that they complete Form 10A within 14 days of today setting out their income and expenditure so that at the hearing of this matter, if the other points which currently exercise them prove of no assistance to them, the court can deal with the issue of a stay as well. Secondly, this belated suggestion that Mrs McCombe might be in some way not bound by the charge to which she subscribed must be borne out on affidavit within 21 days. I could have made that a shorter time but I have fixed what I believe to be a reasonable time. Obviously it would be best if she attended with a solicitor and took advice on the point but at this stage what we want is her affidavit evidence as to her knowledge of and involvement in the loan. That is what that affidavit should address.

[18] The rejoinder, if any, of the lender should follow in 21 days. So as to minimise any prejudice, although I hope there will not be any prejudice to the lender, I would like to try and give an early date for a hearing on this matter. We will put it in provisionally for Friday 16 January 2015. Mr McCombe, you should come into the office, telephone or email by 6 November to say if you are free or not free on 16 January. We will review the matter on Monday 8 December. I reserve the costs.