Neutral Citation No. [2015] NICh 6 | *Ref:* **DEE9527**

Ex tempore Judgment: approved by the Court for handing down | *Delivered:* **16/1/2015**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

PREFERRED MORTGAGES LIMITED **Plaintiff**

-v-

STEPHEN McCOMBE and LYNN McCOMBE **Defendants**

(No. 2)

MR JUSTICE DEENY

[1] I am going to proceed to give my ruling on the matter now. Before doing so I observe I did not receive a formal application on behalf of Mrs McCombe to adjourn the matter; I had this rather indirect indication, but even taken at its height that would not appear to be an appropriate step to take in regard to her. These proceedings have been extant from 16 January 2014, coincidentally exactly one year ago today. In that time they have been dealt with by the learned Master. They were then before this court on 3 November 2014 on the appeal from Master Hilary Wells and the court granted an adjournment then to Mr Stephen McCombe on his behalf and on behalf of his wife Mrs Lynn McCombe for the reasons set out in a short judgment which I have had transcribed, in which I dealt with the particular factual issues there, though I took the opportunity to comment on what might constitute a reasonable period with regard to section 36 of the Administration of Justice Act 1970.

[2] But in any event I granted their application for an adjournment on that occasion on two grounds. One was that they completed Form 10A within 14 days and even though the timing might not be quite right, helpfully that was done and that is in their favour. Secondly, that the belated suggestion, as I called it, of Mrs McCombe that she might not be in some way bound because of lack of advice to her needed to be borne out on affidavit within 21 days; that would have been 24 November. Not only was no affidavit forthcoming then but it is not been forthcoming in the almost two months since that date. It would therefore seem to me contrary to the duty on the court pursuant both to Article 6 of the European Convention on Human Rights and pursuant to Order 1 Rule 1A of the

Rules of the Court of Judicature (Northern Ireland) 1980 ("the 1980 Rules") to adjourn the matter now, especially as there is no concrete suggestion that a solicitor's representation is about to appear. In any event I am about to offer some relief to Mrs McCombe as will emerge in a moment. So it did not seem to me a suitable case to re-adjourn and, leaving aside any of the other issues in the matter, Mr Gowdy briefly indicated that he would have opposed that in any event. The further factor is the last payment under the mortgage in question is as long ago as 31 July 2013. So the plaintiff cannot be accused of rushing into court on this matter.

[3] I am, therefore, going to move to deal with the summons which was brought pursuant to Order 88 of the 1980 Rules by the plaintiff Preferred Mortgages Limited against Stephen McCombe and Lynn McCombe seeking possession of the property. The plaintiff relied on a mortgage of 3 March 2006 entered into by the two defendants and the property is situate at and known as 65 Ballymore Road, Tandragee, County Armagh, being the lands comprised in Folio AR 8672. The matter came before the Master and she granted the order for possession on 19 September 2014 and she granted it within 28 days after service. The order of the court, in accordance with the directions of this court, expressly says that upon an application by summons for sufficient reason the court may vary or discharge this order. The court may stay or suspend this order if it shall appear likely that the defendant will be able pay the arrears of instalments or the entire mortgage debt within a reasonable time. That is a reference to the court's discretion under section 36 and I will turn back to that in a moment.

[4] As I have indicated the appeal came on for hearing initially on 3 November. It was adjourned on the application of the McCombes and it was heard by me just now on 16 January 2015. I am satisfied that the defendants did enter into a mortgage deed. I am satisfied on the affidavit evidence before the court, not contested, that there is a debt of £68,997.50 currently outstanding. The up-to-date arrears, counsel stated from the Bar, were the relatively modest sum of £2,973.83. The payments under the mortgage have fallen from when it was taken out in 2006 because of the fall in Libor interest rates to which the mortgage rate was tied by the original mortgage offer, and now stand at £176.80 per month.

[5] The plaintiff has adduced here today the original mortgage deed, the original land certificate and its own original documents, the original signed acceptance of the offer by Mr and Mrs McCombe and their original copy letter. They have complied with Order 88 because this is a rehearing of the application by me. There is a factual dispute because Mr McCombe asserts in his oral submissions that the originals were not before the Master. Mr Gowdy's solicitor has averred at paragraph 6 of her affidavit that they were before the Master, but it is not necessary for me to resolve that dispute of fact because if there was any defect in the procedure, which is not admitted by the plaintiff, it has been cured at the rehearing before me and it is not necessary therefore to resolve the dispute of fact which Mr McCombe says exists.

[6] Mr McCombe's concern and case was, secondly, based on the fact, the allegation originally but now accepted, that this loan had been securitised. Therefore, he submitted, in effect, that the plaintiff was not the party entitled to bring these proceedings because the true beneficial ownership of the charge on his home was now some third party: therefore I should not grant the relief to this plaintiff. This is, of course, a recurring theme in a number of these cases and as I pointed out it is really of little benefit to borrowers because at most it will mean that another party has to be added to the proceedings to bring the correct party before the court. But in this case that is not even necessary in the submission of Mr William Gowdy who provided the court with very helpful and scholarly written and oral submissions. He points out that, as I have already read out in the beginning of these remarks, this is registered land and that the charge shown on the original Land Certificate, shown on the copy but shown on the original as well, is clearly in favour of this plaintiff. For completeness he has also adduced evidence of an up-to-date search showing no pending applications in regard to the charge or no alteration in the charge.

[7] So, given that we are dealing with registered land, we must turn to the provisions of the Land Registration Act (Northern Ireland) 1970 and section 11(1) of the Act so far as relevant reads as follows:

> "Save as is otherwise provided by or under this Act, the register shall be conclusive evidence of the titles shown on that register and of any right, privilege appurtenance or burden as shown thereon, and the title of any person shown thereon shall not, in the absence of actual fraud, be in any way affected in consequences of his having notice of any deed document or matter relating to or affecting the title so shown."

[8] Now, for completeness I observe, that the words of section 11(1) which I have just read do begin with the words "Save as is otherwise provided by or under this Act…". Of course there is provision later at section 69 to rectify title. But there is absolutely no suggestion of anything of that sort applying here. There is no suggestion of actual fraud or any misconduct at all and so it is clear that section 11 does apply. One then turns to Schedule 7 of the Act and one finds at paragraph 5 the rubric, though that is not strictly speaking part of the statutory provision, the rubric 'Effective registration of ownership of charge' and I will quote paragraph 5, (1) first:

> "On registration of an owner of a charge on registered land for the payment of any principal sum of money, with or without interest, the owner of the charge shall have all the rights and powers of a mortgagee under mortgage by deed within the meaning of the

> Conveyancing Acts, including the power to sell the estate which is subject to the charge and any deed creating such a charge shall be liable to stamp duty as if it were such a mortgage."

[9] Now pausing there, again out of an abundance of caution, I say that of course the reference in section 11 to a burden extends to a charge; a charge clearly is a burden on the title in law and is so to be interpreted. To return to paragraph 5 of Schedule 7, sub- paragraph (2) and (3) of that read:

> "The registered owner of a charge may apply to the court for the possession of the registered land, the subject of the charge or any part of that land and
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> (a) on such application the court may, subject to sub-paragraph (3), order the possession of the land or that part thereof to be delivered to him; and
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> (b) upon so obtaining possession of the land or as the case may be that part thereof he shall be deemed to be a mortgagee in possession.
>
> (3) The power conferred on the court by sub-paragraph (2) shall not be exercised.
>
> (a) except when payment of the principal sum of monies secured by the deed of charge has become due and the court thinks it proper to exercise the power; or
>
> (b) unless the court is satisfied that although payment of the principal sum has not become due, there are urgent and special reasons for exercising the power."

[10] Two matters arise from those statutory provisions which I have just quoted. First of all, the plaintiff as the registered owner of the charge says it is the party that is entitled to proceed. On the plain wording of the statute one would take that to be the case, but if there is any doubt about it the court, as it has done before, will take into account the decision of Lord Justice Jonathan Parker in Paragon Finance Plc v Pender (2005) EWCA 760 at paragraph [13] in particular and paragraphs [109] to [112]. Therein at paragraph [13] he helpfully summarises securitisation and makes the point that legal title may or may not vest in the third party who enters into a transaction with the legal owner as the plaintiff is here. Counsel for the lender, the plaintiff, acknowledges that the economic or beneficial title has passed to a third

party, but refers to the up-to-date Land Registry entry as showing that his clients remain the registered proprietor of the legal charge.

[11] As Lord Justice Jonathan Parker contemplates at paragraph [109] in particular of Paragon, Preferred Mortgages in this case is acting as a trustee for the party, the other party to the securitisation. The Lord Justice cited the high authority of Viscount Haldane in Whitley and Delaney (1914) AC 132 at 141 for that proposition. Mr Gowdy also cites the judgment of this court in Santander UK Plc and Carlin (2013) NICH 14 where I followed Paragon and also a decision of Mr Justice Birmingham in the High Court in Dublin Carney v KBC Bank of Ireland Plc (2014) IEHC 260 as authorities on this island following the decision of the Court of Appeal in England in Paragon. So that establishes the legal basis for his claim. The legal basis as it applies to the facts here is elucidated by the particular mortgage deed which Mr and Mrs McCombe entered into and on foot of that one sees from a reading of Clauses 4 and 5 of the Deed, which I think I need not read in extenso in the circumstances, that the non-payment by them of interest payments is a breach of obligation; it is i.e. the payment of a secured amount and their breach of that by them has been clearly proved and is not denied. In the light of that the lender may "terminate any outstanding obligation to advance money or make any credit available to you and the secured amounts owed by you to the lender which are not already payable on first demand by the lender shall become payable on first demand". I am quoting there from 5.2A and therefore that meets the requirement under paragraph 5.3 of Schedule 7 of the Land Registration Act (NI) 1970.

[12] Mr and Mrs McCombe borrowed the money. They paid the interest for some years. They stopped paying the bank, or in this case the mortgage lender, which is entitled to be repaid its money. I am obliged, it is my duty, to enforce contracts legally entered into between parties and I therefore conclude pursuant to paragraph 5.3 of Schedule 7 [of the 1970 Act] that I do think it is proper that that power be exercised.

[13] Although not raised by Mr and Mrs McCombe before the Master nor indeed before me on the earlier occasion when I raised it, Mr Gowdy very properly does address the statutory discretion vested in the court pursuant to section 36 of the Administration of Justice Act 1970 and sub-section (1) of that Act reads as follows:

> "Where the mortgagee under a mortgage of land which consists of or includes a dwelling house brings an action in which he claims possession of the mortgage property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by sub-section (2) below if it appears to the court that in the event of it exercising the power the mortgagor is likely to be able within a reasonable period to pay any

> sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage."

[14] Sub-section (2) allows me to adjourn the proceedings or on giving judgment or making an order for delivery of possession on the mortgaged property stay or suspend execution of the judgment or postpone the date for delivery of possession for such a period or periods as the court thinks reasonable. Though there has been no application to me I have of my own motion proposed to exercise that power in ease of, in favour of Mr and Mrs McCombe, the mortgagor, for the benefit of the litigant in person, the borrower Mr and Mrs McCombe in this case.

[15] Mr Gowdy helpfully referred to the leading text book O'Neill on Mortgages in Northern Ireland in which the learned author again helpfully set out a passage from the judgment of my brother Girvan in an unreported case of Northern Bank Limited and McTaggart October (2000) relating to a case of this kind. There the learned judge thought that a realistic figure to address the arrears owing would be just under one half of the surplus [income over outgoings] left to the borrowers and he was not dismayed by that meaning that it might take a period of around 4 to 5 years to repay the arrears.

[16] This is an interest only mortgage and sooner or later, later in this case, Mr and Mrs McCombe are going to have to find the money to pay the mortgage off, but I was informed from the Bar that that was not until March 2024. But they can stay in the house if they do the following. I propose to make an order for possession, but to suspend it on condition that Mr and Mrs McCombe pay the monthly payment which falls due on Friday 30 January that is of £176.80 and in addition a sum that addresses the arrears. As I said they did sensibly fill in the mortgage means document sometimes known as Form 10A as directed by me and from that one sees that, though sadly their income has been reduced from apparently what it was some years ago, they still do have earnings, net earnings it appears of £2,308 per month and they have outgoings of £2,153.46. Mr Gowdy sensibly does not quibble with things like cigarettes or an insurance endowment payment, though some counsel on behalf of some parties do take those points, but he just addresses the fact that that still leaves a surplus of £154 a month to allow arrears to be made. Coincidentally that was closely similar to the figures that Mr Justice Girvan was dealing with in Northern Bank and McTaggart and in the light of his observations and those of the learned author and my own perception of the matter it seems to me that arrears must be paid but they should not be of the full amount because there are ups and downs in life and unusual payments, but there has to be a regular payment that will allow these arrears in the relatively modest sum of £2,973.83 to be repaid in a reasonable time as the lender is entitled to expect and I am going to fix that sum at £70 per month. So Mr and Mrs McCombe are to pay the sum of £246.80 that is £176.80 plus £70 on Friday 30 January and the last day of every calendar month thereafter. If they do that the order for possession is suspended and will continue to be suspended. If they do not do that then the plaintiffs' suspension obviously ends

and the defendant will be entitled to enforce the order for possession. So the matter is in their hands and obviously the wise and sensible course to do would be to pay that rather than look for illusory legal points to escape from the debt that they entered into in the year 2006.