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Judgment: approved by the Court for handing down | *Delivered:* **25/04/2013**
*(subject to editorial corrections)**

2012 No. 16322

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

KIERAN RAFFERTY

Plaintiff-Appellant;

-and-

GB FINANCE GROUP LIMITED
and
GB ASSET MANAGEMENT LIMITED

Defendants-Respondents.

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Before: HIGGINS LJ, GIRVAN LJ and COGHLIN LJ

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GIRVAN LJ (giving the judgment of the Court)

Introduction

[1] This is an appeal brought by the plaintiff/appellant, a litigant in person against an order made by Deeny J on 1 June 2012. This order struck out under Order 18 Rule 19 the plaintiff's statement of claim endorsed on a writ issued on 8 February 2012, stayed the plaintiff's action and ordered the plaintiff to pay the defendants' costs on an indemnity basis. The plaintiff/appellant issued a Notice of Appeal in respect of the judge's order on 17 July 2012. His grounds of appeal are that –

(1) he had no representation before Deeny J, he was deprived of a right to a fair trial and the decision reached infringed the principle of equality of treatment;

(2) he had no representation at the time of the making of the original possession order (the alleged irregularity of which lies at the heart of the plaintiff's present case); and

(3) the court had been misled by the defendants and their legal team when the relevant possession order was made.

[2] Mr Rafferty appeared on his own behalf and relied amongst other things on a paper prepared by his son, a law student which contained arguments attacking the order and judgment of Deeny J. Mr Hopkins appeared on behalf of the defendants.

[3] Mr Hopkins made two alternative applications. Firstly, he sought an order that the notice of appeal should be struck out pursuant to the court's inherent jurisdiction on the basis that there was no substance in the appeal. In the alternative, assuming that he failed on that first application, he sought an order for security for costs against the plaintiff/appellant. As the case proceeded it became clear that the arguments raised covered the full substance of the appeal and the court concluded that there was no reason why it could not determine the merits of the appeal in the light of the arguments and evidence adduced. Accordingly, we have reached a final conclusion in relation to the appeal. We should make it clear that this was a matter in respect of which, in the light of the authorities, an order for security of costs would have been appropriate since there is clear evidence of impecuniosity on the part of the plaintiff/appellant, that the impecuniosity had not been brought about by the conduct of the defendants/respondents and there is no substance in the merits of the appeal.

Background to the appeal

[4] The first named defendant/respondent, GB Finance Group Limited ("GBF") (whose rights are now vested in the second defendant/respondent GB Asset Management Limited) initially brought proceedings against the plaintiff/appellant in 2009 seeking possession of the lands comprised in TY16658 and TY8167 County Tyrone. This land was situated at Aghafad Road, Fintona, County Tyrone. It comprised agricultural land and also the plaintiff/appellant's dwelling house. The plaintiff/appellant entered into an agreement on 18 April 2008 to borrow the sum of £275,000 from GBF. The plaintiff/appellant claimed that the purpose of this loan was for the construction of a dairy parlour and extension of his dairy business. The loan was originally intended to be secured by way of a first charge on the agricultural land (which was then unencumbered) and by way of a second charge on the plaintiff/appellant's dwelling house (which was already mortgaged). The house was subject to a first charge in favour of Preferred Mortgages Limited and to a second charge in favour of Future Mortgages Limited. A registered charge in favour

of GBF was created on the lands in the two folios. The relevant document is undated but is expressed to have been made on the same date as the loan agreement. Although the initial agreement envisaged that the security on the dwelling house would be a second charge there was no consent to the creation of a second charge by the first chargee. This, together with the existence of possession proceedings brought by the existing second charge, led to the decision being made to the plaintiff/appellant's legal adviser to discharge the prior encumbrances on the dwelling house and to create a first charge over the dwelling house in favour of GBF. Mr Rafferty signed an authorisation directing Diamond Heron, his solicitors, to discharge and redeem the prior mortgages in favour of Preferred Mortgages Limited and Future Mortgages Limited. In the result out of the loan of £275,000 the sum of £164,000 was used to discharge prior encumbrances (thereby removing the plaintiff/appellant's liability for those debts).

[5] The plaintiff/appellant defaulted in the payment of interest due on foot of the loan agreement with GBF which initiated proceedings for possession of the property. Master Ellison initially adjourned the application on 3 March 2010. At that stage counsel was instructed by the plaintiff/appellant and he indicated to the court that the plaintiff/appellant was hopeful that he could raise finance from a Mr Robert Smith which would enable him to discharge the debt due to GBF. The Master's note shows that when the matter came back before the court on 13 May counsel and solicitors were again present. No argument was raised about the validity of the charge in light of the Consumer Credit Act 1974. The Master made an order for possession. The Master's order by necessary implication makes clear that the court was satisfied and made a finding that there was a valid and binding charge on the property in favour of GB; that the plaintiff/appellant owed the monies on foot of the mortgage; that he had defaulted in his obligations thereon; and that the plaintiff/appellant being in default, the chargee was entitled to possession of the premises to enable a sale to be effected to realise monies to discharge the mortgage debt out of the proceeds of sale. If the plaintiff/appellant had any legal basis to challenge the validity to the charge or to dispute the mortgage debt secured thereby that was the proper time to raise the issues before the court and to bring forward his case on those points. In fact the plaintiff/appellant did not do so nor did he appeal the Master's order. Nor has he sought leave to appeal that decision out of time.

[6] Subsequently, a different firm of solicitors was instructed on behalf of the plaintiff/appellant. They challenged the execution of the order for possession and finally on 3 August 2010 the plaintiff/appellant filed an application for a stay of enforcement. Following an initial adjournment on 15 September 2010 Master McCorry heard the application for a stay of enforcement on 18 October 2010. The plaintiff/appellant was represented by new solicitors and by experienced junior counsel who raised issues arising under the Consumer Credit Act 1974. Master McCorry rejected the application deciding that Master Ellison's order gave rise to a res judicata. An application for leave to appeal from Master McCorry to the Chancery Judge was heard by Deeny J. Another experienced junior counsel was now instructed on behalf of the plaintiff/appellant. Deeny J, however, was not

persuaded that Master McCorry's decision should be set aside and on 9 May he dismissed the application. No appeal was brought in relation to the decision.

[7] Subsequently the plaintiff/appellant issued the current writ of summons on 8 February 2012. He appears to have had the benefit of some legal assistance in the drafting of the endorsed statement of claim. The statement of claim asserts that the plaintiff was unaware that part of the monies was going to be used to redeem the first charge on the dwelling house and that this outcome did not meet his borrowing requirements. This is an allegation amounting to a criticism of his then legal advisors. It fails to take account of the signed authorisation which he gave directing the discharge of the prior encumbrances of the house.

[8] The statement of claim also asserts that the loan agreement was a regulated agreement under the Consumer Credit Act 1974. The redemption of prior encumbrances was alleged not to be a business purpose. It is in fact clear that the plaintiff/appellant represented that the monies he was borrowing were required for expansion of his dairy business. He asserts that the loan agreement failed to comply with the Consumer Credit (Agreements) Regulations 1983 and that it was unenforceable. In paragraph 18 he asserts that the defendant issued proceedings for possession without providing a notice under Sections 76 or 87 of the Consumer Credit (Enforcement Default and Termination Notices) Regulations 1983. He also asserts that the defendant failed to seek the permission of the court to enforce the loan agreement under Section 65 of the Consumer Credit Act 1974. These allegations are a clear attempt to contradict the unappealed decision of Master Ellison which as noted is premised on the legal enforceability of the charge and underlying loan agreement. For the court to accede to the plaintiff's claim in this respect would result in a judgment contradicting an existing binding judgment.

[9] In paragraphs [12] and [13] of the statement of claim the plaintiff/appellant claims that GBF failed to carry out an adequate investigation and assessment to ascertain whether the plaintiff could afford to meet his obligations under the terms of the loan agreement. He asserts that the requirement to repay the loan agreement went beyond what the plaintiff/appellant could afford and he claims that his loss and damage comprises all payments made towards the loan agreement, all of the principal which is currently owed under the loan agreement, all of the interest under the loan agreement and future liability under the agreement and any further losses arising from a sale of the property. In paragraph [14] he asserts that his credit-broker, Mr McAnespie, and his solicitors, Diamond Heron, were associates of GBF and that he received no adequate or independent financial advice. Under paragraph [19] he asserts that all the circumstances taken together rendered the transaction unfair for the purposes of Section 140A(1) of the Consumer Credit Act 1974 and he seeks such relief as the court considers appropriate under Section 140B(1)(a), (b), (c), (d), (e) and/or (f) of that Act.

[10] In paragraph [12] of his statement of claim the plaintiff/appellant has pleaded a claim based on negligence. To succeed in such a claim he must establish a duty of

care owed by the defendant to him as a party entering into the transaction. It would be a novel proposition with enormous implications to conclude that a creditor owes a tortious duty of care to a debtor borrowing money and that the lender has a duty to ensure that the borrower can afford to pay the debt which he is entering into. We have been referred to no authority for such a proposition. Applying established principles we do not consider that it would be fair, just and reasonable to imply such a duty of care in the circumstances of a case such as the present. In the present case the plaintiff had independent advice before negotiating the loan and if the advice was carelessly given the plaintiff/appellant may have a remedy against his advisors. Furthermore, there exists a specific statutory scheme dealing with consumer credit which contains statutory safeguards for borrowers in the specific circumstances covered by the legislation. This is an area of law governed by statutory protections which are negative and inconsistent with any free standing implied duty of care. In essence the plaintiff/appellant's claim is based on the proposition that the transaction in question constituted an unfair one within Section 140A(1) of the Consumer Credit Act. If he has a remedy it must be under that provision.

[11] Section 140A of the 1974 Act was inserted by the Consumer Credit Act 2006. It and the succeeding provisions of the Act replaced Sections 137-140 of the 1974 Act which empowered the court to re-open extortionate credit bargains. A bargain was extortionate if at the time the agreement was made it required the debtor to make payments which were grossly exorbitant or otherwise grossly contravened ordinary principles of fair dealing. In coming to its conclusions the court was required to consider evidence concerning factors relevant to prevailing interest rates, the debtor (age, experience and degree of financial pressure) and the circumstances relating to the creditor. The amended provisions enable the court to consider whether the relationship between the creditor and the debtor is unfair to the debtor because of the terms of the agreement, the way in which the agreement is operated by the creditor or anything done or not done by the creditor or on his behalf before or after the agreement was made. The court may take into account all matters and things relevant relating to the creditor and debtor in making its assessment. The court is provided with a broad range of remedies under the new section 140B(1) to address any unfairness found.

[12] By Section 140B(2) an allegation of an unfair relationship has to be made by the debtor or any surety and, as under the former regime, the court cannot raise the point itself. The situations in which an extortionate or credit bargain may be reopened are presented as follows:

(a) on an application made by the debtor or any surety;

(b) at the instance of the debtor or a surety in any proceedings to which the debtor or creditor are parties being proceedings to enforce the credit agreement or any security relating to it or any linked transaction; and

(c) at the instance of the debtor or a surety in other proceedings in any court where the amount paid or payable under the credit agreement is relevant.

Whenever the debtor or surety alleges that the relationship between the creditor and the debtor is unfair to the debtor it is for the creditor to prove the contrary (Section 140B(9)).

[13] It is clear that the proceedings brought by GBF to recover possession of the premises by way of enforcement of the security were proceedings in which the plaintiff/appellant was entitled to challenge the loan agreement and the related security under Section 140B. Under the principle enunciated by Wigram VC in Henderson v Henderson (1843) 3 Hare 100 the position is as follows:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

[14] Where, as in this case, a plaintiff is asserting that there were matters affecting the validity of the loan agreement and with it any security created in consequence of it the proper time to bring forward his case and his allegations is when the mortgagee is seeking to enforce the impugned security. Deeny J correctly based his decision on an application of the Henderson v Henderson principle.

[15] The plaintiff/appellant relied on three grounds of appeal none of which lays the basis for a proper challenge to the judge's conclusion that the plaintiff-appellant's claim could not succeed because of the res judicata/Henderson v Henderson points. The plaintiff/appellant has not sought to amend his grounds of appeal and even if he had sought to amend, the res judicata/Henderson v Henderson points are fatal to his claim. We agree with Deeny J that there is no actual merit in the plaintiff/appellant's case. He borrowed £275,000, £164,000 of

which was used to discharge debts which he owed. He has had the benefit of the discharge of those debts together with the benefit of the rest of the monies borrowed. Although he had purported to borrow the monies to expand his dairy business the money was never intended or used for that purpose. The respondents having accepted that they will not, in fact, recover the principal sum paid much less any interest thereon (which in any event was fixed at 6% per annum a rate which could not in any sense be described as exorbitant), counsel on instructions stated that the respondents were not pressing to recover interest. The plaintiff/appellant asserts that he is not liable for even the principal sum of £275,000. This is a proposition without merit since, even if the loan agreement and security were set aside under Section 140A that could not cancel the obligation to repay the principal sums which he had received and, if irrecoverable, would give the plaintiff/appellant an unjust enrichment.

[16] In the result we affirm the order made by Deeny J and dismiss the appeal.