Neutral Citation No. [2015] NICA 41 | *Ref:* **GIL9673**

Judgment: approved by the Court for handing down | *Delivered:* **16/06/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

SANTANDER (UK) PLC

Plaintiff/Respondent

and

ANTHONY PARKER

Defendant/Appellant

Before Morgan LCJ, Coghlin LJ and Gillen LJ

GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal by Anthony Parker (the "Appellant") against the judgment of Weatherup J on 21 October 2014 in which he dismissed Mr Parker's appeal against the Order of Master Bell refusing a stay on possession by Santander (UK) PLC (the "Respondent") of the appellant's dwelling house.

[2] The appellant was a litigant in person and the respondent was represented by Mr Gibson.

Background

[3] Master Ellison made an Order on 21 October 2011 for possession of premises owned by the appellant at Forfar Street, Belfast. The Order was made on the application of the respondent on the basis that the respondent bank had advanced monies to the appellant for the purchase of premises and the appellant had defaulted on the repayment thereby entitling the respondent to possession.

[4] The appellant had appealed that decision to Deeny J, that appeal being dismissed on 20 January 2012.

[5] The appellant then appealed that matter to the Court of Appeal. On 25 April 2012 the matter was remitted to Deeny J to consider the issue of sealing of the mortgage deeds.

[6] On 6 June 2012 Deeny J dealt with the issue of sealing and concluded that his finding of 20 January 2012 remained unchanged.

[7] The appellant then issued a Notice of Appeal dated November 2013 seeking an extension of time in which to appeal the decision of Deeny J. On 18 February 2014 the Court of Appeal dismissed that application to extend time.

[8] On 20 March 2014 the appellant issued a summons for a stay of the possession order.

[9] On 23 June 2014 Master Bell dismissed the application for a stay of the possession order with no order as to costs.

[10] The appellant then appealed this decision of Master Bell. On 15 October 2014 Weatherup J heard the matter and adjourned the case. Counsel on that occasion on behalf of the respondent had suggested there was a mechanism by which the bank would consider offers of payment dependent upon Mr Parker's income and expenditure. The judgment of Weatherup J relates that the appellant had informed the court that he had lost his former employment and was working part-time. The appeal was adjourned to permit Mr Parker to consider whether he would complete the standard form which the bank has for those wishing to make offers of payment. Weatherup J observes that the appellant did not complete the standard form and had not made any arrangement with the bank or disclosed any details to the bank about his income and outgoings.

[11] The judgment of Weatherup J records as follows at paragraph [4]:

> "Mr Parker's approach is to offer the bank a Promissory Note. This Promissory Note I understand would in effect be in the form an IOU to the bank. The bank has refused to accept such an offer. Mr Parker says that such refusal is contrary to the terms of his agreement with the bank. He has offered to support his offer in the form of his wedding ring to back up the Promissory Note. He filed a further affidavit dated today which makes points in relation to the nature of credit and arrangements made for funding and he comments on the artificial nature of payments made by the bank as not literally involving a transfer of currency.

> [5] Mr Parker has also raised a question mark over the debt due and hence the entitlement of the bank to the Order for possession. The Order for possession has been made on the basis that the Master was satisfied that there was a debt due, that it ought to be paid, that there was good security and that in the absence of payment the security should be realised to meet the debt. This is not the issue before me today. What is before me today is a rehearing of an application to stay the Order for Possession. I am now looking at whether I should defer the Order for Possession for a period."

[12] The learned judge concluded that he was not satisfied that providing a Promissory Note in the manner suggested by Mr Parker was sufficient to address the issue and there was no basis upon which he could exercise his discretion to grant a stay. He therefore dismissed the appeal.

Statutory Provisions

The Administration of Justice Act 1970

[13] Section 36 of the Administration of Justice Act 1970 as it applies to Northern Ireland provides that 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 mortgaged property a judge of the High Court or Master of the Court of Judicature may stay or suspend execution of the judgment or order for such period or periods as a court thinks reasonable if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage.

The Administration of Justice Act 1973

[14] Section 8 of the Administration of Justice Act 1973 provides that to exercise its discretion to stay the Order the court must also be satisfied that within the reasonable period identified the mortgagor is also "likely to be able by the end of that period to pay any further amounts that he would have been expected to be required to pay by then".

[15] The Court of Appeal in England and Wales in Zinda v Bank of Scotland PLC [2011] EWCA Civ 706 commented on the effect of these provisions in the following terms at paragraph [23]:

> "[23] … First, there is the jurisdictional gateway created by the requirement on the mortgagor to demonstrate that he is (section 36(1)) "likely to be able within a reasonable

> period to pay" both (section 8(1)) the "amounts [he] would have expected to be required to pay if there had been no … provision for earlier payment – in other words, the arrears of the instalments due to date – and (Section 8(2)) the "further amounts that he would have expected to be required to pay by then" – in other words, the future instalments accruing during the reasonable period. The power of suspension exercisable by the court under Section 36 is conditional on it appearing to the court that in the event of the exercise of the power the mortgagor is likely to be able to pay the sums in question within a reasonable period. Absent such proof, the court has no jurisdiction to stay or suspend the Order for Possession.
>
> [24] Second, and assuming that the mortgagor surmounts the jurisdictional hurdle, the court is given a wide discretion under Sections 36(2) and (3). In particular, Section 36(3) permits the court, if it decides to stay or suspend a possession order, to attach such "conditions with regard to payment" by the mortgagor of any sum secured by the mortgage as the court thinks fit. This power is not confined to the arrears of the instalments due to date or to the future instalments accruing during the reasonable period referred to in Section 36(1). It extends to "any" sum secured by the mortgage including, for example, the totality of the future instalments accruing due throughout the remaining life of the mortgage."

[16] It is also relevant in the context of the instant case to note the observations of Girvan J in National & Provincial v Lynd & anor [1996] NI 47 where he said at p 60:

> "If a mortgagor declines to put any material before the court which could lay a basis for the court exercising its powers under s36 the mortgagee would be entitled to his remedy based on his clear contractual rights under the mortgage. It is for a mortgagor to adduce some justification or basis to enable the court to exercise its discretionary power under s36 in his favour. A mortgagor who is in default under his mortgage has no right to demand that the court exercises its discretion in his favour to grant what is in effect a form of relief against the consequences of a breach of contract. … A mortgagor seeking to persuade the court to exercise its powers under s36 should be expected to put before the court his best

> realistic proposals to avoid the consequences of his breach of the contractual terms of the mortgage … ."

Applying these principles to this case

[17] At the outset we observe, as did Weatherup J, that this appeal has nothing to do with the Order for Possession itself. The Order for Possession has been made on the basis that Master Ellison was satisfied that there was a debt due, that it ought to be paid, that there was good security and that in the absence of payment, the security should be realised to meet the debt. That is not the issue which was before Weatherup J or which was before this court. This court is confined exclusively to looking at whether or not the Order for Possession should be deferred for a period. It was clear to us that Mr Parker had difficulty grasping this concept and it is perhaps this misunderstanding which has partly fuelled his enthusiasm for appeal.

[18] It was the appellant's contention that the respondent had been offered a Promissory Note, that this note should or ought to have been treated as equivalent to cash, that the appellant had therefore offered to discharge his indebtedness and the respondent had refused which in terms acted as a clog on the equity of redemption.

[19] The appellant's argument suffers from a number of fundamental flaws. First, the fact of the matter is that, as he conceded, he has not in fact tendered a Promissory Note to the bank. There is no draft of such a note in the papers before this court and he accepted that he had not yet drafted such a note.

[20] Secondly, the Bills of Exchange Act 1882 s.83(1) defines a Promissory Note as follows:

> "A Promissory Note is an unconditional promise in writing made by one person to another … engaging to pay … a sum … in money, to, or to the order of, a specified person or to bearer."

[21] In Wirth v Weigel Leygonie & Co Ltd [1939] 3 All ER 712 at 721, Du Parcq LJ said:

> "I doubt whether a promise to pay to a man or to somebody else, who may be his creditor or debtor is a promissory note." (See also Halsbury's Laws of England Volume 48 paragraph 1405.

[22] It is not disputed that a Bill of Exchange or a Promissory Note is to be treated as cash. However, that Promissory Note needs to be backed by adequate security in order to constitute a proper promise to pay. If, as in this instance, there is merely a simple promise to pay without any evidence whatsoever of the resources to meet that payment then this is insufficient. The appellant in this case has been given

ample opportunity by Weatherup J to set out in detail the basis of the security that he offers, a reference to his income, the period over which he will be able to pay, his capacity to pay, job security etc. This he has failed and, indeed, refused to do. In terms he has made a promise which is without foundation. In such circumstances the respondent is perfectly entitled to refuse to accept the offer to pay and there has been no agreement between the parties given this background. The vague offer of his wedding ring without any attempt to value it or place the strength of it as security is hopeless.

[23] At the conclusion of his submissions the appellant prayed in aid the recent judgment of the Supreme Court in Carlyle (Appellant) v Royal Bank of Scotland Plc (Respondent) (Scotland) [2015] UKSC 13. This case centred on whether, on an objective assessment of a what a developer and the bank had said to each other, the bank intended to enter into a legally binding promise to advance sums in the future to fund not only the developers purchase of two development plots but also the construction of a house on each plot.

[24] Two points emerged from this case per the judgment of Lord Neuberger, neither of which availed the appellant in this case. First, at paragraph [21] ,that when deciding that a judge at first instance who has heard the evidence has gone "plainly wrong" the appeal court must be satisfied that the judge could not reasonably have reached the decision under appeal. We have no hesitation in concluding that Weatherup J in this case has come to an entirely rational and proper decision. We detect no error in either his approach or his conclusion.

[25] Secondly, at paragraph [29] in Carlyle's case, Lord Neuberger cited with approval the judgment of the Court of Appeal in New Zealand in Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd [2002] 2 NZLR 433 where the majority judgment stated at paragraph 58:

> "The court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however, the court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities."

[26] This declaration of principle has no relevance to the present case. There is no plausible evidence before this court that the respondent ever intended to enter into an agreement with the appellant to accept his offer to pay in circumstances where he had not only refused to set out in any detail his means of paying, but where the offer was patently lacking in any adequate security or means to fulfil the promise. Hence no question arises of the court taking steps to give effect to the intention of the parties or to uphold any contract despite any omissions or ambiguities.

[27] We conclude that this appeal is wholly without foundation and we therefore dismiss it. We shall hear the parties on costs.