Neutral Citation No: [2017] NICA 56 *Judgment: approved by the Court for handing down* *(subject to editorial corrections)**	*Ref:* **MOR10408** *Delivered:* **20/9/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM

THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

JULIAN SMITH and ANDREW HUGHES

Plaintiffs/Appellants;

-and-

DAVID BLACK AND PERSONS UNKNOWN

Defendant/Respondent.

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Before: Morgan LCJ, Stephens LJ and O'Hara J

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MORGAN LCJ (giving the judgment of the court)

[1] The appellants claim that they are the validly appointed receivers under a mortgage dated 12 March 2004 between Capital Home Loans Limited ("CHLL") and Places 4 You Limited ("the Company"). CHLL lent to the Company capital sums of £63,000 and £16,000, which were secured on a property in Belfast ("the property") under the mortgage. The Company failed to make the monthly instalments it was required to make under the mortgage. On 5 September 2015 there were outstanding mortgage arrears of £5,812.62. The balance due on the mortgage was £88,357.08. In light of the Company's breach of the mortgage conditions CHLL was entitled under the mortgage to appoint receivers.

[2] This is an appeal from the finding of Horner J that the title of the receivers was not established and that the action for possession consequently failed. Mr Gibson appeared for the appellants and Mr Creighton, solicitor, appeared for the

respondent with the special leave of the court. We are grateful to both for their helpful submissions. Although there were other matters raised in the course of the hearing before Horner J these are not material to the issues in the appeal.

Background

[3] It was not in dispute that by virtue of Clause 9.5 of the mortgage conditions CHLL became entitled to appoint receivers once the mortgage fell into arrears. On 9 October 2015 a deed of appointment was prepared purporting to appoint the appellants as receivers. The deed was subsequently rectified but that is of no relevance in this appeal. The appellants accepted the appointment as joint receivers in accordance with the deed of appointment on 13 October 2015. On 17 December 2015 the appellants issued an Order 113 summons seeking possession of the property. The respondent resisted that application *inter alia* on the basis that he was a lawful tenant of the property. After a hearing before the Master the trial judge ordered that the proceedings should be converted into a Writ action. The statement of claim was served on 15 June 2016 and a defence on 19 July 2016.

[4] The action proceeded over five days from 6 September 2016 until 14 September 2016. In his defence the respondent indicated that he needed the appellant to confirm the appointment as receivers. The grounding affidavit of Ms Crotty, solicitor, exhibited the deed of appointment but she did not otherwise deal with the appointment either in her affidavits or in oral evidence. Mr Kimber, the appellant's head of operations, gave oral testimony and indicated that he did not know how the receivers were appointed. In submissions at the end of the evidence it was disclosed by the appellants that the deed of appointment was executed by Wilson Nesbitt solicitors who held a power of attorney granted by CHLL. The power of attorney had not been disclosed in the appellant's discovery list and it is common case that the respondent did not know of its existence.

[5] At a further review on 22 September 2016 the learned trial judge ordered that a copy of the power of attorney granted by CHLL to Wilson Nesbitt solicitors to allow them to execute legal documentation be provided to the court, that the respondent lodge any comment in respect of the same by the following Monday and that the case be listed for judgement thereafter. By an email dated 22 September 2016 Ms Crotty forwarded an attached copy of a power of attorney made on 20 August 2014 appointing 3 named members of Wilson Nesbitt as attorneys enabling them to execute deeds of appointment of receiver. The foot of the document stated:

> "In witness whereof we have executed and delivered this Power of Attorney as a deed on the day and year first written.

Executed and delivered as a deed by Capital Home Loans Limited

Director/Secretary

Director/Secretary"

Above each of the "Director/Secretary" entries there was handwriting consistent with signatures. The document gave no indication of the identity of the authors of the handwriting.

[6] It is common case that although the evidence had finished on 16 September 2016 the submission of the copy of the power of attorney was additional evidence introduced at the request of the trial judge and without objection by the respondent. On 26 September 2016 the respondent complained that the signatures on the power of attorney were not clear, nor was it clear in what capacity or with what authority the signatories signed. The deed of appointment was signed by a solicitor who was named in the copy of the power of attorney provided by Ms Crotty and she signed as a duly authorised attorney on behalf of the bank. Since the power of attorney had not been proved the respondent submitted that the authorisation of the signatory had not been established.

[7] In light of this submission at the direction of the learned trial judge an email was sent indicating that he expected the bank to respond to the points in the respondent's email prior to the delivery of judgment. An e-mail was sent that afternoon by Gillian Crotty in reply indicating that the power of attorney was executed by Mr Gerald Walter Hickey and Mr Sunny Hun So Lo, both of whom were directors of CHLL at the time of execution. The e-mail also referred to a letter of 11 September 2015 from CHLL to solicitors in Liverpool asking them to arrange for the appointment of receivers of rent and an entry in the appellant's working documents indicating that deeds should be sent to Wilson Nesbitt in respect of a receiver of rent action in respect of the property.

[8] On the same date Ms Crotty forwarded an e-mail from Mr Kimber confirming that CHLL appointed Wilson Nesbitt to carry out all and any work required to validly appoint a fixed charge receiver in relation to the property and that this would include executing any documentation considered necessary including deeds of appointment of receivers under the executed power of attorney.

Consideration

[9] The learned trial judge concluded that the validity of the power of attorney was in issue between the parties in light of the submission made by the respondent. At the hearing of the appeal the appellant accepted that this was the case and that it was a matter with which the judge had to deal.

[10] It was common case that by virtue of section 1(1) of the Powers of Attorney Act (NI) 1971 a power of attorney could only be conferred by deed. The judge

concluded that the deed put before him was signed by persons whose signatures were indecipherable. The identity of the signatories was an issue which had been raised by the respondent. Mr Kimber had been asked about it but could not answer it. Ms Crotty had given no oral evidence about it. This was a fundamental proof which the judge concluded was overlooked.

[11] We accept that the learned trial judge did not deal with the e-mail responses of 26 September 2016 but we do not consider that those responses materially changed the position. Mr Kimber had given evidence that he had no knowledge of the circumstances of the appointment of receivers. His e-mail of 26 September 2016 was, therefore, completely undermined by his evidence in the absence of any explanation as to why he was now in a position to deal with it. Ms Crotty had asserted the identity of the people who had signed the power of attorney but it appeared from the e-mail traffic that she had relied upon Mr Kimber as the authoritative voice on this issue and she set out no independent basis as to her knowledge.

[12] The methods of proof of handwriting in modern documents are set out in Volume 12A of Halsbury's Laws of England:

> "Except when judicial notice is taken of official signatures, or where an apparent or purported signature is deemed by statute to be the actual signature, the handwriting or signature of unattested documents may be proved in the following ways:
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> (1) by calling the writer; or
>
> (2) by a witness who saw the document written or signed; or
>
> (3) by a witness who has a general knowledge of the writing, acquired in any of the ways mentioned earlier ; or
>
> (4) by comparison of the disputed document with other documents proved to the judge's satisfaction to be genuine; or
>
> (5) by the admissions of the party against whom the document is tendered; or
>
> (6) in particular cases, by a document purporting to be a solemn declaration in a prescribed form made before a prescribed person."

[13] None of the material introduced by the appellant met the standard for proof of the handwriting and the judge was correct in the circumstances to so conclude. Since the deed of appointment of receiver was executed by the named person from

Wilson Nesbitt on foot of the unproved power of attorney the validity of the said deed remained unestablished. Although Mr Gibson sought to establish that the exchange of emails was sufficient to demonstrate that the appointment of the receivers was authorised by CHLL he was not able to avoid the need to rely on the power of attorney for the appointment.

Conclusion

[14] For the reasons given we are satisfied that the learned trial judge was correct to conclude that the execution of the power of attorney had not been established and accordingly the title of the receivers was not proved. That does not, of course, prevent the receivers establishing their title in further proceedings.