Neutral Citation No: [2012] NIMaster 9 *Delivered 21 December 2012*

2009/55737

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

SWIFT ADVANCES PLC

Plaintiff;

and

FRANCIS MARRON and FLORENCE MARRON

Defendants

MASTER ELLISON

[1] This is an application for possession and for an enforcement order by originating summons issued on 26 May 2009 pursuant to a credit agreement dated 27 September 2007 ("the agreement") and mortgage of the same date (incorporated in the agreement by reference) both of which were executed by the defendant borrowers. The mortgage is secured against the second defendant's home, her husband the first defendant, a compulsive gambler, having left upon their separation shortly after completion of the agreement and mortgage. Mrs Marron's 18 year old son also lives at the property, the title to which is an unregistered one. The second defendant has borne sole responsibility for all of the payments made since inception.

[2] The second defendant is defending the plaintiff's application on the basis that the agreement was not properly executed in circumstances whereby the plaintiff should not be permitted to enforce the agreement or mortgage by reason of the provisions of sections 58, 61, 65 and 127 of the Consumer Credit Act 1974 ("the Act"), or in the alternative if the court is satisfied that an enforcement order (ie an order

permitting the plaintiff to enforce notwithstanding improper execution) should be made, that the terms of the agreement and mortgage should be altered radically under the court's express powers to do so when making an enforcement order under section 127 or when making a time order under sections 129, 135 and 136.

[3] At the hearing of this matter Mr Gowdy of Counsel appeared for the plaintiff instructed by McCartan Turkington Breen and Company and Miss Kilpatrick of Counsel appeared for the second defendant instructed by Housing Rights Service and I am obliged to them for their helpful submissions and skeleton arguments.

[4] The agreement, which appears to have been instigated by the first defendant, was for an advance of £15,000.00 (ostensibly for the purpose of home improvement and debt consolidation but actually used for other purposes) to be repaid along with a broker's fee of £1,000.00 and a loan administration fee of £395.00 and interest on the principal by calendar monthly instalments of £234.37 over a period of 10 years. The interest was stated on the agreement to be at the rate of "11.91% variable" and the APR was stated to be 15.1% variable. The term of the loan is due to expire in 58 months. At the hearing on 27 November 2012 the balance due under the agreement was stated to be £18,343.23 and the arrears £3,243.07, and the current monthly instalment was stated (to the surprise of Mrs Marron's representatives) to be the abated sum of £192.05 (based evidently on a reduced interest rate of 0.6% per month agreed as a temporary forbearance between Housing Rights Service and Mr Tanner of the plaintiff for a year from 27 March 2012). Mrs Marron has been making "fairly regular" payments (including sums well in excess of the monthly instalments due since they were reduced on 27 March) on 10 occasions in 2011 and 9 this year down to 1 November. The amount currently required to redeem the plaintiff's mortgage (until 7 January 2013) is stated to be £20,945.18 inclusive of legal costs and outlays (£3,710) a redemption administration fee (£150) and interest on late instalments, disbursements and added charges (£2,422.93) less "rebate of Finance charges" (£2,113.38). This is a second mortgage, the first being in favour of Bank of Scotland

Plc and stated to secure approximately £53,000. Based on the plaintiff's assessment of value of the property at in or around £82,000.00 there appears to be equity available.

[5] Mrs Marron suffers from multiple serious and well-evidenced health problems including vascular dementia which impinges significantly on her ability to recollect events relevant to these proceedings. Other medical conditions including the aftermath of strokes which leave her doubly incontinent and restrict her mobility to the extent that the property has had to be adapted substantially for her needs. She suffers also from arthritis, valvular heart problems and depression. She has a high degree of dependence on her 18 year old son (who is her principal carer) and other adult children and brothers who live in the vicinity, and on the help of neighbours. It is not in issue that any forced relocation would be traumatic for the second defendant. In the words of her G.P., Dr Logan: "There is no doubt that the potential loss of her home would have a NEGATIVE effect on her physical and mental well-being!!" Her means are very limited, she appears to have a degree of financial dependence also on her family and she is anxious not just about these proceedings but the prospect that her mortgage with Bank of Scotland is due to revert to a capital and interest repayment basis in March 2013 with a considerable increase in the level of monthly instalments.

[6] The second defendant neither denies nor has any recollection of having signed the agreement and mortgage and has no recollection of having received consideration copies or a notification of right to withdraw. She has however put the plaintiff on strict proof that (a) unexecuted "consideration copies" of both the agreement, with a prescribed notice of her rights to withdraw in writing or orally (eg by phoning the broker), and of the mortgage were given to her as required by section 58(1) of the Act and (b) the consideration period of not less than 7 days before copies were sent to the defendants for signature was strictly observed as required by section 61(2). These are extremely important procedural requirements

and, if not complied with in regulated credit agreements secured on land which were entered into before 6 April 2007 (ie before the introduction of s15 of the Consumer Credit Act 2006), would (by reason of section 127(3) of the Act as it then was) have precluded the court from making any enforcement order and rendered the mortgagee creditor completely incapable of enforcing either the agreement or the mortgage. The instant agreement and mortgage were however executed (whether properly or not) several months after that date.

[7] I quote from paragraphs 10.81 and 10.82 of Charles O'Neill's excellent book The Law of Mortgages in Northern Ireland (2008) as to the relevant provisions of the Act:-

> "**Is the agreement valid**?
>
> 10.81 The first question which has to be considered is whether or not the agreement itself is valid. For a regulated agreement which is to be secured on land to be properly executed the following conditions must be in place:
>
> (1) the document must be in prescribed form itself containing all the prescribed terms and conforming to the regulations made under section 60(1) of the Consumer Credit Act 1974 and signed in the prescribed manner by the debtor and by or on behalf of the creditor, and
>
> (2) the document embodies all the terms of the agreement, in such a state that all its terms are readily legible.
>
> *In addition* to the above requirements if the agreement is one which is to be secured on land to ensure that an agreement is properly executed:-
>
> (1) before sending the unexecuted agreement to the debtor for signature the creditor must send a copy of the unexecuted agreement (often referred to as the 'consideration copy') which must contain a notice in prescribed form together with a copy of any other document referred to in the agreement to the debtor, and

(2) if the unexecuted agreement is sent to the debtor for signature by post, it must be sent together with a copy of the agreement and any other document referred to in it, not less than seven days after the consideration copy was given to the debtor, and

(3) during the consideration period the creditor must not approach the debtor by telephone letter or in any other way save in response to a specific request made by the debtor after the beginning of the consideration period; and

(4) no notice of withdrawal has been received by the creditor before the sending of the unexecuted agreement; and

(5) a copy of the executed agreement has been sent to the debtor within seven days following the making of the agreement.

…

10.82 It is important to consider the consequences of the document being improperly executed. An improperly executed regulated agreement is enforceable against a debtor *only* with an order of the court. Under section 127(1) of the Consumer Credit Act 1974 if a creditor applies for an enforcement order due to an improperly-executed agreement the court will dismiss the application if it appears just to do so having regard to: (i) any prejudice ceased to any person by the contravention; (ii) the degree of culpability for it; and (iii) the power of the court to make a time order. If it makes an enforcement order, the court may, if it considers it just to do so, reduce or discharge any sum payable by the debtor or any surety to compensate him for prejudice suffered as a result of the contravention".

[8] The plaintiff's Risk Manager Mark White explained in his affidavit evidence that it receives all of its business from brokers or mortgage intermediaries. The broker, he claimed, issues pre-contractual documentation from software provided by the lender, which has no contact with the borrower before execution of the

agreement except for a telephone call for verification purposes. He relies for proof of service of the consideration copies on the alleged confirmation of both defendants on 18 September 2007 to a Ms Finnegan of the plaintiff during a phone call made by her and recorded on a pro forma New Business Verification Form completed and signed by her to the effect that they had to wait 8 days between the first and second set of documents. Mr White exhibits a copy of that Form to his affidavit, but for a number of reasons cogently alluded to at hearing by Miss Kilpatrick on behalf of the second defendant the form appears to have been completed inadequately and irresponsibly and cannot be relied on by a court as evidence of service of consideration copies. Moreover during cross-examination Mrs Marron asserted that at the time (which I have since ascertained was on a weekday) she would have worked between 6pm and 8pm and therefore believed she could not possibly have been spoken to by Ms Finnegan who had recorded the time of the call as 7pm. Mrs Marron's evidence is credible and I find on the balance of probabilities that Ms Finnegan spoke only to Mr Marron, who had issues with gambling and was the initiator of the whole transaction which would appear to have been neither needed nor desired by Mrs Marron.

[9] Mr Gowdy argues for the plaintiff that it is entitled to the benefit of the evidential assumption of regularity. Mr White further explains that the broker concerned, People's Loans Limited, was dissolved on 15 September 2009 and the plaintiff does not have access to its files and records. The plaintiff relies however on a date code on the top left hand corner of the executed loan agreement "20070830" generated and imprinted by the software supplied by the plaintiff as meaning "that all documents (both the advance copy and the executed) were generated on 30 August 2007, 9 days prior to the date the executed copy was signed". (The credit agreement bears the handwritten date 8 September 2007 alongside the unwitnessed signatures of the defendants.)

[10] Section 7 of the Interpretation Act 1978 provides that where (as in section 58(1)) a statutory provision requires a document to be "given" and permits it to be served by post and it is so served it will be deemed, in the absence of evidence of the contrary, to be served when it would have been delivered "in the ordinary course of post". As the broker was based in England and the Accreditation Agreement between the plaintiff and the broker stipulates that the agreement must be served by post, it presumably was so served. There is no evidence that it was served by special delivery or recorded or registered post. As regards court documents, and by analogy documents required to be served by statute which are despatched by post the following passage from paragraph 65/5/7 of The Supreme Court Practice (Volume 1, 1999 edition) is relevant:-

> "*Service by post by first class or second class mail* – In all cases in which any document is served by ordinary post, the date on which the document will be deemed to have been served will depend on whether the posting was made by first class mail or by second class mail. To avoid uncertainty as to the date of service, subject to proof to the contrary, it will be taken that delivery in the ordinary course of post, for the purposes of the Interpretation Act 1978 s.7 is effected (a) in the case of first-class mail, on the second working day after posting; and (b) in the case of second-class mail on the fourth working day after posting. For this purpose 'working days' are Monday to Friday, but excluding any Bank Holiday. Affidavits of service must state whether the document was despatched by first or second class mail, and if this information is omitted, it will be assumed that second-class mail was used."

[11] Assuming for the purpose (and my two decades of past experience working in offices suggest this would be a precarious assumption) that the unexecuted copy agreement and mortgage with the prescribed notice of right to withdraw contained in the former were not only generated but also despatched by post on 30 August 2007, as that date was a Thursday then even if there were evidence that it was sent by first class post it would not be deemed served until Monday 3rd September – a mere five days before the documents appear to have been signed by the borrowers. There being no evidence that first class post was used, then applying these principles

service would not be deemed to have occurred until Wednesday 5th September – only three days before signature. It therefore appears that the plaintiff did not comply with the requirements of section 61(2) which are very strict, providing as they do that a regulated agreement is not properly executed (as already explained in my quotation from O'Neill) unless:-

> "(a) the requirements of section 58(1) (namely service of the consideration copies and prescribed notice of withdrawal) were complied with; and
>
> (b) the unexecuted agreement was sent, for his signature, to the debtor or hirer by an appropriate method not less than seven days (emphasis added) after a copy of it was given to him; and
>
> (c) during the consideration period, the creditor refrained from approaching the debtor or hirer (whether in person, by telephone or letter, or in any other way) except in response to a specific request made by the debtor or hirer after the beginning of the consideration period; and
>
> (d) no notice of withdrawal by the debtor was received by the creditor or owner before the sending of the unexecuted agreement."

[12] The plaintiff relied, in support of its argument (which clearly fails given what I have just said) that a presumption of regularity should apply, on paragraph 29 of the Broker Accreditation Agreement dated 5 April 2002. That paragraph falls well short of what Mr White describes in his affidavit dated 6 March 2012 as the plaintiff's "standard process for the execution of a regulated agreement, which it requires (sic) all brokers and mortgage intermediaries is:". Mr White sets out the "standard process" as bullet points in paragraph 4 of his affidavit which, itself, refers only to the "unexecuted agreement", failing to mention that (a) it has to bear on its face the prescribed notice of right to withdraw and (b) it has to be accompanied by a copy of the unexecuted mortgage or charge. He also fails to state that the plaintiff clarifies to brokers the full extent of the pre-execution obligations and their legal

importance and significance, and how it provides such clarification. Paragraph 29 of the Broker Accreditation Agreement reads as follows:-

> "If the Broker issues Swift loan documents, the Broker will for regulated loans, send the documents by post to the Borrowers, strictly in accordance with Section 58 of the Act. The Broker will make sure that all the information is completed on the agreement, in particular that all the boxes are filled up and that the agreement contains both the front of the agreement and the printed terms and conditions. There will be one copy of each document for each of the Borrowers."

[13] This simplistic statement is ambiguous and misleads by drawing attention to section 58 without in the same context drawing attention to the inextricably linked requirements of section 61(2) or, for that matter, the relevant regulations made under the Act. Far from bolstering or making operational a presumption of regularity, this, together with what I have already said and judicial notice of the widespread inefficiencies and shortfalls in ethical standards among mortgage brokers, perhaps especially around the time of this transaction, reinforces my conclusion that the plaintiff by its broker did not comply with the requirements of section 61(2). Accordingly I find that the agreement was not properly executed pursuant to section 65 of the Act and that culpability for any prejudice resulting from the breach of these requirements rests firmly with the plaintiff, which relied far too heavily on its broker to ensure compliance with key statutory requirements without any, or any serious, attempt to provide adequate instruction or guidance.

[14] The tenor of the second defendant's oral testimony, which I accept as truthful, was that had she realised at the time the full import of the documents she was signing she would not have signed them. She accepted that the relevant signatures were hers and that she had thereby subscribed to a statement that she had first read the documents. However had she "known then what (she knows) now" she would never have signed them, particularly given the interest and other charges she had to pay. As regards the purpose of the provisions breached, I quote from Lord

Hobhouse's judgment in Wilson v Secretary of State For Trade and Industry [2003] UKHL 40 at 138:-

> "The relevant provisions of the (Consumer Credit) Act are a legitimate exercise in consumer protection. Borrowers are vulnerable and not on an equal footing with lenders. The Act legitimately regulates the transparency and recording of the terms of the transaction and makes provision for the clear obtaining of the burrower's informed consent to those terms."

[15] That case did not involve a mortgage of land but his lordship's comments would seem to apply with added force to provisions such as section 58 and 61(2) which are designed to protect the consumer where the credit agreement is secured by such a mortgage – particularly where as in the present case the mortgage is of the relevant borrower's home and the court is therefore obliged to respect her rights under Article 8 ECHR by reason of section 6(1) of the Human Rights Act 1998. The failure by the lender to comply with the relevant provisions denied her a proper opportunity to realise the full import of the transaction and withdraw from it very easily without any penalty, delay or formality by making a phone call to the broker. In Wilson Lord Hobhouse supported the sanction which then applied to breaches of this gravity, namely that the credit agreement (and any related mortgage) would be completely unenforceable by the lender. The legislator since repealed section 127(3) and allowed the court to exercise a discretion (as I have already mentioned) to permit or refuse an enforcement order having regard to a number of matters including prejudice caused by the breach and the culpability for it.

[16] Professor Goode states the following in Volume 2 of his Consumer Law and Practice at IIB [5.247] when commenting on section 127(1):-

> The intention appears to be that an (enforcement) order will generally not be refused unless prejudice has been caused (although it is also apparently contemplated that an application may be dismissed 'on technical grounds only': see CCA 1974 ss 142(1) and 189(5)). It may be expected, for example, that in an application pursuant to CCA 1974, s 65 an order will be made

> unless there is reason to believe that the debtor's conduct would have been different if the documentation had been in proper compliance with Pt V of the Act: Nissan Finance (UK) Ltd v Lockhart [1993] CCLR 39, [1000] GCCR 1649, CA. Where there has been such prejudice, the court should seek to remedy it by the exercise of its powers under the provisions referred to, and will refuse an order only where the prejudice cannot be remedied in this way."

[17] In the present case I am satisfied from the evidence and on the balance of probabilities that if she had received and been left for at least a week to reflect on the contents of unexecuted consideration copies of the agreement and mortgage (with the prescribed information about the very simple procedure for withdrawal) there was every chance that she would have availed of such a realistic opportunity to withdraw – perhaps especially given the presumably unstable nature of her failing relationship with her husband at that time. Accordingly I find that she was directly prejudiced to the extent that she did not receive the benefit of the advance and had to deal with the high interest and heavy default charges imposed by the plaintiff.

[18] Mrs Marron candidly and properly adduced in evidence a copy of a cheque she had received from the plaintiff for £7,500 and relevant bank statements which, while they did not show any sudden debiting of monies of that order of magnitude in months that followed the crediting of that amount, revealed a high level of debiting activity on her account which would not be inconsistent with her evidence under cross-examination that her husband "got a hold of (her) bank card and would have cleared out (her) account quite a few times".

[19] The second defendant has already paid to the plaintiff an amount which approximates very closely to her (notional) liability if she had now to discharge a default judgment obtained immediately after the agreement for payment of £7,500, costs and - at the very high judgment rate in this jurisdiction of 8% per annum - accrued interest. I recognise that her contractual liability under the agreement (if she were subject to such) would have been a joint and several one for the entire advance,

interest and other charges. However I find that the lender should not be permitted to enforce the agreement and mortgage beyond the amount already paid by the second defendant. I accept that a necessary consequence of this is that the first defendant, who initiated the agreement and shortly after benefiting from it effectively disappeared from the second defendant's life, will be relieved completely of responsibility on foot of the agreement. However I am under a duty to respect the rights of the second defendant to her home and private life pursuant to Article 8 of the European Convention on Human Rights and exercise the Court's powers under section 127 of the Act in light also of the fact that no recourse to a time order or other order revising the terms of the agreement and mortgage could adequately compensate Mrs Marron for the prejudice she has suffered. Moreover it appears to me that the countervailing right of the plaintiff to its possessions under Article 1 of the First Protocol of the Convention are satisfied adequately in the unusual circumstances of this case by the approach I have adopted and the monies the plaintiff has already received.

[20] The Order I make will include a declaration that the plaintiff is entitled to retain the benefits of all monies already received from the defendants. It will go on to refuse the plaintiff's application for an enforcement order. There will be no order as to the costs of these proceedings save that the second defendant's costs will be the subject of legal aid taxation.