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2009 No 29922/05

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

SWIFT ADVANCES PLC

Plaintiff:

and

DAVID CULLY

Defendant:

MASTER HARDSTAFF

1. In this matter the plaintiff is represented by Keith Gibson BL instructed by McCartan Turkington Breen solicitors. The defendant is a self litigant. This case involves an application by the defendant David Joseph Cully for a continued stay upon enforcement of an Order for Possession of premises situate at Lisnevenagh Road, Ballymena, wholly comprised in Folio AN14767 County Antrim (the premises). The Order requiring that the defendant deliver up possession was made by Master Ellison on 22 January 2010. After various events which I will refer to later liberty to enforce that Order was granted by this court on 29 June 2015.

2. The background to this matter is as follows – by way of an unregulated credit agreement completed in and around 19 September 2007 made between the plaintiff and the defendant, the defendant agreed to borrow a sum totalling £137,190 from the plaintiff to be repaid over a period of 300 months at an amount initially of £1,210.70 per month subject to variations in the interest rate. The agreement included an agreement on the part of the defendant to provide by way of a charge security for the loan over the premises. A charge was registered in the Land Registry on 25 September 2007. At that stage it was registered subsequent to a charge in favour of Morgan Stanley Bank International Ltd. The interest in the Morgan Stanley Bank charge now rests with

Albion Residential Ltd. The plaintiff's charge is therefore a second charge in priority.

3. The plaintiff commenced possession proceedings against the defendant by way of an originating summons issued on 19 March 2009. That summons was supported by an affidavit on behalf of the plaintiff from Mr Michael Bennett, solicitor of McCartan Turkington & Breen the plaintiff's solicitors. In his affidavit he confirmed amongst other things that at 15 December 2008 the defendant was £4,957.12 in arrears in payment of the monthly instalment due to the plaintiff.

4. At the first hearing of the matter on 15 September 2009 Master Ellison adjourned to monitor an arrangement which had been entered into by the defendant to pay the monthly instalment due together with £100 towards the arrears each month. He further adjourned the matter for the same purpose on 30 September 2009 to the 22 January 2010.

5. When the matter came before Master Ellison for hearing in January 2010 the defendant represented by his solicitor acknowledged that the arrangement had been defaulted upon but submitted that monies would be through in a number of weeks to regularise matters. On that basis Master Ellison made an Order for Possession with an extended stay period of 42 days.

6. The matter next came before Master Ellison on 16 November 2012 by way of a stay application made by the defendant. At that time he was assisted by a Mr Seymour Major a McKenzie Friend appointed by Master Ellison. It is clear from Master Ellison's detailed note that he felt persuaded to grant a stay and adjourn the matter to 23 January 2013 to allow the defendant an opportunity to explore issues which may have arisen for consideration by virtue of the provisions of the Consumer Credit Act 1974.

7. There were then a number of further adjournments throughout 2013 which reflect that the parties were considering various issues raised and were negotiating with each other.

8. Matters came to a satisfactory conclusion in and around 12 November 2013 when by way of a Tomlin Order the proceedings were stayed with liberty to apply for the purposes of enforcing possession. It is important to remember that by that time the plaintiff had indeed the benefit of a possession Order. It follows that the terms of the Tomlin Order do not expressly refer to the delivery up of possession because that is already catered for under the terms of the Order of 22 January 2010. Rather, the Tomlin Order sets out in its Schedule a money

settlement allowing the defendant a significant discount on what was properly due to the plaintiff and indicating an installment payment method by which the settlement was to be effected. The terms of the Order make clear that the charge in favour of the plaintiff will only be released upon payment of the settlement. The defendant accepted that the terms of the settlement brought to an end any potential claims, causes of action and complaints which he may have had against the plaintiff.

9. Regrettably with the exception of one payment made by the defendant in January 2014 no further payments were made and ultimately the plaintiff issued proceedings to enforce the terms of the original possession Order by way of a summons issued on 3 June 2015.

10. This court granted leave to enforce the Order for Possession on 29 June 2015. In due course enforcement was to proceed and the defendant then made a further stay application on 4 February 2016. That is the application currently under consideration.

11. In his affidavit in support of that application the defendant makes essentially two cases. Firstly, he says that the Tomlin Order provided simply for a money judgment and did not envisage possession. Secondly, he argues that having obtained a valuation of the property at in or around £230,000 there would be no equity whatsoever available to the plaintiff as at that stage the first charge owner was owed £268,063.53.

12. Dealing with the first of his arguments namely that the most the plaintiff has is a money judgment. That is simply plainly wrong. The plaintiff has the benefit of a possession Order since as long ago as January 2010. The terms of the Tomlin Order which set out the framework for settlement made no reference to possession simply because enforcement in breach thereof would necessarily simply involve enforcement of an already existing possession Order. Plainly the plaintiff has not released its charge as the settlement monies have not been paid. No more time need be expended on this particular argument.

13. Of much greater interest to the court has been the argument advanced by the defendant that the valuation evidence suggests that there is no equity available at present to the plaintiff, and that therefore enforcement should not be allowed as it would be of no useful effect.

14. In his skeleton argument the defendant quotes from Master Ellison in GE Money Secured Loans v Morgan & Morgan 2013:–

> "Moreover in the present case had the court been made aware last year when the possession order was made the total negative equity pertained for the plaintiff the making of the order might not have been considered proper in accordance with Schedule 7 of the Land Registration Act (Northern Ireland) 1970 which confers a discretion on the court whether to grant a chargee an order for possession of land and imposes a duty on the court not to do so unless it is satisfied that such a course would be proper".

15. He further relies upon Master Ellison's reasoning in Swift Advances Plc v Justin Heaney when the Learned Master stated:-

> "I do not think a court should be asked to make an order for possession of a persons property let alone her home in favour of a plaintiff lender not for the purpose of releasing or protecting its security but apparently to hold as a threat eviction over her so as to coerce her into payment or punish her for her default".

16. In fleshing out his argument he states at paragraph 3 of his skeleton argument:-

> "Sufficient to say that if there were such a mortgage condition permitting a lender to take possession (in the event that equity is non-existent) for such purpose I believe it would be void whether as being unconscionable useable close to a penalty in terrorem or under the unfair terms in the Consumer Contracts Regulations 1991".

17. Now to be clear; I have reread Master Ellison's judicial notes in respect of this case and in particular the note which was made when he granted possession on 22 January 2010. There was no evidence before the court that would have suggested that at that stage the property was wholly in negative equity. That argument was simply not advanced to the court. Further notwithstanding Master Ellison's various subsequent Orders adjourning the proceedings, so as to allow the defendant to explore issues under the Consumer Credit Act, and to negotiate with the plaintiff, at no stage did Master Ellison consider it appropriate to set aside the Order which he had originally granted. His Order was never appealed. The court therefore necessarily will

require very persuasive argument indeed to set aside what appears to have been a perfectly regular and un-appealed Order.

18. However, to give the defendant a degree of latitude, it appears that he is now asking the court not to permit further enforcement steps for the same reasons.

19. In his skeleton argument to the court Mr Gibson deals with this at some length from paragraph 11 through to paragraph 26 thereof.

20. He sets out in some detail the history of the courts' interventions and the courts' discretion in possession cases both prior to and after the Administration of Justice Acts 1970 and 1973. He rehearses in brief the principle led out in Cholmondeley (Marquis) v Clinton (Lord) 1817, and notes that the Master of the Rolls commented "a court of equity never interferes to prevent the mortgagee from assuming possession". In that context he confirms that prior to 1936 when amendments were made to the Rules of the Supreme Court, equity would not interfere with the position at common law except on terms of payment of the whole principal interest and costs.

21. Following the changes to the Rules in 1936 the court was to afford the defendant borrower a short period of time to find the means to discharge the mortgage entirely or otherwise satisfy the mortgagee that there was a reasonable prospect of him discharging the mortgage within a short space of time. He illustrates this general proposition by reciting the dicta of Lord Justice Coulson in Redditch Benefit Building Society v Roberts where the judge indicated that "in proper cases the wind was tempered to the shorn lamb time being given for payment and so forth".

22. In Birmingham Citizens Permanent Building Society v Caunt Mr Justice Russell commented "equity was never and should never be in the hands of judges so as to attack any part of the security itself, the right to possession was an important part of that security, more particularly in association with the ability to give vacant possession in the exercise of a power of sale."

23. Mr Justice Russell concluded that (a) the court had no right to stand the matter over generally without the consent of the plaintiff; (b) that the only power the court retained was the power to adjourn the matter for a reasonable period to give the mortgagor an opportunity of making some offer acceptable to the mortgagee and if necessary trying to find a means of discharging the loan altogether; (c) the object of the alteration in 1936 to the Rules or especially Order 5 rule 5A and Order 55 rule 5A was to prevent a mortgagee turning a mortgagor out of possession

literally overnight without giving him an opportunity to meet and try to satisfy his creditors; (d) that in the absence of any acceptable proposition the court had no right to adjourn; and (e) that it could not be a reasonable exercise of the discretion to adjourn the hearing for as long as one year in some hope that the financial circumstances of the defendant would change.

24. Mr Gibson goes on to comment that perhaps pre-empting the changes which would be brought about laterally by the Administration of Justice Act Russell J quoted with approval a passage from the Law Quarterly Review Volume 73 page 16 which states "in Law and in Equity the right to possession is absolute subject only as it is not settled to the power of the court to delay the enforcement of that right so as to give the mortgagor a reasonable time to raise the money for redemption. This removes the fear that the court would exercise a somewhat indefinite discretionary jurisdiction to stand between the mortgagee and mortgagor and that the same time prevents the mortgagee turning a mortgagor out of possession almost literally overnight without giving him an opportunity to meet and try and satisfy his creditor".

25. Significantly however, Parliament both by Section 36 of the Administration of Justice Act 1970 and Section 8 of the Administration of Justice Act 1973 provided a novel and significantly different form of discretion to the court. For the first time the court was permitted to stay or adjourn proceedings if a defendant borrower made proposals to deal with the arrears in payment of the periodic payments in a reasonable period of time and doing so in circumstances where normally not only the contractual monthly repayment would be made but a monthly additional payment would be made to address the arrears. All practitioners in this area of law in Northern Ireland are now familiar with how that discretion has been applied by this court over many years. The manner in which such discretion is exercised takes account of a range of matters. The proposal needs to be supported by accurate financial information including income and expenditure statements. In the case of a proposal to sell and redeem the mortgage account this needs to be supported by what is commonly referred to as a Mallet type letter from the selling agent. I do not propose to go through all of the cases on the point. Suffice to say that the discretion exists to provide a breathing space for a defendant borrower to make a proposal to deal with the arrears. The discretion does not exist to allow the court to interfere with the mortgagee's legitimate entitlement to possession.

26. How the court exercises its discretion in these matters is therefore extremely important when considering the argument advanced by the

defendant in this case namely that because of apparent negative equity, and he suggests wholly negative equity, the court should exercise its discretion to further stay the hand of the plaintiff. However, in sound judgments referred to by Mr Gibson and in particular Bristol & Westbuilding Society v Ellis 1997 a Court of Appeal case Lord Justice Auld concluded:-

> "Given the inevitable uncertainty as to the movement of property values over the next few years and the reserve with which the court should approach estate agents estimates of sale prices … no one could be sanguine about the adequacy, now or continuing over that period, of the property as security for the mortgage debt and arrears."

27. Indeed Mr Gibson goes further and quotes from O'Neill Law of Mortgages in Northern Ireland in which the author Charles O'Neill comments on the rational of Lord Justice Auld when he says:-

> "Where there has already been a considerable delay in realising a sale of a property and or the likely sale proceeds are unlikely to cope with the mortgage debt and arrears or there is not sufficient evidence as to sale value the normal order would be for immediate possession".

28. Therefore the rationale of any court confronted with the exercise of its discretion in a negative equity case is to grant possession all the quicker so as to not to further weaken the position of the plaintiff mortgagee. Indeed Mr Gibson refers the court to the dicta in Cheltenham & Gloucester Building Society v Krauze to the effect that if the property is in negative equity the court has no jurisdiction in respect of adjourning an application for possession. All of this clearly stands very much against the argument being made by the defendant in this case. However, the defendant relies heavily on the judgment of Master Ellison in Swift v Heaney. Master Ellison notes that Schedule 7 Part 1 paragraph 5(2) of the 1970 Land Registration Act (Northern Ireland) (the 1970 Act) states:-

> "The registered owner of a charge may apply to the court for possession of the registered land the subject of the charge or any part of that land and (a) on such an application the court may subject to sub-paragraph 3 order possession of the land or that part thereof to be delivered to him and (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.
>
> Paragraph 5(3) then states the power conferred on the court by sub-paragraph 2 shall not be exercised (a) except where payment of the principal sum of money secured by the deed of charge has become due and the court thinks it is "*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".

29. Master Ellison observes:-

> "Thus under paragraph 5(2)(a) the court has a discretion rather than a duty to make an order for possession and paragraph 5(3)(b) makes it clear that only in the most exceptional cases will a chargee be given possession where the chargor has not been guilty of any default. The court's power to refuse possession under paragraph 5(2) and its duty to do so under paragraph 5(3) are clearly potentially more favourable to chargors than the jurisdiction conferred in respect of mortgages of dwelling-houses by the Administration of Justice Acts 1970 and 1973. Therefore although the relevant provisions of the latter Acts apply also to charges on registered dwelling-houses it would seem that the application serves only to indicate particular circumstances in which it would not be proper within the meaning of paragraph 5(3)(a) of Schedule 7 Part 1 of the Land Registration Act to make an Order for possession".

30. Clearly, no doubt in my view Master Ellison postulates a statutory discretion which is in addition to or at least parallel to the discretions under the Administration of Justice Acts. As the 1970 Act only applies in Northern Ireland, it is clear that Master Ellison envisages an additional discretion not available anywhere else in the United Kingdom. Moreoever, he clearly envisages an additional discretion, available only in cases where the title is registered in the Land Registry in Northern Ireland.

31. However I note that Mr Justice Deeny commented recently in the case of <u>Woolwich v Boyd</u> [2015] NICh 16:-

> "For the avoidance of doubt I should confirm that we are dealing here with unregistered land so the provisions of the Land Registration Act (Northern Ireland) 1970 Schedule 7 thereof do not apply. All the same it would scarcely be ideal if the court's discretion regarding registered land in this jurisdiction were to differ to a marked extent from its discretion regarding unregistered land".

32. Mr Gibson in my view quite rightly draws parallels between the exercise of the apparent discretion under Schedule 7 and the exercise of the discretion generally available under Section 86(3) of the Judicature Act. In Woolwich v Boyd Deeny J considers Section 86(3) which he says reads as follows:-

> "Without prejudice to any other powers exercisable by it a court acting on equitable grounds may stay any proceedings or the execution of any of its process subject to such conditions as it thinks fit".

33. Mr Justice Deeny goes on to comment:-

> "It seems to me that particularly in the context of a repossession action for a dwelling-house where the right to family life of a party may come into effect that the discretion under Section 86 of the 1978 Act should not be confined solely to instances where it would be unconscionable not to do otherwise. As Lowry LCJ said in McAuley:-
>
> "It could be exercised to enforce a legal or equitable right that would include in an appropriate case staying possession while a mortgagor exercised a right at law against the mortgagee or pursued proceedings that would allow the mortgagor the pay the sums due under the mortgage". But in the context of the basic principle respected by Parliament in the Financial Servicing Markets Act, that a mortgagee is entitled to possession of the property when the mortgagor is in default. It seems to me that the exercise of such a discretion outside Section 36 would only be in rare and compelling circumstances as Lord Bingham said in Reichold. Given that it is an

> exercise of discretion it would be unwise to hypothesise in advance in any rigid way on the circumstances which would cause the discretion to be exercised. One might however consider that one such circumstance might be where the mortgagor had a clear and strong case against either the mortgagee or perhaps a third party which made it likely that the mortgagor would recover compensation greater in extent than the sums due to the mortgagee and that compensation would be forthcoming in a reasonable period of time to address the arrears. In saying that one ends up being very close to the statutory power given under Section 36 of the Administration of Justice Act 1972 to adjourn proceedings or to stay or suspend any judgment execution or postpone the date for delivery if it appears to the court that in the event of its exercising the power to do so the mortgagor is likely to be within a reasonable period to pay any sums due under the mortgage".

34. In this case however none of the circumstances contemplated by Mr Justice Deeny arise.

35. Therefore the discretions available to the court under the 1970 and 1973 Administration of Justice Acts are limited to staying or adjourning possession proceedings in defined circumstances where there is a reasonable prospect of the defaulting arrears being discharged within a reasonable period of time.

36. If as Master Ellison clearly believed, there is in Northern Ireland some further discretion afforded by the 1970 Act, then Mr Justice Deeny helpfully compares the exercise thereof to the exercise of the general equitable discretion provided for in Section 86(3) of the Judicature Act.

37. In the course of preparing this judgment my attention has been drawn to an important case in which judgment was delivered on 15 June 2016 by the United Kingdom Supreme Court in the matter of McDonald v McDonald & Ors (2016) UKSC 28. This judgment which clearly binds this court, adds further weight in my view to the argument already made by Mr Gibson that the court in exercise of its discretion must not stray into the realms of interfering with the normal contractual rights of parties in a private transaction so as to deprive one of the parties of an outcome to that transaction which was provided for when it was first entered into.

38. In particular in considering whether the court should be required to consider the proportionality of evicting an occupier in the light of Section 6 of the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights the court comments as follows at paragraph 40:-

> "In the absence of any clear and authoratitive guidance from the Strasbourg Court to the contrary we would take the view that, although it may well be that Article 8 is engaged when a judge makes an order for possession of a tenant's home at the suit of a private sector landlord it is not open to the tenant to contend that Article 8 could justify a different order from that which is mandated by the contractual relationship between the parties at least where, `as here' there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants".

39. Whilst this case involves a landlord tenant relationship I have no doubt that the court intended the general principle in regard to the applicability of proportionality under the Human Rights Act and the Convention would apply to similar private sector commercial contract relationships including mortgage contracts. By way of comparison therefore, the domestic provisions which provide a proper balance in the mortgage arena are the provisions of the Administration of Justice Acts. The court goes on to say at paragraph 41:-

> "To hold otherwise would involve the convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations whereas the purpose of the convention is as we have mentioned to protect citizens from having their rights infringed by the state. To hold otherwise would also mean that the convention could be invoked to interfere with the A1 P1 rights of the landlord and in a way which was unpredictable. Indeed if Article 8 permitted the court to postpone the execution of an order for possession for a significant period of time it could well result in financial loss without compensation for instance if the landlord had wished or indeed needed to sell the property with vacant possession

> (which notoriously commands a higher price than if the property is occupied).

40. Compellingly further at paragraph 46 their Lordships' conclude:-

> "Of course there are many cases where the court can be required to balance conflicting convention rights of two parties for example, where a person is seeking to rely on her Article 8 rights to restrain a newspaper from publishing an article which breaches her privacy, and where the newspaper relies on Article 10 but such disputes arise not from contractual arrangements between two private parties but from tortious or quasi tortious relationships where the legislature has expressly, impliedly or through an action left it to the courts to carry out the balancing exercise. It is in sharp contrast to the present case where the parties are in a contractual relationship in respect of which the legislature has prescribed how respective convention rights are to be respected".

41. It seems to me that this clear exposition of the principles governing the applicability of European Convention proportionality are in effect simply a re-affirmation of the law pertaining to mortgage transactions since the introduction of the Administration of Justice Acts discretions.

42. Of course in Swift v Heaney Master Ellison chose the very issue of convention proportionality to persuade himself to apply a broader discretion than available under the Administration of Justice Acts by relying upon the discretion which he says arises from Schedule 7 to the 1970 Act. McDonald v McDonald makes clear that such an approach by the court cannot be to the effect of denying either party its fundamental contract rights.

43. In this case whilst the defendant has not developed an argument around the rationale of Mr Justice Deeny in Titanic v Rowe; Mr Gibson has wisely made some observations in connection with same. It seems to me that this is particularly important in considering Master Ellison's reasoning in the Heaney judgment.

44. If one considers the word `proper' in the context of the granting of a possession Order it might be open to the defendant to argue that it is not proper to grant either possession or to grant liberty to enforce possession if there is clear evidence that such an Order would be useless; "to beat the air".

45. The circumstances of this case however are not the same as those prevailing in the Rowe case. The Rowe case dealt with amongst other things the extent to which the defendant was genuinely impecunious and likely to remain so. In this case by contrast whilst there might be some evidence to suggest the premises are wholly in negative equity, it is not hard to envisage circumstances which might improve the plaintiff's prospect. I need not rehearse again what was said by Lord Justice Auld. Suffice to say markets can change and indeed circumstances and relationships between a first charge holder and a second charge holder can change by way of commercially pragmatic arrangements.

46. I am not therefore persuaded that it would be improper for that reason to allow enforcement to proceed. In brief therefore the relief of possession originally sought by the plaintiff as a result of the defendant's default has long since been granted by this court. No application has been made to set aside that Order, no appeal has been made from that Order. That Order stands as a good order. It is clear from the extensive rehearsal of the law above that historically and to date the courts have taken the view that equity should not interfere with the plaintiff's right to possession, to deprive the plaintiff of possession in circumstances where the default has not been dealt with.

47. The exercise of any discretion available to the court under the Administration of Justice Acts within the United Kingdom as a whole must simply relate to the staying or adjourning of proceedings where there is a reasonable expectation that within a reasonable period of time through reasonable and realistic proposals the defaulting arrears or the debt as a whole will be discharged.

48. To the extent that the discretion exists in the manner envisaged by Master Ellison in Swift v Heaney it must be applied in a way consistent with the courts general equitable discretion under Section 86(3) of the Judicature Act. It is no more than that.

49. Insofar as this court is authoritative to make any such comment or observation I would simply say that for my part I do not believe that the drafter of the 1970 Act envisaged providing the court with a statutory discretion which would go beyond that provided on a United Kingdom basis. This court does not intend in the future to apply Schedule 7 to the Land Registration Act (Northern Ireland) 1970 in a way which appears more liberally or generously disposed towards a borrower who happens by dint of accident to have the benefit of a registered title as opposed to a non-registered title. The application of the law must be consistent and easily understood by all potential

defendants. It would in my view be intolerable for an unregistered owner to be in some way at a disadvantage to a registered owner all other things being equal. It is my clear view that the Administration of Justice Acts provide the appropriate discretion in such matters and this discretion is equally applicable to all owner borrowers in Northern Ireland in domestic mortgage situations whether registered or unregistered title holders.

50. The discretion which appears to arise by virtue of the word proper in Schedule 7 to the 1970 Act in Northern Ireland is in my view not to be regarded as an additional or more broader ranging discretion than that available under the Administration of Justice Acts. In my view it is reasonable to consider that the legislature expected that the court would only make a possession order if satisfied that it was proper to do so in accordance with the then well established legal principles no more or less. In other words the word "proper" simply looks back to the existing law.

51. For all of the above reasons I dismiss the current outstanding stay application and grant leave to the plaintiff to enforce its possession Order.