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Judgment: approved by the Court for handing down
(subject to editorial corrections)

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2001 No 3215

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE PARTITION ACT 1868 AND 1876

and

IN THE MATTER OF THE PROPERTY (NORTHERN IRELAND) ORDER 1997

BETWEEN:

NORTHERN BANK LIMITED

Plaintiff;

and

DESMOND GEORGE BROLLY AND JACQUELINE BROLLY

Defendants.

GIRVAN J

INTRODUCTION

Northern Bank Limited ("the plaintiff Bank") seeks possession of premises comprised in Folio LY 11227 County Londonderry ("the premises") and an order for sale in lieu of partition and an order for the division of the proceeds of sale thereof

between the plaintiff and the second defendant in such shares upon such basis as the court may direct.

The defendants, who are married, are the owners of the relevant premises as tenants in common. The plaintiff Bank obtained a judgment against the first defendant for £8,197.24 and costs of £284 on 24 October 2000. On 22 November 2000 the Enforcement of Judgments Office ordered that the interests of the first defendant in the lands stand charged to the plaintiff Bank with payment of £7,362.74 and costs of £50 with continuing interest in the meantime at 8%. The order was made subject to the condition that the power of sale conferred by article 52(1) of the Judgments Enforcement (Northern Ireland) Order 1981 should not be exercised without the leave of the Master. On 25 October 2001 the Master in the Enforcement of Judgments Office granted liberty to exercise the power of sale under article 52(1). The amount currently outstanding at the date of the grounding affidavit in the application was £7,592.97. It does not appear that any further sum has been made in discharge of this debt on which continuing interest runs.

The plaintiff Bank avers that it requires to obtain vacant possession of the premises in order to sell them. It is stated in the grounding affidavit filed on behalf of the plaintiff Bank that the premises are worth between £100,000 and £111,000. There are two other charges registered in priority to that of the plaintiff namely a charge in favour of Abbey National Plc and a charge in favour of Ulster Bank Limited. Paragraph 9 of the plaintiff Bank's grounding affidavit states that the plaintiff is unaware of the amounts owing on foot of the charges and duties of

confidentiality which those financial institutions owe to the defendants would constrain them from furnishing such information to the plaintiff Bank.

THE MASTER'S ORDERS

By order dated 18 February 2002 the Master gave the plaintiff liberty to amend the originating summons to show the postal address of the property and directed the plaintiff to file and serve a supplementary affidavit as to the correct address of the property subject to the order charging land exhibiting if appropriate a certificate of street numbering. The order directed the defendants so far as is known having regard to any report as to means prepared by the Enforcement of Judgments Office and communication with the defendants and the prior incumbrancers the amount of the prior incumbrances though the order as drawn on 18 February appears to have accidentally omitted some words. By the supplementary order of 21 March 2002 the Master made it clear that it was intended to require the plaintiff Bank to state so far as is known the amounts owing to prior incumbrances.

By affidavit of 20 March 2002 Mr Stewart, on behalf of the plaintiff Bank, avers that the plaintiff has not asked Abbey National Plc or Ulster Bank Limited what is due and owing because it holds no authority address to the financial institutions from the defendants authorising the institutions to disclose to the plaintiff Bank the amounts due and owing. It is alleged that the plaintiff Bank is aware that it will contravene the duty of confidentiality which they owe the defendants for revealing that information in the absence of authority from the defendants and the plaintiff Bank is loath to ask them to breach their duty of

confidentiality. It appears that the plaintiff Bank's solicitors wrote to the defendants on 25 February 2002 asking them to state what was owing to Abbey National Plc and Ulster Bank Limited but no reply was received.

THE IMPACT OF ARTICLE 8 OF THE ECHR

Under article 8 of the Convention the court must respect the parties' rights in relation to their home. Where a judgment creditor seeks an order for possession and sale of property jointly owned by the judgment debtor and his spouse the court must be alive to the article 8 rights of the debtor and, in particular, the spouse whose interest is not the subject of the judgment security.

If a party asserts that his or her Convention rights has been or is going to be infringed it is normally for him or her to make out the case and adduce the relevant material to make that assertion good (see MacRandal v MacRandal [2000] NIJB 272 at 279). In an application such as the present where the order sought will impact on the right of the defendants to their home the court must make sure that they are properly aware of the proceedings (which is the case here). The plaintiff must adduce sufficient evidence to make good its case for possession and an order for sale of the lands. If it adduces prima facie evidence entitling it to the relief sought then if the defendants do not seek to make out a case against the making of the orders sought then there is no reason why the court should not make such an order even if the result of the orders will be to deprive the defendants of their home.

THE ISSUE RELATING TO IDENTIFICATION OF THE LAND

The Master was concerned to ascertain the correct postal address of the relevant premises. The plaintiff in this appeal asserts that this is not necessary since

the land is identifiable from the Land Registry Folio. It is not clear why the plaintiff Bank has seen fit to refuse to provide a relatively simple piece of information to the court.

The correct postal address is of significance in this case because there is confusion within the papers as to what the precise address is. The Land Certificate exhibited to the plaintiff Bank's affidavit refers to the premises as No 57 Hazelbank Road, Drumahoe whereas the affidavit and Mr Gowdy in his affidavit state that the correct address of the defendants is 55 Hazelbank Road, Drumahoe. The affidavit asserts that an investigator visited No 55 and found that those premises were occupied by the defendants and their three children. This affidavit is not entirely satisfactory since it does not make clear how the investigator discovered this. It may have been based on information received from the defendant and his wife or from information received from some third party. Furthermore, no explanation is given why there is a different address shown in the Land Certificate.

For my own part I would go somewhat further than the Master because the affidavit before the court gives no evidence about the nature and extent of the land. It is not clear how much land is composed within the folio and the affidavits do not address the question whether partition is or is not a practical possibility. If the land comprises effectively a dwelling-house in its curtilage partition would not be practical but if it comprises a dwelling-house and adjoining land capable of being partitioned then partitioning part of the land so as to enable the judgment debt to be paid may be a practical possibility. That would leave the spouse in her home. It is

for the plaintiff to adduce the evidence to make it clear that partitioning the land is not a practical possible solution.

THE AMOUNT OF THE PRIOR INCUMBRANCES

The plaintiff objects to the Master's direction that it communicates with the prior incumbrancers to ascertain the amount of the debts due to them.

Order 88 Rule 5A(2)(d) requires the plaintiff to state so far as is known the amount due to prior incumbrancers. In this case the defendants were asked to state what was owing, but declined to provide any such information. The question arises as to whether the plaintiff should now be required to go further and approach those bodies directly to obtain the information.

The information could be obtained by interrogatories served on the defendants themselves, the ordered reply to the interrogatories being enforceable, if necessary, by committal. In addition, under section 7 of the Bankers' Books Evidence Act 1879 the court may on the application of any party to legal proceedings empower him to inspect and take copies of entries in the accounts either of the parties, their spouses or strangers although the power will only be exercised in respect of strangers with great caution. In this case were it necessary to do so the court would have power on foot of an application by the plaintiff Bank to empower the plaintiff Bank to inspect the entries relating to the defendants and this would reveal the size of the incumbrances. It is true that the prior incumbrancers in the absence of an order under section 7 could not disclose that information but if an order were made under section 7 the prior incumbrancers (provided they are banks within the Act) would be bound to supply the information and could not rely on the

principle of confidentiality. The question arises whether the court should effectively require the plaintiff to make such an application under section 7 of the Act to obtain disclosure of the information relating to the size of the prior incumbrancers or should decline to make an order at this stage unless the plaintiff Bank makes such an application.

It will often be in the interest of the judgment creditor to ascertain the size of prior incumbrances because if there is no sufficient equity in the property to discharge the judgment debt the judgment creditor will incur costs in the sale of the property producing with no tangible benefit to the creditor. Furthermore the making of an order for the sale of the property may adversely impact on the prior incumbrancers if they are not fully secured since the plaintiff Bank might find it pointless to try and sell the property. The property meanwhile after an order for possession is made may deteriorate and be vandalised. This could prejudice the interests of prior incumbrancers.

The court should have regard to the interests of the prior incumbrancers who could be prejudiced by the making up of the order for sale. If the plaintiff does not see fit to obtain the relevant information from the prior incumbrancers it will be legitimate and proper for the court to direct that the prior incumbrancers be put on notice of the proceedings and informed of their right to intervene in the proceedings if they consider that the making of an order for sale and possession would prejudice their securities. If they do not object then there will be no reason why an order for sale should not be made if the plaintiff is otherwise entitled to such an order. If it is the case of the debtor or his spouse that the sale of the premises would not achieve

any tangible benefit to the judgment creditor then it is for them to make that case out.

In the circumstances I shall vary the Master's order to require the plaintiff to file affidavit evidence confirming the correct postal address of the property, detailing the nature and physical lay out of the premises and verifying that physical partition of the premises is not possible.

I shall direct the plaintiff to give notice of the proceedings to the prior incumbrancers notifying them that if they have reason to object to an order for possession and sale being made at the suit of the plaintiff Bank they should give notice of their objection and will have liberty to them to intervene in the proceedings if they see fit.

I shall remit the matter to the Master to determine the application when those steps are taken. A further affidavit should be filed within ten days and within the same period the plaintiff Bank should communicate with the prior incumbrancers as indicated.

I shall hear counsel on the question of costs.

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BETWEEN:

NORTHERN BANK LIMITED

Plaintiff;

and

DESMOND GEORGE BROLLY AND JACQUELINE BROLLY

Defendants.

JUDGMENT

OF

GIRVAN J
