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*Ex Tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **09/01/2014**

IN THE HIGH COURT OF JUSTICE IN Northern Ireland

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CHANCERY DIVISION

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BANK OF IRELAND (UNITED KINGDOM) PLC

-v-

MICHELLE McKEEVER
And
JOHN McKEEVER

_____

DEENY J

[1] This matter comes before the court for a ruling in the following way. The Bank of Ireland (United Kingdom) Plc issued a writ against Michelle McKeever and John McKeever on 16 May 2013. In the statement of claim endorsed on that writ the plaintiff bank expressly said it was the successor in title to the Governor and Company of the Bank of Ireland and that it carried on business at, inter alia, 12 Trevor Hill, Newry, County Down. The bank through that branch had made banking facilities available to the defendants in connection with the redevelopment of 48/49 The Square, Crossmaglen, County Armagh and a substantial loan of £450,000 was made available, initially on an interest only basis and then to be interest and capital repayment. Pursuant to the terms of the facility letter on 15 June 2007 the defendants granted the Bank of Ireland a charge over the property. The property is registered property and its folio number has been given in County Armagh and both the transfer to Mr and Mrs McKeever from Mrs McKeever and the charge to the bank are both registered on 17 December 2007 in and under Folio 16777 County Armagh.

[2] The defendants redeveloped the property into five apartments and two retail units. They unhappily fell behind and into arrears in regard to the property and first of all the bank in November 2012 wrote demanding repayment of the substantial sums outstanding and that was followed by a solicitor's letter of 10 January 2013 from Messrs C & H Jefferson in Belfast and subsequently by these proceedings.

[3] Now following the writ there was an appearance entered by Mr and Mrs McKeever. It is a point that has not been taken that it is not a conditional appearance, it is an appearance, but I think I need not dwell further on that.

[4] On 18 June the plaintiff bank applied for injunctions restraining the defendants from trespassing on the property. The bank had appointed receivers to take over the property. Mr and Mrs McKeever were very unhappy about the conduct of the receivers which effectively they say drove away tenants of the property and cut off their supply of rent, but the bank are equally unhappy at interventions by Mr and Mrs McKeever with regard to the property which on foot of their contractual rights they had entrusted to the receivers. So the bank was seeking an injunction.

[5] The matter came before the court on 26 June and it emerged that Mr and Mrs McKeever had issued a plenary summons in the High Court in Dublin three days before this writ was issued here; they had issued theirs on 13 May and they objected to the jurisdiction of the court. They live in County Louth on the other side of the border and they said not only that but they had borrowed the money from the Bank of Ireland which at that stage was incorporated in the Republic, though it is not by law obliged to put limited after its name, perhaps no doubt because of its long standing, but that was the case. They therefore objected to the jurisdiction of the court. They also took a point that is not infrequently taken by borrowers in these courts but had perhaps particular application on their part that they did not accept the right of this plaintiff, Bank of Ireland UK Plc, to pursue them on foot of the charge, given that the charge that they had entered into to secure this substantial loan was entered into with the Bank of Ireland as incorporated in the Irish Republic. That emerged both from their initial comments and a subsequent affidavit and skeleton argument. The affidavit was from Michelle McKeever and the skeleton argument was also from her and she has represented herself and her husband in an articulate and, in my view, able way, despite not having the benefit of legal assistance for, I was informed, financial reasons. It seems to me that they raised an issue or two issues. One as to the bank's right to enforce the mortgage and therefore appoint the receivers and therefore seek injunctions and also whether this was indeed the appropriate court to try these issues and I directed that this hearing be listed for today, 9 January 2014, to decide those two preliminary issues.

[6] The bank put in a substantial further affidavit from Mr John Greer, a solicitor in its employ, exhibiting a considerable volume of documents and I will refer to those so far as necessary. I have had the benefit of helpful submissions as I have indicated from Mrs McKeever, but also helpful written and oral submissions from Mr Douglas Stevenson, of counsel, for the bank. I will not repeat all of those by any matter of means in these circumstances, but will seek to summarise the position.

[7] So far as the mortgage is concerned Mr Greer exhibits the facility letter entered into by Mr and Mrs McKeever with a body then simply called Bank of Ireland and the letter is of 6 March 2007. On it is the home address of Mr and Mrs

McKeever at Hackballscross in County Louth and the letter is signed by them it would appear on 12 March 2007 and signed by two officials of the bank. The lending under that was secured as is customary by an indenture of charge relating to the folio which I have named, 16777 County Armagh and the address there given for Mr and Mrs McKeever was [address], Crossmaglen, Newry, County Down which seems to me not an accurate address, though it may be in the Newry and Mourne District, but in any event that is the address of Mrs McKeever's father and she does not dispute that. So there was a charge, the charge seems perfectly valid and furthermore the charge was as I have already averted to and as the Land Registry entry shows was registered in the name of the Bank of Ireland originally. Subsequently as appears at page 17 of the exhibits to Mr Greer's affidavit it was registered in the name of Bank of Ireland UK Plc and there was a transfer of charge which was registered on 20 January 2011. Mr Stevenson relies on the provisions of Section 11 of the Land Registration Act (Northern Ireland) 1970 that that is conclusive in these circumstances and I quote Section 11(1):

> "Save as is otherwise provided by or under this Act, each register shall be conclusive evidence of the titles shown on that register and of any right, privilege, appurtenance or burden as shown thereon, and the title of any person shown thereon shall not, in the absence of actual fraud, be in any way affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown."

[8] Now there is clearly no evidence of actual fraud in this case. There is, of course, provision under Section 69 of the Act for the court to rectify an error in the title but that does not arise here. So on this mortgage point Mr Stevenson says "there we are that is conclusive evidence on which the court should act". In any event he says it is not the only evidence because I am faced with an order of the High Court in England upon which I should act applying the customary maxims of law and that order, apparently of Mr Justice Henderson, of 29 October 2010 is <u>In the Matter of The Governor and Company of the Bank of Ireland</u> and <u>In the Matter of the Bank of Ireland UK Plc</u> and <u>In the Matter of Part VII of the Financial Services and Markets Act 2000</u> referred to by one of the witnesses by its acronym FiSMA. Now that order of the court sanctions the scheme set out in the schedule thereto. It orders that with effect from the effective date the business shall by virtue of this order be transferred to and be vested in the transferee, the transferee being the plaintiff in this action. Counsel took me through the order of the court. He pointed out that at page 27 as exhibited paragraph UU the order recites:

> "The production of a copy of this order with any modifications and/or additions made under paragraph 13 of the scheme, shall for all purposes be evidence of the transfer to invest again the transferee

> of the business, transferred assets, transferred liabilities, residual assets and residual liabilities in accordance with this order and this scheme."

[9] And he then turned to the scheme and he pointed out that under Clause 11 of the scheme, Interpretation, business means part of the business of the transferor carried on from establishments in the UK as at the effective date and comprising etc and number two of these eight categories that follow was 'NI Banking'. It was not disputed it was Northern Ireland Banking, which he said was applicable here and that definition concluded with these words:

> "Including (without prejudice to the generality of the foregoing):
>
> (a) All activities and services carried on principally in connection with or principally for the purposes of such businesses.
>
> (b) All rights, undertakings and assets of whatever nature used in, or relating to, any such businesses including the transferred assets.
>
> (c) All liabilities of whatever nature relating to any such businesses including the transferred liabilities and including any contingent liabilities or customer indemnities provided in relation to such liabilities, but excluding excluded matters."

[10] So he says that that definition includes all rights and assets. For completeness I asked him to take me to excluded business and its definition and that does not appear to exclude this commercial loan to Mr and Mrs McKeever by the Northern Ireland section of the bank. Nor does 'excluded loans' appear to exclude the transfer of this mortgage as this clearly is not, in my view, a residential mortgage. It was for the development of two retail units and five apartments and it is not suggested that Mr and Mrs McKeever are living in the apartments. It is not a whole finance arrangement under the alburaq brand. It might have been a loan held on one of the transferor's computer systems known as ACBS system. However Mr Nicholas Gracey, a business manager with the bank for some nine years dealing with commercial lending at Newry gave evidence that that referred to 'advance commercial banking system' which he on oath said was internal non-base rate lending on properties, for example, Libor or a fixed rate, whereas Mr and Mrs. McKeever's loan was related to base rate as clearly appears on the face of it and was in the category of bookkeeping and not in that form of internal bank software, so it is not excluded.

[11] The definition of Northern Ireland Banking means "the transferor's branch banking, business lending, deposit taking and current account business carried on through establishments in Northern Ireland, including the products listed in Part B of schedule 1" and that covered the loan in question also. I have already dealt with the transferor and transferee. At paragraph 1.2 of the schedule of the scheme asset is defined in a way that includes securities and security is defined as including a mortgage, charge, standard security, debenture, floating charge etc etc. Now this deals with a point that troubled the defendants. It can be seen there that the draftsman has used the two different words mortgage and charge. They have seen a document, they say belatedly, excluding mortgages from the transfer. But the bank's witness swore that in bank parlance mortgage refers to a residential mortgage, whereas the word charge is used with regard to commercial loans and indeed that would be consistent so far as one can see with the charge granted here.

[12] So Mr Stevenson therefore submits that it is perfectly clear that this was lawfully transferred to Bank of Ireland UK Plc which, it was said in evidence, is a subsidiary of the Governor and Company of the Bank of Ireland. It is duly registered in the Land Registry and that really that is an end of the matter.

[13] Mrs McKeever's point was that she denied that they had ever been notified of this transfer. This was her best point and most substantial point but I have taken all her submissions into account in arriving at this ruling even if I do not expressly refer to them. She had said in an earlier affidavit or sworn in an earlier affidavit that they had not been consulted about this transfer and they were unaware of it and were unaware of it really until they got these proceedings which took them by surprise. I do observe that the letter from Mr Nicholas Gracey seeking money, or I did observe and put to her, seeking repayment of the monies of 15 November 2012 is clearly labeled as Bank of Ireland UK, Business and Corporate Banking, Newry and it is noted on the bottom of that "registered in England and Wales and a member of Bank of Ireland Group"; as is also written "Bank of Ireland UK is a trading name of Bank of Ireland UK Plc which is authorised and regulated by the Financial Services Authority".

[14] I might observe that an earlier letter also exhibited by her to a recent affidavit has the same nomenclature. This is a letter about the alteration of the loan of 26 January 2011 which is also headed Bank of Ireland UK with a similar notation at the foot of it. So it is a little surprising that it had not been noticed by the defendants. They say they would have got mail that had come to [address], Crossmaglen, the residence of her father and of course they were working in and about Crossmaglen themselves in connection with this development and otherwise. They asked the court to accept that they were not notified and that that is a fatal flaw in the plaintiff's claim.

[15] The first issue is whether, on the balance of probabilities, the court is satisfied that they were or were not notified? Mr John Anthony Greer was called to give evidence. He is a solicitor in the Bank of Ireland Group based here in Belfast at

Donegal Square South. He had earlier averred that he had made enquiries. He told the court in oral evidence that he had made the enquiries from the marketing section of the bank and he named two officials therein whom he had personally spoken to and they had checked the data file of the bank and Mr and Mrs McKeever's name was there as people who were written to. The actual sending out was done by an external mailing house, but the bank's data file should be the same as theirs. Now, although this point was not taken by the defendants who are lay people, I take it on their behalf that this is double hearsay; it is admissible but I have to decide what weight to give to it. I am entirely happy that Mr Greer was a careful witness and I make no criticism of him, but he is dependent on other persons who are dependent on a data file. Mrs McKeever in a recent affidavit has repeated this assertion that they did not get it. Mr Greer makes a point which I have to say I find convincing that not only would the defendants have been sent a template letter which went out to all relevant customers, but they were sent a brochure as well and he exhibited both of these and he says there might have been other correspondence as well. I have to say that I find it likely and if the bank, and I give them leave to this, did submit an affidavit from the external mailing house swearing that they had from their records believed they had sent correspondence on one or several dates to Mr and Mrs. McKeever, while one might be satisfied that either the post went astray or perhaps their recollection is at fault over a period of years, stressful years for them, or perhaps a member of their family omitted to give them the document, but I might be satisfied that on the balance of probabilities the bank had taken whatever steps it ought to have taken.

[16] At the present time however Mr Stevenson independently of that submits that no matter in law I have the registration of the charge in favour of this plaintiff and I have the order of the High Court in England and in effect that it would be wrong for me to act in disregard of those. It seems to me that that is a valid submission so I find that for the purposes of this case I do not have to be satisfied of notification as a point of fact. I think the point is a not uninteresting one because as the bank itself acknowledged in one of its documents Mr and Mrs McKeever could have gone to the High Court and objected to the transfer. Well, such a right to object must be vitiated if they are not aware that the transfer is taking place. But the order itself does not recite that everybody had been notified and it does not impose an obligation to notify before it comes into effect. In any event as a practical matter this is a transfer between a parent company and a subsidiary. The parent company acted throughout the island of Ireland for a long while before the partition of the island into two jurisdictions and continued so to act and indeed continues so to act to this day. So there is nothing remotely sinister about this transfer from an Irish registered entity into a United Kingdom registered entity. Taking all these factors into account I am satisfied that the Bank of Ireland UK Plc had satisfied me that it is entitled, subject to any other points, to pursue the charge, and that it has a valid enforceable charge against the defendants.

[17] The second issue for determination today is the jurisdictional issue. Mrs McKeever to her credit had taken the point in her earlier written submissions

that on foot of the relevant EC Regulation they were entitled to have their dispute with the Bank of Ireland heard in the High Court in Dublin and that I should stay these proceedings against them. One turns therefore to Council Regulation EC No. 44 of 2001 with a view to interpreting that document. That document recites that it deals with "jurisdiction and the recognition and enforcement of judgments in civil and commercial matters". It is not in dispute that it is binding on this court in these proceedings. Article 1 (1) recites:

> "This regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters."

[18] Article 2(1) recites:

> "Subject to this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

And this the defendants rely on. They are domiciled in another Member State and they want to be sued there. But the opening words of Article 2 are "subject to this Regulation", so it is necessary to go on and see what the Regulation says. Article 3(1) expressly says: "Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2-7 of this chapter". So helpfully we are confined to consideration of those sections. Section 2 is described as dealing with special jurisdiction. Article 5(1)(a) and (c) apply to the effect that a person domiciled in a Member State, such as the Irish Republic, may in another Member State, such as the United Kingdom, be sued "in matters relating to a contract, in the courts for the place of performance of the obligation in question". Sub-paragraph (b) does not apply and therefore by virtue of (c) (a) applies. Counsel submits that the place for performance of the obligation in question here is clearly Northern Ireland. The money was lent by a Northern Ireland branch, the Newry branch of Bank of Ireland as it then was, now Bank of Ireland UK for these purposes. The money was lent in sterling, the currency of the United Kingdom not the currency of the neighbouring Member State. The money was lent for the redevelopment of property in Northern Ireland. So they were to use the money, sterling, to redevelop the property and then repay the money out of the profits of the property. In the event this was all being done in 2007 which proved not to be a good time to be entering into business ventures, but they were not to know that. So he says the place of performance of obligation is clearly here. I accept that submission, though in this particular case it would not be determinative on its own for a reason I will come to in due course.

[19] Section 6 which, it will be recalled, is one of the relevant sections, deals with and has the rubric "Exclusive Jurisdiction" and Article 22 begins as follows:

> "The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> (1) in proceedings which have as their object rights in rem in immoveable property or tenancies of immoveable property, the courts of the Member State in which the property is situated."

[20] Now the drafting there is clear and in fact it was not disputed and nor can it, I think be disputed that the bank here is enforcing a right in rem in immoveable property i.e. they have a charge on a building in Northern Ireland in the United Kingdom. On that basis the courts of the United Kingdom of Northern Ireland shall have exclusive jurisdiction. The use of the word "exclusive" points to that section and that article of the Regulation trumping Article 2 of the Regulation favouring persons domiciled in a Member State.

[21] The defendants Mr and Mrs McKeever pray in aid, in effect, Section 9 of the Regulation. Now it can be seen it is not referred to in Article 3 which concludes with Chapter 7. But leaving that point aside Section 9 begins with Article 27 which reads:

> "(1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> (2) Where the jurisdiction of the court first seised is established any court other than the court first seised shall decline jurisdiction in favour of that court."

[22] Now a plenary summons has certainly been issued in the High Court in Dublin. I am not absolutely sure that it is seised with jurisdiction inasmuch as I have not been shown any order of that court, but that is not a point I think need weigh with me here. The point that Mr Stevenson does rely on is, firstly, that the proceedings in the south are <u>not</u> between the same parties. The proceedings in the south are against the parent company of the plaintiff here, namely, the Governor and Company of the Bank of Ireland. While that is perfectly correct it may not be impervious to attack in certain cases. The court might look behind the corporate veil between a subsidiary and a parent company. It might consider that that could be interpreted in that way in that context. But he has not confined his argument to that point. If there had been merely some kind of personal loan and the dispute had

started in the neighbouring jurisdiction one might have been minded just to leave it to that jurisdiction i.e. that Article 27 and 2 would prevail over Article 5. But this is not a solely Article 5 case. Article 22 gives exclusive jurisdiction where the object of the proceedings are rights in rem in immoveable property. The good sense of that is obvious. The European Union now extends across many countries. It would be wholly impracticable for a court in Romania to deal in a sensible way with a property in County Armagh or to deal in any kind of proper way with orders in connection with it. The court would be most unlikely to know of its own knowledge of the land law of Northern Ireland, of the remedies available. Great inconvenience would be caused in trying to ascertain that law and practice, errors may be made, costs incurred and so the injunctions in the EC Regulation both to sue people in their own State and to allow the first case to prevail where proceedings have been issued, it seems to me rightly, should yield and do yield to Article 22. Indeed the use of the word "exclusive" jurisdiction there clearly points to that being the intention of the European Community, as it then was, in that piece of legislation. I am satisfied of that here. If I had discretion in the matter it would point in that direction in any event. Somebody has to manage this property. It is in nobody's interest if it is destroyed or if no tenants are put in place in the units, that does not help anybody. The sensible thing is for somebody to be managing the property so as to mitigate the loss to both parties.

[23] This decision on my part does not prevent Mr and Mrs McKeever proceeding with their claim in the Republic. I am not attempting to usurp the proper jurisdiction of my brethren or sisters in the High Court in Dublin. As I pointed out ex arguendo, if they go ahead and they prove that the Bank of Ireland acted unlawfully towards them they could still recover an award of damages either against the Bank of Ireland or if they joined them the Bank of Ireland UK plc and those damages might include the loss to the McKeevers in being deprived of possession of this property. If that is the outcome of that case so be it. But the proper conduct of litigation where the persons domiciled in one Member State have chosen to develop property in another Member State with money borrowed in that state is, it seems to me, on foot of the EC Regulation, properly dealt with in the Member State where the property is and I so rule. So I hold that I have jurisdiction in this matter.