**Neutral citation: [2013] NICA 2**

*Ref:* **MOR8709**

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

*Delivered:* **07/01/13**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**BANK OF IRELAND**

**Applicant/Respondent;**

**-and-**

**JOSEPH WALKER**

**Respondent/Appellant.**

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**Before: Morgan LCJ, Higgins LJ, and Coghlin LJ**

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**MORGAN LCJ (ex tempore)**

[1] This is an appeal by Mr Walker of the decision of Mr Justice Deeny on 10 October 2011 to dismiss Mr Walker's appeal against a possession order made by Master Ellison in respect of 43 Hillside Crescent, Belfast.

[2] In 2006 Mr Walker had lived with his family in 33 Hillside Crescent, Belfast and had a 25 year residential repayment mortgage with Halifax. He had current accounts with the Bank of Ireland. His case is that Ryan Kelly of the Bank of Ireland advised him that if he changed his mortgage to the Bank of Ireland, the bank would lend him money to start an investment portfolio. He did this and he purchased several investment properties. He sold 33 Hillside Crescent and purchased 43 Hillside Crescent and moved there with his family. It was not until repossession proceedings were issued in respect of a number of properties that he realised that the mortgages in respect of 33 and 43 Hillside Crescent were commercial mortgages. He submits that these mortgages should have been residential mortgages and therefore subject to regulation pursuant to the Mortgages Conduct of Business Rules.

He sold 33 Hillside Crescent shortly after purchasing 43 Hillside Crescent and part of the proceeds were used to reduce the mortgage on 43 Hillside Crescent.

[3] Mr Walker continued to make payments in respect of the mortgage until 2008 when the Bank called in all his outstanding loans. He is presently indebted to the Bank in the sum of more than £2m. The outstanding sum in respect of the subject property is in excess of £315,000.

[4] The Bank pursues the case for repossession on the basis of an indenture of mortgage made on 9 June 2006 signed by Mr Walker and witnessed by his solicitor. The mortgage is expressly stated to be an all monies mortgage secured by the subject property.

[5] Prior to his signing of the mortgage deed the Bank prepared a facilities letter indicating that the mortgage was a commercial mortgage over 25 years. Someone other than Mr Walker purported to sign the facilities letter and the suggestion is that the prime candidate for that is Mr Kelly. It certainly appears to have been someone in the Bank. There is however no material before the court to indicate how that arose. Mr Kelly is no longer employed by the Bank. The facilities letter was forwarded with the draft mortgage deed to the solicitors acting for the appellant. Mr Walker makes no complaint against his solicitors although he says that he did not see the facilities letter. He did, however, make payments in accordance with the terms of the facility letter until 2008 when his loans were called in.

[6] He was also provided with at least three other facilities letters in which the subject property was stated to be part of the security for other loans obtained by Mr Walker for his property business. Each of these was admittedly signed by him. By letter dated 3 February 2010 the Bank wrote to Mr Walker stating as his complaint that he was advised by Mr Kelly to provide an alternative residential address so that his property could be used as part of the security for his property portfolio. There is no reply in the papers taking issue with that.

**Consideration**

[7] The general rule is that subject to contractual or statutory limitations a mortgagee under a legal charge is entitled to seek possession of the mortgaged property at any time after the mortgage is executed. Any cross claim would not by itself defeat that claim for possession even if it exceeded the amount owed (See National Westminster Bank v Skelton [1993] 1 WLR 72). Mr Walker has issued proceedings on the basis that the provision of a commercial mortgage rather than a mortgage regulated by the MCOB was a breach of the relevant financial services regulations. Even if that turns out to be right the claim arises under Section 150 of the Financial Services and Markets Act 2000 and is limited to damages. By virtue of section 151(2) any contravention of the regulations does not invalidate or make unenforceable the mortgage.

[8] The burden of Mr Walker's submission is that he did not intend to place his home at risk. The documentation signed by him and witnessed by his solicitor shows that this was precisely what he did. That was confirmed in the three further facilities letters signed by him. We agree that the signing of the facilities letter by someone purporting to be him would be outrageous and that the form of mortgage provided by the Bank may give rise to an action for damages on his behalf but the documents demonstrate that he had independent legal advice at the time of signing the mortgage deed which itself made clear the nature of the liability he was incurring in respect of 43 Hillside Crescent.

[9] In those circumstances we accept that the only course available for Mr Walker at the hearing was to offer to make an arrangement to pay off the outstanding monies on his residence. That was the course which his legal advisers at the hearing pursued and it seems to us that they had no alternative in the circumstances. Mr Walker gave evidence on that basis and his case was presented in his presence on that basis. He was unable to persuade the judge that he could do so and we agree that the judge applied the correct principles to this. We see no basis for the suggestion that Mr Walker was in any way disadvantaged by his representation.

[10] In our view the appeal must be dismissed.