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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **3/03/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

BARCLAYS BANK PLC trading as THE WOOLWICH

Plaintiff/Respondent;

-and-

CREGAN BOYD AND PAULA BOYD

Defendants/Appellants.

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Before: Morgan LCJ and McBride J

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MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal from an Order of Deeny J made on 1 December 2015 that the respondent was entitled to delivery of possession of dwelling house premises situate at and known as 2 Casaeldona Rise, Belfast (the premises). On 8 December 2015 the learned trial judge granted an 8 week stay on the Order.

Background

[2] The appellants are a married couple. In or about July 2000 they purchased the premises with the aid of a mortgage of £120,000 from the Woolwich. The respondent has now taken over that business. Shortly thereafter a further £90,000 was advanced for major construction work on the property. Prior to entering into the original mortgage the Woolwich obtained a mortgage valuation report from Ekins Surveyors. The report as exhibited contains 4 pages. It has been compiled as a result of an

inspection on 14 June 2000 and is dated the following day. It is described as a Home File report.

[3] There is a copy of the report the first page of which has the names of both appellants at the top left-hand corner with an address in Belfast. It refers to the subject property. It identifies the contents of the report being general property information which is contained in the second page, valuation and insurance reinstatement cost contained in the third page and "Level 1 Condition Statement" which is the fourth and last page of the report. The index suggest that there were further documents in relation to energy rating, maintenance, security and fire safety advice, emergency assistance and conditions of engagement.

[4] The second page of the report indicated that at the time of inspection there appeared to be nobody living in the property and that inspection was therefore restricted. The general property information is very general. The third page contains the valuation and insurance reinstatement cost. There is an open market valuation of £140,000 but on the third line the report says "Assumes no major costs in relation to structural movement".

[5] The fourth page has a section entitled "Structural Movement". It described evidence of differential movement both internally and externally with cracking around door and window openings, walls and ceilings. Some of the cracks had been filled. Differential movement was noted to pathways particularly to the side and rear. Movement was also noted to paint areas and retaining walls. It was indicated that a structural engineer's report should be obtained to establish movement had now ceased. There was also comment upon the close proximity of a tree to the front gable corner. Although the appellants accept that they received the first three pages of the report their case is that the fourth page was not sent to them but it was available to the bank. If the fourth page had been sent to them the appellants contend that they would not have purchased the property. The bank disputes the assertions that they did not receive the fourth page and that they would not have proceeded with the mortgage.

[6] On 12 December 2006 the respondent made an offer of a flexible mortgage in the sum of £247,500 to replace the existing facility. The appellants signed a mortgage deed on 22 December 2006 on the basis of the advance of £247,500 and were also given a current-account facility of up to £100,000. Unhappily the appellants were unable to maintain the payments under the mortgage and on 31 July 2009 demands were made for payment of the balance of the monies owing under the mortgage account and a notice to quit in the form of a demand for possession was served. The bank issued an Originating Summons on 14 August 2009 to pursue its claim. The matter came before Master Ellison on 18 June 2010 and he made an order for possession but suspended its operation so that it was not to be enforced without the leave of the court while the appellants paid the normal monthly instalments on the mortgage and equal sums of £500 on the first day of every calendar month in respect of the current-account liability.

[7] It appears that payments were made in accordance with that arrangement until in or about June 2011. In light of the continuing failure to adhere to the terms set by Master Ellison the respondent issued a summons on 30 June 2014 seeking an order for possession in accordance with the terms of the original summons. That was grounded on an affidavit of Gillian Crotty of 20 June 2014 which indicated that at that time the arrears on the mortgage account was £5,624.32 and the arrears on the current account was £29,482.50. On 16 September 2014 Master AE Wells made an Order that the bank should be at liberty to enforce the Order which was stayed on 18 June 2010. Although neither appellant was legally represented at that hearing and only the first appellant was present at the hearing, the Order records that the Master heard the solicitor for the appellants. That was clearly an error but does not invalidate the substance of the Order.

[8] The appellants retained solicitors and an application to extend time to appeal dated 2 October 2014 was lodged supported by an affidavit of the first appellant sworn on 6 November 2014. In that affidavit the first named appellant did not disagree with the sworn evidence in relation to the mortgage but pointed out that the respondent had not exhibited any documentation to show that the mortgage account reserve facility was similarly secured. The first named appellant referred to the Ekins report which was prepared for the bank. He said that the appellants only got the fourth page of that report in 2012 and would not have proceeded to purchase the property if they had known of the existence of the major structural problems.

[9] He maintained that the bank was guilty of gross negligence in lending to the appellants in light of the report. He said that the cause of the structural problems appeared to be related to the fact that the property was built on top of a storm drain which was not shown on any of the property searches at the time of purchasing the property. At that stage the appellants had instructed solicitors to pursue a claim for negligence against the respondent, NI Water, DRD Road Service and perhaps their former solicitors and the vendor of the property. He asserted that he had a defence to the claim for possession arising out of the same lending on the same property.

[10] In a second affidavit filed on 1 December 2014 he stated that the fourth page of the Ekins report was not received by the appellants until 20 March 2012 after extensive and protracted correspondence with the bank. He claimed that he did not consider that he was afforded an opportunity to state his case before Master Wells and did not feel that he was given a fair hearing. He took issue with the valuation of the property obtained by the bank and indicated that he and his wife had issued a Writ of Summons against the Woolwich, Ekins Surveyors and NI Water Limited claiming damages for loss and damage sustained by reason of the negligence, misstatement, misrepresentation, breach of contract and/or breach of statutory duty of the Woolwich its servants or agents in and about the provision of lending and/or financial services and/or in or about the valuation and/or surveying of the premises with similar claims against Ekins Surveyors and claims including nuisance and trespass against NI Water. The Writ was issued on 1 December 2014.

[11] Ms Crotty replied in an affidavit lodged on 6 January 2015. She pointed out that the appellants had disclosed some years beforehand a report from Doran Consulting who inspected the property on 22 October and 8 November 2004. The report was dated 11 November 2004. The report noted that a sales leaflet for the property at the time of the appellants' purchase included a photograph of the front elevation showing that the supporting lintel over the garage door opening was not horizontal suggesting differential vertical settlement of the right gable wall. The writer noted that the appellant had carried out the construction of a significant extension with the aid of an architectural technician and building contractor. He suggested that the appellant had become concerned about the building comparatively recently when a potential purchaser decided not to proceed. The writer considered that the decision to carry out the recent works, ignoring the clearly obvious settlement defects in the garage area and the nature of the previous extension on top of the garage seemingly without any investigation or remedial works was not appropriate. In particular it should have been recognised by the appellants' advisors that additional loads would be added to areas which had already settled by altering the roofline. He considered that an assessment of the overall effect of these loads should have been made. The exhibit appears incomplete in that it stops after the second page. The appellants completed a statement of means and offered to pay £500 per month being £169.38 per month in respect of the ongoing monthly payments and £330.62 against the outstanding balance on the mortgage but no payment in respect of the current account which was over £100,000 in debit. The bank rejected that offer.

[12] The first appellant submitted his third affidavit on 23 January 2015. He said that there was no secret about the fact that he had been corresponding with the Woolwich from in or about 2009. He said that the report from Doran Consulting dated 11 November 2004 did not cause the ringing of any alarm bells that there was a claim against the Woolwich or any other party. It did not indicate the significance of the problem or indicate that any action should be taken. He referred to a report from Mr McQuillan of RPS dated 7 January 2015 to support that view. He reiterated that the cause of the problems to the property and the liability of the Woolwich, Ekins and the other defendants only became apparent when he obtained the full Ekins report in or about March 2012. He considered that the appellants' case against the Woolwich and others was extremely strong.

The proceedings before the learned trial judge

[13] The appellants were represented by counsel and solicitors at the hearing before Deeny J. The bank's case was that the appellants were wholly or effectively confined to the relief which can be obtained under section 36 of the Administration of Justice Act 1970 as amended by section 8 of the Administration of Justice Act 1973. It was submitted that on any analysis of the sums involved the appellants were unable to meet the test under that provision of the likelihood of payment of the sums due under the mortgage within a reasonable period. The bank further submitted that either there was no further discretion under section 86 of the Judicature (Northern

Ireland) Act 1978 or if there was any discretion it should not be exercised in favour of the appellants because the action which they wished to pursue was hopelessly weak.

[14] Mr Jonathan Dunlop for the appellants recognised that he was likely to have difficulty on the argument in respect of the likelihood of payment of the sums due under the mortgage, which included the current account, within a reasonable period and concentrated his argument on the discretion to stay proceedings under Ssction 86 (3) of the Judicature (Northern Ireland) Act 1978:

> "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."

He submitted that the appellants were seeking to protect their legal right to sue a subsidiary of the bank and that a stay can properly be granted for that purpose. He also relied upon the observations of Griffiths LJ in Bank of Scotland v Grimes [1985] 1 All ER 254 that the exercise of the courts power under Section s6 of the 1970 Act and section 8 of the 1973 Act was designed to give a measure of relief to those people who find themselves in temporary financial difficulties. Given the admission by the appellants of a reduction in their circumstances such an argument could only assist if there was likely to be a satisfactory outcome to the litigation within a reasonable time.

[15] The learned trial judge noted the robust language to be found in Marquis of Cholmondley v Lord Clinton and others [1817] 2 MER 171 that a court of equity would never interfere to prevent the mortgagee from assuming the possession of the mortgaged property. He noted, however, that in Northern Ireland Housing Executive v McAuley [1974] NI 233 Lowry LCJ had recognised that earlier similar statutory provisions could be invoked for the purpose of protecting legal and equitable rights which existed or may be shown to exist. Support for the view that section 86 could be invoked in those circumstances was also available from Lord Bingham's judgement in Reichold Norway ASA v Goldman Sachs International [1999] 2 All ER (Comm) 174.

[16] As to the nature of the discretion he recognised the basic principle that the mortgagee is entitled to possession of the property when the mortgagor is in default which is preserved in the statutory context by the Financial Services and Markets Act 2000 section 151 (2) but considered that the power should be available in rare and compelling circumstances including those 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 overdue to the mortgagee within a reasonable period of time.

[17] Turning then to the exercise of the discretion the learned trial judge considered the proceedings which had been issued by the appellants. The

underlying issue was the contention that they had a cause of action as a result of not learning in 2000 from the report submitted by Ekins that there was a possible source of subsidence beneath their property which required investigation by a structural engineer. It was accepted that the primary limitation period for tort and contract had long expired and it was therefore necessary for the appellants to bring themselves within Article 11 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order"). It was contended by the appellants that the Writ of Summons was issued within three years from the date of knowledge required for bringing an action for damages in respect of the relevant damage. The date upon which the appellants relied was 20 March 2012 when the Ekins report of 4 pages was provided by the bank.

[18] The limitation point was the primary basis upon which the bank contended that the appellants claim was inevitably going to be defeated. In support of that submission they relied upon a note which was discovered as a result of a search of the complaint management system of the bank dated 24 June 2000 and which stated:

> "Val received property shows evidence of movement and valuer recommends structural engineer's report. Advised apps this is required prior to offer once recd refer to Val and check with WIS re insurance – RH"

A further note of 27 June 2000 states:

> "Mr B called – very concerned since D/E tomorrow!!
>
> 27/6 - Regards surveyor recommending a structural engineer report – Mr B says he is putting in a lot of his own money to the…"

D/E seems to be a reference to draw down/execution.

[19] Secondly, the appellants obtained a report from RPS Consulting dated 24 November 2014 which disclosed that the property was previously inspected by them on 25 November 2003 for the Trustees of May Street Presbyterian Church who had identified the property as a potential manse. He had been asked to comment on alleged distress in the rear extension and cracking on the front elevation. The Trustees did not proceed with the purchase. The first appellant accepted that the sale had fallen through at that time.

[20] Thirdly, the court noted the contents of the Doran Consulting report dated 11 November 2004 the contents of which are set out at [11] above. Fourthly, the letter from Cowley estate agents of 20 April 2011 to the first appellant expressly referred to there being structural issues which would mean that the property would not be mortgagable. The proceedings were not issued within three years of that correspondence.

[21] The learned trial judge noted that pursuant to Article 11 (9) of the 1989 Order a person's knowledge includes knowledge which he might reasonably have been

expected to acquire from facts observable or ascertainable by him or ascertainable by him with the help of appropriate expert's advice which it was reasonable for him to seek. In those circumstances the learned trial judge concluded that the appellant would face real difficulties in surmounting the limitation obstacles under the 1989 Order. He declined, therefore, to exercise the section 86 discretion. Having reviewed the outstanding figures on the various accounts he concluded that a sizeable monthly payment would be required to pay the arrears and the current interest within a reasonable time and no such offer had been made by the appellants. Accordingly he made the possession order

The appellants' case

[22] The appellants' notice of appeal was lodged on 1 February 2016. It was, therefore, out of time. The appellant contended that the respondent's solicitor and the bank had acted in a negligent manner towards the appellants and submitted that the mortgage contract of 2006 should be seen as null and void because it was claimed that the contract procedures were not completed. The appellant stated that they were endeavouring to obtain relevant documents and were still awaiting the required information.

[23] A skeleton argument was submitted on 23 August 2016. That made the point that the evidence showed that there had been a fraudulent misrepresentation and that evidence surrounding the remortgage only came to light in February 2015. The appellants called into question whether they had entered into a mortgage in 2000 but that was never in issue in the original hearing. In relation to the notes produced of conversations in 2000 the first appellant claims that the conversation was obviously recorded but he did not give permission for it to happen so that the material is inadmissible in evidence. That would obviously be a matter for any trial judge.

[24] The first appellant claimed that there was a possibility of developing the site in 2004 and Doran Consulting raised the issue that he may have been improperly advised by the respondent. The appellant claimed that he immediately contacted the bank to ask for a copy of the survey and having received the three-page Home File survey he was content because it made no mention of having an engineer's report or any problems with the house. That is clearly a matter which would have to be dealt with in the litigation arising from the Writ which has been issued and the indication to us at the hearing was that a preliminary issue on the limitation matter remained outstanding.

[25] Turning then to the 2006 remortgage the appellants argued that the failure of disclosure by the bank of the full Ekins report meant that there was an inequality of bargaining power and that the property risk assessment conducted at that time was a desk-based assessment rather than a full inspection. All of the may have to be examined if the appellant can get over the limitation issue but the judge's exercise of his discretion was concerned principally with that issue.

[26] The next point advanced by the appellants was that the property had been signed over to them on 20 December 2006 and on 21 December 2006 funds had been transmitted to the bank's solicitors on behalf of the appellants for remittance of the mortgage. Accordingly it was contended that the mortgage had been completed prior to the deeds being signed on the following day, 22 December 2006. The bank's position is that the funds transmitted to its solicitors were only available for draw down after the mortgage deed was signed. That occurred on 22 December 2006 and was, therefore, the date of the mortgage. This argument was not advanced at the hearing before the learned trial judge.

[27] Next it is contended that the bank should not have instructed the same solicitor to act on its behalf and on behalf of the appellants. The basis upon which the remortgage option was made available to the appellants was that there would be no fees other than a transfer fee of £275. The application form indicated that if the applicant had selected a Woolwich to Woolwich remortgage package the section identifying a solicitor or licensed conveyancer should be left blank. The solicitor dealing with the transaction was that selected by the bank from its Northern Ireland panel solicitors. The appellants made a complaint about the solicitors but no proceedings have been issued in respect of them and there was no complaint about them before the learned trial judge.

[28] The appellants claim that despite denials by the solicitors involved they did in fact act on behalf of the appellants. It was contended in the appeal that a competent solicitor dealing with the remortgage would have reviewed the previous mortgage documents showing major structural problems with the property. That may or may not be correct but it is certainly not conclusive evidence of fraud as suggested by the appellants. In the documents making the offer of mortgage there is a section about the service that the bank was providing. There were two boxes. The first was a box saying that the bank recommended, having assessed the applicant's needs, that the applicant take out the mortgage. The second was a box indicating that they were not recommending a particular mortgage but giving information about the mortgage so that the applicant could make their own mind up about it. There is a tick against the first box in the documentation provided to the appellants. The appellants relied upon this as an inducement to enter into the mortgage in circumstances where the bank knew that the property was valueless. Fraud was never claimed in the proceedings before the learned trial judge and the Writ of Summons as issued does not allege fraud. The valuation material available to the bank up to 2014 suggested that the property had substantial value. The fraud claim is, therefore, likely to pose considerable difficulties for the appellants.

[29] After the hearing of the case on 26 September 2016 the first applicant lodged further submissions addressing the issue of fraud and misrepresentation. The misrepresentation upon which he relied was the issue over the date on which the 2006 mortgage was entered into. He also relied upon the fact that in the proceedings issued on 1 December 2014 the bank accepted that the solicitors retained by it were also acting on behalf of the appellants. We have dealt with those issues above.

Conclusion

[30] There was no criticism of the learned trial judge's approach to the nature of the discretion that was available to him. The criticism related to his evaluation of the materials in coming to his view about how the discretion should be exercised. The appellant's submissions effectively sought in some respects to argue that the discretion should have been exercised differently and in addition to introduce a case on fraud based in part on a dispute over whether the date of the mortgage was 21 December 2006 or 22 December 2006. The new points were available to be argued in the court below. For the reasons we have given we do not consider that they would have materially affected the approach that the learned trial judge took to the exercise of his discretion. The learned trial judge has set out in some detail why he came to his discretionary judgment and there is no proper basis upon which we should interfere with his decision. The appeal is dismissed.