

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**AN APPLICATION FOR JUDICIAL REVIEW BY  
HEATHER MILDRED BRANGAM**

**WEATHERUP J**

[1] This is an application for judicial review of the decision of the Law Society of Northern Ireland of 27 June 2007, in exercise of its power of attorney for George Brangam, solicitor, to convey to the Law Society of Northern Ireland, as Trustees of the Solicitors Compensation Fund, as mortgagee, the interest of George Brangam in the premises at 1 Earlsfort, Old Kilmore Road, Moira, County Down, held as joint tenants by George Brangam and the applicant. Ms McGreenera QC and Mr Gowdy appeared for the applicant and Mr A J S Maxwell appeared for the respondent.

[2] The applicant and George Brangam were married on 26 March 1976 and purchased the premises as joint tenants on 9 February 1979, where they lived together in the premises as the matrimonial home. The parties separated in December 1995 and the applicant continued to reside in the premises. On 12 December 1997 the applicant was granted a decree of judicial separation and on 16 November 2004 the applicant was granted a decree nisi of divorce. On 23 February 2005 the applicant commenced proceedings for ancillary relief, which included a claim for a property adjustment order in respect of the premises. The applicant continues to reside in the premises.

[3] On 16 August 2006 the respondent was appointed attorney of George Brangam pursuant to paragraph 22A of Schedule 1 Part II of the Solicitors (Northern Ireland) Order 1976. On the same date the respondent obtained against George Brangam an injunction prohibiting disposal of assets up to a value of £500,000.

[4] On 15 March 2007 Northern Bank Limited obtained against George Brangam an injunction prohibiting the disposal of assets up to a value of £220,000, including a prohibition on dealing with the premises at Moira.

[5] On 27 June 2007 the statutory mortgage was created on George Brangam's interest in the premises at Moira by the respondent, as attorney for George Brangam, to the respondent as Trustees of the Solicitors Compensation Fund. It is necessary to note that action was taken at a time when there were concerns about the life of George Brangam.

[6] George Brangam died on 28 August 2007. On 4 September 2007 the respondent gave notice to the applicant of the creation of the statutory mortgage on George Brangam's interest in the premises at Moira.

[7] The effect of the mortgage of George Brangam's interest in the premises was to sever the joint tenancy and create a tenancy in common and thereby bring to an end the applicant's right to the whole interest in the premises by survivorship.

[8] The applicant's essential complaint is that the statutory mortgage effectively removed the applicant's claim to entitlement to her husband's undivided share in the premises, in which she continued to reside. Had the applicant received notice of the proposal for a statutory mortgage on the premises she contends that she would have sought an injunction in the Family Division to restrain the respondent from charging George Brangam's interest in the premises, pending determination of her claim for a property adjustment order in respect of the premises. When the applicant received notice of the statutory mortgage on 4 September 2007 the instrument had been executed, George Brangam had died and the matrimonial proceedings had thereby concluded.

[9] The respondent refers to alternative proceedings impacting on the applicant. In the first place reference is made to the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979 and a claim on the estate of the deceased replacing the claim in the matrimonial proceedings. Secondly, on 29 June 2007 Northern Bank Limited obtained the order charging land against George Brangam's interest in the premises at Moira. The applicant lodged an objection in the Enforcement of Judgments Office and the matter has been adjourned pending the outcome of this application for judicial review. Thirdly a bankruptcy petition was issued by Her Majesty's Revenue and Customs against George Brangam prior to his death and in any event the respondent has the statutory power to petition for bankruptcy in the event that the deceased's estate is insolvent.

[10] Clearly there are other proceedings or potential proceedings arising out of the events referred to above. It is proposed to commence the process by

addressing the issues that arise in these proceedings rather than defer to consideration of other, if related, issues in other proceedings.

[11] On 1 February 2008 Gillen J gave leave to apply for judicial review. The respondent had argued that the application did not give rise to public law issues and that it was therefore not appropriate to proceed by way of judicial review. Gillen J rejected the respondent's argument.

[12] The applicant's grounds for judicial review may be summarised as follows –

- (i) Breach of the applicant's legitimate expectation that the respondent would give notice to the applicant of the proposal to create the statutory mortgage.
- (ii) No legal effect of the mortgage until notice to the applicant.
- (iii) Unequal treatment compared with another joint tenant who had notice of an intention to deal with the other property.
- (iv) Procedural unfairness in failing to give notice to the applicant of the proposal to create the statutory mortgage.
- (v) Interference with the right to peaceful possession of the premises contrary to Article 1 of Protocol 1 of the European Convention.
- (vi) Ultra vires the power of attorney to deal with the premises in which (i) the applicant had an interest and (ii) a Court Order restrained dealing with the premises.

**(i) Legitimate Expectation.**

[13] The applicant contends that she was entitled to notice of the proposed statutory charge on the basis of legitimate expectation engendered by an assurance given by the respondent. On 16 August 2006 solicitors for the applicant wrote to the respondent stating that ancillary relief proceedings were pending and that –

“We must ask you to inform us if there are any ongoing proceedings which would in any way prejudice the relief sought by our client”.

By reply dated 22 August 2006 the respondent confirmed that the application to the High Court on 16 August 2006 to be appointed George Brangam's attorney had been successful and concluded by stating -

"We have noted your interest and will keep you informed as appropriate".

[14] The respondent contends that it satisfied the statement in the letter of 22 August 2006 by giving notice to the applicant on 4 September 2007 that it had obtained the statutory mortgage on 27 June 2007. The request made on behalf of the applicant was to be informed of any proceedings which would in any way prejudice the relief sought by the applicant. It would be apparent that any mortgage of George Brangam's interest in the premises would be capable of prejudicing the claim by the applicant for a property adjustment order in respect of the premises. Notice to the applicant of the proposal to obtain a statutory mortgage on George Brangam's interest in the premises would have afforded the applicant an opportunity to address the respondent on her concerns about the proposed course of action and if necessary to seek to intervene and restrain the respondent.

[15] Legitimate expectation may arise from a promise or practice of a particular course of action by a public authority. A promise must be clear and unequivocal. The context in which the promise or practice arises may determine the nature of the legitimate expectation, which may be that in making a decision the public authority will take into account the promise or practice or that a person affected will be consulted before a decision is made or that a particular outcome will be the result of any decision.

[16] Legitimate expectation is now recognised as being procedural or substantive. The position has been comprehensively reviewed recently by Laws LJ in R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 Laws LJ. In relation to procedural legitimate expectation it is stated -

"29. There is a paradigm case of procedural legitimate expectation and this at least is in my opinion clear enough, whatever the problems lurking not far away. The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy: see *CCSU* [1985] AC 374 at 408G - H (Lord Diplock's category (b)(ii)), *Ex p Baker* [1995] 1 AER 73 at 89 (Simon Brown LJ's category 4, acknowledged by him to equate with Lord Diplock's category (b)(ii): see p. 90), *Ex p Coughlan* at paragraph 57, p.242A - C: Lord Woolf's category (b)). I need not for present purposes set out these taxonomies.

30. In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in *CCSU*)."

[17] In the present case the respondent stated, in reply to the applicant's request that the applicant would be kept informed, thereby inducing an expectation on the part of the applicant that any proceedings on the part of the respondent affecting the applicant's claim to her husband's interest in the premises would be notified to the applicant. The respondent undertook action that had the effect of prejudicing the applicant's claim in respect of the premises. The respondent did not inform the applicant at a time when it should have been considered appropriate to do so, namely at the time of the proposed action.

[18] Accordingly I am satisfied that the applicant had a legitimate expectation that it would have been considered appropriate for the respondent to notify the applicant that it proposed to exercise the power of attorney on behalf of her husband to obtain a statutory mortgage on his interest in the matrimonial home, to the prejudice of the applicant's claim for a property adjustment order. The absence of notice was not justified by any overriding legal duty or by any countervailing public interest.

[19] The respondent contends that the applicant's position would have been no different had she received notice of the proposed statutory mortgage. Article 39 of the Matrimonial Causes (NI) Order 1978 provides for the avoidance of transactions that are intended to prevent or reduce financial relief in matrimonial proceedings. Article 39(2) provides:

"Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first mentioned person -

If it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim."

[20] The respondent contends that the "other party to the proceedings" was George Brangam and the dealing with the premises was undertaken by the

respondent and not George Brangam. Further the respondent contends that the mortgage was not created with an intention of defeating the applicant's claim for financial relief but for the purposes of securing the asset for the benefit of the compensation fund. Further, there remains the matter of the injunctions obtained by the respondent and by Northern Bank Limited and their impact on the applicant's position. As the impact of the Northern Bank injunction has yet to be determined in other proceedings it is not proposed to make any direct or indirect finding in relation to that issue in these proceedings.

[21] The statutory mortgage was executed by the respondent as attorney for George Brangam. In so acting to convey his interest in the premises I am satisfied that the respondent acted as or on behalf of the other party to the matrimonial proceedings for the purposes of Article 39. Further Article 39(9) provides that where the disposition has the consequence of defeating the claim then that is the presumed intention, unless the contrary is shown. The creation of the statutory mortgage had the consequence of subjecting that interest in the premises to the claims of the trustees of the Solicitors Compensation Fund in preference to the claim of the applicant. There is a presumption that the respondent intended to defeat the applicant's claim. That presumption has not been displaced by the declared intention of the respondent to secure the interest in the premises for the benefit of the solicitors' compensation fund.

[22] In any event the applicant refers to the inherent jurisdiction of the High Court to grant an injunction under section 91 of the Judicature Act (NI) 1978 "... in any case where it appears to the court to be just and convenient to do so for the purposes of any proceedings before it." As I am satisfied that Article 39(2) applies in the circumstances it is not necessary to determine the application of section 91.

[23] Had the respondent given notice to the applicant of its intended action in relation to the statutory mortgage the applicant would have taken proceedings to restrain the respondent and protect her claim and on the balance of probabilities would have succeeded. Accordingly I propose to set aside the statutory mortgage and restore the applicant to the position she would probably have attained had the respondent met her legitimate expectation. In so doing I make no finding in relation to the impact on the applicant's position of the Northern Bank injunction.

[24] The next four grounds for judicial review are variations on the theme that the applicant's position should not be adversely affected without notice to the applicant of the proposed mortgage. As I find for the applicant on the ground of legitimate expectation of notice it is not necessary to consider in detail the further grounds that rely on the question of notice.

**(ii) The notice to the applicant of the statutory mortgage.**

[25] The applicant contends that the mortgage could not impact on the applicant's position until she was notified on 4 September 2007. The applicant considers that the consequence would be that the joint tenancy was not severed so that on the death of her husband the applicant acquired the whole interest in the premises by survivorship. This approach is based on the general proposition that the principles of legality and access to justice require that a party liable to be adversely affected by a decision should have notice of the decision before it has legal effect. In R (Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604 the applicant's income support was stopped during the period between the benefits agency being informed that the applicant had been refused asylum and the applicant being so informed. The House of Lords set aside the decision and Lord Steyn at paragraph [26] stated -

“Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. This is a fundamental and constitutional principle of our legal system.”

[26] Lord Millett agreed and at paragraph [43] referred to the strong “presumption” that notice of a decision be given to a person adversely affected before it can have legal effect and added - “It cannot be lightly overturned”.

[27] In the context of the legal scheme for the creation of mortgages and the registration of interests in land, leaving aside the issue of legitimate expectation, I am satisfied that the legal effect of the statutory mortgage did not require direct notice to the applicant.

**(iii) Unequal Treatment.**

[28] The applicant contends that there was unequal treatment when compared with a Jill McIntyre who was the joint owner with George Brangam of premises in Dundonald. It is a cardinal principle of good public administration that all persons who are in a similar position should be treated equally. After Ms McIntyre's solicitors approached the respondent's solicitors with a view to selling the Dundonald premises and in the light of the injunction, a voluntary severance of the joint interest was prepared to

protect the respondent's position pending completion of the sale. However the voluntary severance did not proceed and the respondent registered a charge against the Dundonald premises without notice. The contact with Ms McIntyre emerged out of her intention to sell the property. There was no notice to Ms McIntyre in relation to the statutory charge. While there is an obligation to accord equal treatment to those in similar positions the individual circumstances of such cases may vary considerably and the commercial aspect of these arrangements may alter the nature and timing of steps to be taken.

[29] I have not been satisfied that the circumstances involving Ms McIntyre imposed an obligation on the respondent to give notice to the applicant of the proposal to create a statutory mortgage.

#### **(iv) Procedural Unfairness.**

[30] The applicant contends that procedural fairness required that the respondent give notice to the applicant of the proposed statutory mortgage. The applicant relies first of all on Hallmark Furniture Co Ltd v Collins (1998) NI 4. On the application of a judgment creditor the EJO made an order charging a dwelling house in favour of the creditor. The dwelling house had originally belonged to the debtor but had been transferred to his wife 13 years earlier. The EJO did not give notice of the proposal to make the order to the wife. The order was set aside. Carswell LJ stated at page 8 that it is impossible to sustain the validity of a charging order made without notice of any kind to the person most directly affected, namely the owner of the legal title to the land. A purported charging order would be void if such an order were made without notice and would be outwith the statutory power, being made in breach of the rules of natural justice.

[31] Secondly the applicant relies on Ulster Bank v Carter (1999) NI 93. A husband and wife were joint tenants. The parties separated and the bank obtained judgment against the husband and a charge against the husband's interest was made without the wife's knowledge. The Property (NI) Order 1997 altered the law by conferring on the owner of a judgment charge on land in co-ownership the right to apply for partition. The bank was not entitled to enforce the charge by means of partition proceedings where the charge had been created before the change of law had come into force. The absence of a requirement to give notice to the co-owner prior to the change of law coming into force led to the conclusion that the right to partition did not apply to charges created before the law came into force. Girvan J stated at page 104 that there is no reason in principle why the same approach as that applied in Hallmark Furniture should not be adopted when the EJO was purporting to make an order against one co-owner which will have the direct consequences



of interfering with the other co-owner's rights to quiet enjoyment and possession of the premises.

[32] It is proposed to defer further consideration of this issue to the hearing of the related issue in the proceedings involving Northern Bank Limited.

**(v) Right to Peaceful Enjoyment of Possessions.**

[33] The applicant contends that there has been interference with the right to peaceful enjoyment of possessions in breach of Article 1 of the First Protocol of the European Convention on Human Rights. Article 1 of the First Protocol provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes of other contributions or penalties.”

[34] Article 1 of the First Protocol comprises three distinct rules. The first rule set out in the first sentence of the first paragraph is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that member states are entitled amongst other things to control the use of property in accordance with the general interest.

[35] The applicant relies on the procedural requirements of Article 1 of the First Protocol as set out by the European Court of Human Rights in Jokela v Finland (2003) 37 EHRR 26 at paragraph 45:

“Although Article 1 of Protocol 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether

this condition has been satisfied a comprehensive view must be taken of the applicable procedure.”

[36] The beneficiaries of the deceased’s estate complained that their property rights had been violated on account of the discrepancy between the assessment of the market value of expropriated land and of the market value of land subject to inheritance tax. The procedural aspect involved a complaint that the applicants had not been afforded a reasonable opportunity to present their arguments at the expropriation hearing. The ECHR found that the expropriation proceedings viewed as a whole afforded the applicant’s a reasonable opportunity of putting their case to the competent authorities with a view to establishing a fair balance between the conflicting interests at stake.

[37] I will assume that Article 1 of the First Protocol has been engaged in the present case and that there has been interference with the applicant’s right to peaceful enjoyment of the property. That brings into play the issue of the nature and extent of the procedural requirements in the circumstances. This is a variation of the previous ground based on procedural unfairness. Again it anticipates arguments that will arise in the proceedings involving the Northern Bank. It is proposed to defer further consideration of this issue to the hearing of the related issue in the proceedings involving Northern Bank Limited.

**(vi) Power of Attorney.**

[38] Finally the applicant contends that the respondent did not have power to effect the statutory mortgage in the circumstances. Paragraph 22A of Schedule 1 to the Solicitors (Northern Ireland) Order 1976 provides for the powers exercisable by the respondent as attorney as follows:

“(a) The Society shall have power, either in their name or in the name of the solicitor, to do all or any of the acts and things mentioned in paragraph 23 and all such other actions things in relation to the solicitor’s practice or property or assets as appear to the Society to be necessary for any of the purposes of this order, as fully and effectively in all respects as if they were done by the solicitor present in person (irrespective of where he then may be); and

(b) The solicitor shall be precluded from doing any of the acts and things mentioned in head (a) which may be done by the Society as his attorney.”

[39] The powers exercisable pursuant to paragraph 22A (2) include at paragraph 23 -

“(5) To manage, let, sell, mortgage, charge or otherwise dispose of and convey, assign, transfer, surrender, sub-lease or grant in fee any property whatsoever of the solicitor or in which he has any estate, title, right or interest or any part thereof on such terms or conditions as the Society think fit.”

[40] The applicant contends that the power of the respondent in respect of the mortgage of George Brangam’s interest in the premises was limited to that power that George Brangam would have had to mortgage the premises. As the injunction obtained by the Northern Bank Limited on 15 March 2007 prohibited George Brangam from dealing with the premises up to the value of £220,000 then similarly the respondent did not have power to mortgage George Brangam’s interest in the premises. The respondent contends that it had secured a prior injunction on 16 August 2006 restraining George Brangam from dealing with his assets and accordingly was entitled to mortgage the premises at Moira on its own behalf. The applicant draws attention to the two capacities in which the respondent acted in relation to the statutory mortgage. The Indenture of 27 June 2007 was made by statutory mortgage between George Brangam as mortgagor and the Law Society of Northern Ireland as Trustees of the Solicitors Compensation Fund as mortgagee whereby the mortgagor conveyed to the mortgagee his interest in the premises at Moira. The Indenture was executed and delivered as a deed by George Brangam by his lawful attorney the Law Society of Northern Ireland pursuant to the order of the High Court of 16 August 2006. Thus the respondent as attorney conveyed to the respondent as Trustees of the Solicitors Compensation Fund. I do not accept that this alters the entitlement of the respondent to create the statutory mortgage.

[41] In summary, I accept the applicant’s argument on legitimate expectation and set aside the respondent’s statutory mortgage of 27 June 2007.

I do not accept the applicant’s arguments in relation to a statutory mortgage only having legal effect on notice to someone in the applicant’s position, or unequal treatment of the applicant or the inability to create the statutory mortgage under the power of attorney.

I state no conclusion of the applicant’s arguments on procedural unfairness and the procedural requirements of Article 1 of Protocol 1 of the European Convention, which issues are deferred to the hearing of the outstanding proceedings involving Northern Bank Limited.

