Neutral Citation [2016] NICh 11 | *Ref:* **HOR10036**

Judgment: approved by the Court for handing down | *Delivered:* **20/09/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF PREMISES SITUATE AND KNOWN AS 23 ANNA'S GROVE, NEWTOWNABBEY, CO ANTRIM, BT36 4PQ

Between

MARK DEERY

Plaintiff

and

JAMES DEERY

First Named Defendant

and

LAURA GRAHAM

Second Named Defendant

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HORNER J

A. INTRODUCTION

[1] The issue between the parties in this case is whether the failure to include a Penal Notice in an agreed order requiring the defendants to do an act within a specified time, namely vacate forthwith 23 Anna's Grove, Newtownabbey, Co Antrim ("the Premises") precludes the plaintiff from seeking to re-serve the order with a Penal Notice attached in accordance with Form No:67 of Appendix A of the Rules of the Supreme Court (NI) 1980 and enforcing the order by committal under Order 52.

[2] It appears that in an increasing number of cases plaintiffs are obtaining orders for possession under Order 113 but failing to include a Penal Notice in the original order. An application then has to be made subsequently seeking to have the original order amended and asking for leave to re-serve the order.

B. BACKGROUND FACTS

[3] On 19 June 2015 the plaintiff issued proceedings against his brother, James Deery ("D1") and D1's partner, Laura Graham ("D2") and persons unknown, namely the children of D1 and D2 who were occupying the Premises. The Premises had been registered in the name of the plaintiff on 20 August 2009. Apparently, D1 the plaintiff's eldest brother, had suggested that the plaintiff purchase it and that D1 would pay the monthly mortgage instalments and the deposit, together with all the associated expenses such as stamp duty, legal costs, rates, insurances and utility bills. D1 and D2 would then reside there with their four children. The plaintiff claims that he was pressurised into entering into this arrangement. D1 says that no pressure was applied and that the plaintiff received a £2,000 fee for so acting. D1 arranged for solicitors to be instructed and the plaintiff, according to his evidence, played little role in the transaction.

[4] In or around 2013 the plaintiff received correspondence from HMRC complaining about a failure to pay stamp duty and threatening legal action. D1 promised to discharge this debt. In 2014 the plaintiff learned that money was due to the Land and Property Services (Rating) (LPS) in respect of rates for the property which had not been discharged. The LPS agreed to transfer the responsibility for paying these rates to D1 and D2 who were occupying the premises.

[5] At the same time, on contacting the mortgagee, the plaintiff learned that the mortgage was £1,200 in arrears. By July 2014 over £6,500 was due in connection with the mortgage. The plaintiff paid £2,400 to Santander in respect of these mortgage arrears in September 2014. In August 2014 D1 did agree to market the property for sale at £190,000, the value placed on it by Ulster Property Sales. Offers were made but D1 and D2 would not leave. The Premises are currently valued at £200,000 and the amount due under the mortgage was £161,465.47 when proceedings were initially issued.

[6] The plaintiff served Notices to Quit on D1 and D2 on 28 January 2015. Proceedings followed under Order 113. D1 and D2 initially took the point that this was not the appropriate way to proceed, D1 claiming that he was a tenant, paying a rent and that the proceedings were misconceived. However, this argument seems to have been abandoned. A joint consultation took place on or before 14 September 2015.

[7] D1 and D2 claim that they have spent very substantial sums in capital improvements to the Premises. These include money spent on flooring, tiling, painting, conversion of the attic into a bedroom and landscaping. D1 alleges that his business had suffered in the recession and that is why he was unable to pay the mortgage repayments due in respect of the premises.

[8] On 21 September 2015 the case was announced as settled on terms to be scheduled to an Order of Court, that is a Tomlin Order. This provided that D1 and D2 would pay the sums due in respect of the mortgage, that they would obtain their own offer of mortgage in respect of their intended purchase of the property, that they would reimburse the plaintiff in respect of the £2,500 paid in respect of arrears of mortgage, all sums due to HMRC, £135.00 being the sum paid by the plaintiff for a policy of buildings insurance for the property and £1,000 in respect of the plaintiff's costs.

[9] It was agreed that the plaintiff would sell the premises to D1 and D2 on or before 23 December 2015. In default of such sale, it was agreed the plaintiff would be entitled to market the property for not less than £180,000. The terms also dealt with the possibility of the mortgagee commencing proceedings to recover possession of the property. Time was stated to be of the essence.

[10] Further proceedings were issued on 26 October 2015 on the basis that D1 and D2 had defaulted on the agreed terms set forth in the Tomlin Order. This does not appear to be in dispute. On 17 November 2015 terms were agreed between the plaintiff and D1 and D2. These terms provided that an order for possession of the premises should not be enforced before 31 January 2016 on the condition that the defendants comply with their aforementioned undertakings but that D1 and D2 should forthwith deliver possession of the Premises. Further, it would appear that no mortgage repayments had been made in respect of the months of September, October or November to the mortgagee.

C. ENFORCEMENT OF ORDERS

[11] Order 45 Rule 3 of the RSC states:

> "Without prejudice to Article 53 of the Order of 1981 and subject to the provisions of these rules, a judgment or order for the giving of possession of land may be enforced in a case to which Rule 4 applies by an order of committal under Order 52."

[12] Order 45 Rule 4 states:

> "(1) Where –
>
> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do so within that time …; or,
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,

> then, without prejudice to Article 111 of the Order of 1981 and subject to the provisions of these rules, the judgment or order may, subject to Articles 107 to 110 of the Order of 1981, be enforced by an order of committal under Order 52."

[13] Order 45 Rule 5(4), which deals with the pre-requisite to enforcement under Rule 4 above, states that:

> "There must be prominently displayed on the front of the copy of an Order served under this Rule a warning in Form 67 in Appendix A …"

[14] Order 52 Rule 1(3) provides that where civil contempt of court is committed in connection with any proceedings at the High Court, an order of committal may be made by a single judge.

[15] Thus under Order 45 Rule 4 the court can enforce by committal under Order 52 a failure by a defendant to do an act within a specified time. Such an act would include the giving up of possession of premises. However, it is a requirement of the rules and a pre-condition to obtaining committal that there must be displayed on the order a Penal Notice in accordance with Form No: 67 which must be served on any defendant against whom relief is sought.

[16] The plaintiff sought to rely on Order 20 Rule 11. This is the slip rule. It states:

> "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or summons without an appeal."

[17] Order 113 Rule 7 provides:

> "The judge may, in such terms as he thinks just, set aside or vary any order made in the proceedings under this Order."

[18] For the sake of completeness, it is necessary to record that the plaintiff also sought to call on the inherent jurisdiction of the court in seeking relief.

D. DISCUSSION

[19] Quite properly no point was taken by D1 and D2 that the use of the word "forthwith" offended Order 45 Rule 4(1) in that no time was specified in the Order. There is no substance to this given that in Re Hogan (No: 2) [1986] NIJB 45 at [51] the

court held that "forthwith" is a sufficiently certain expression of time and means as soon as reasonably possible after service of the Order.

[20] It is common case that the draft order which was agreed and was issued by the court and which the plaintiff now seeks to enforce did not have a Penal Notice attached to it. D1 and D2 complain that they did not agree to a Penal Notice being included. In particular they object to the plaintiff being able to enforce the order by committal under Order 52. It is common case that neither party gave the issue of the Penal Notice any consideration at the relevant time when the draft order was being drawn up.

[21] The court was asked to amend the original order by including a Penal Notice. The plaintiff relied on Order 20 Rule 11, Order 113 Rule 7 and the inherent jurisdiction of the court. These claims were met by objection on behalf of D1 and D2 that the inclusion of a Penal Notice had not been expressly agreed as part of any order. Mr McCausland on behalf of D1 and D2 in the course of a well-thought out and attractively presented argument made valid points about how a court's hands were tied in amending consent orders. Quite properly he drew attention to the restriction placed on a court amending a consent order in cases which involve fraud. He argued that Order 20 Rule 11 could not be invoked as what had occurred was not a clerical mistake or error. Further, any attempt to rely on the inherent jurisdiction of the court must fail because that was limited to cases where the order did not accurately express the "manifest intention of the court": see Moore v Monteith [1998] NIJB 103. He also argued that Order 113 Rule 7 did not allow the court to rewrite the parties' bargain.

[22] Mr Sinton on behalf of the plaintiff sought to improve his hand by amending the relief sought in the plaintiff's summons to include a declaration pursuant to:

> "Section 23 of the Judicature (Northern Ireland) Act 1978 and/or the inherent jurisdiction of this Honourable Court that the plaintiff may and is at liberty to, without need of any further Order or leave of this Honourable Court, endorse a Penal Notice upon a copy of the sealed Order dated the 17th day of November 2015 in the above entitled action."

[23] It is important to remember that the parties agreed that: D1 and D2 would do an act immediately on the happening of a certain event, which has now occurred, namely give up possession of the Premises. The Rules of Court provide that one of the means of enforcing a failure to do such an act is committal.

[24] The court's experience and understanding is that as part of any settlement the parties agree the relief that should be given to the plaintiff by the defendant. They do not generally agree the means by which the terms of an Order will be enforced. Accordingly, a plaintiff who has obtained a judgment for damages against

a defendant can enforce it by a number of different means. He may seek, for example, to use it to bankrupt the defendant by serving a statutory demand relying on the judgment as evidence of the debt. Parties do not have to agree that the plaintiff may bankrupt the defendant in the event the defendant does not satisfy the judgment. The parties understand that the judgment can be enforced by whatever means are lawful and those means are rarely, if ever, spelt out.

[25] In Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann set out the principles by which contractual documents should be construed today at 912F to 913H. In particular he said:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract."

[26] In Rainy Sky SA v Kookmin Bank [2011] 1 WLR 290 Lord Clarke said at paragraph [14]:

> "As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case [1998] 1 WLR 896, 912H, the relevant reasonable person is the one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

[27] Accordingly, the court's task involves ascertaining what a reasonable person with the necessary background information would have understood that the parties meant, both parties, as here, having had access to legal advice. I am satisfied that such a reasonable person in these particular circumstances, with the benefit of legal advice, would have understood the order to mean that the plaintiff was able to enforce the terms of the agreement, if they were broken, by any means which were lawful.

[28] Some support for my conclusion is derived from Anglo-A-Eastern Trust v Kermanshahchi [2002] All ER (D) 296 where Park J had to consider an issue in relation to the deletion of a Penal Notice from an order. He held that Rule 7(4) of Order 45 (the equivalent of our Order 45 Rule 5(4)) seemed to suggest that the Penal Notice was not part of the order itself but might be added onto the copy of the order served under the Rule. This interpretation was in line with Order 45 Rule 2(a) which provides for the enforcement of an order to pay money into court by the appointment of a receiver. I agree with the conclusion of Park J. In effect the service of a Penal Notice on a party under Order 45 Rule 5 is an administrative act which is a pre-condition for enforcement of an order under order 25. The Penal Notice does

not form part of the order. The agreement reached between the parties and which is embodied in the order impliedly permits the party seeking to enforce the order to do so by whatever means are lawful.

[29] The omission of the Penal Notice in the draft order agreed between the parties and which became an order of the court does not prevent the plaintiff from now serving the order with a Penal Notice attached. The Penal Notice is an administrative pre-condition which must be taken before any plaintiff can enforce such an order under Order 52. This conclusion would be very different if the plaintiff had, for example, represented that he would not seek to enforce the agreed order by committal, if the defendant agreed to one being made. If a defendant relied on such a statement to his detriment, then a plaintiff would almost certainly be estopped from resiling from his representation. This is not the position here. D1 and D2 consented to an order being made which provided that they would give up possession forthwith in certain circumstances, and there was no discussion about how that order could be enforced.

[30] In the circumstances I do not see any difficulty in the plaintiff seeking to re-serve the order with the Penal Notice attached. He is then free to choose what method, if any, he wishes to employ to enforce that order.

E. CONCLUSION

[31] The failure of the plaintiff to include a Penal Notice in the agreed order is not fatal to the claim of the plaintiff now to seek to re-serve the order with an appropriate Penal Notice. The Penal Notice does not form part of the order. It is, however, required under the Rules of the Supreme Court if the plaintiff wishes to enforce the order by having D1 and D2 committed under Order 52. The plaintiff is able in accordance with the agreement made and embodied in the order to enforce that order using whatever means are lawful. Accordingly, in this case, the plaintiff remains free to attach a Penal Notice to the original order and then re-serve it. If I am wrong and the Penal Notice does form part of the order, then the draft order can be amended under the slip rule or Order 113 or under the court's inherent jurisdiction to ensure that it embodies the true nature of the agreement as reached between the plaintiff and D1 and D2.

[32] As I have noted earlier in this judgment there appears to be an increasing problem of plaintiffs, especially in Order 113 applications, omitting to attach a Penal Notice to the original order and then coming back to the court and seeking leave to include a Penal Notice and re-serve that order at a later date. As I have concluded, the Penal Notice is not part of any order. Therefore, I do not see a problem in the plaintiff attaching a Penal Notice to an order under Order 113 granting possession of a property where it has not been attached to the original order and then re-serving it on the recalcitrant defendant without the necessity of seeking the leave of the court.

[33] Costs will follow the event.