Neutral Citation No: [2019] NICA 56	*Ref:* McC11080
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **11/10/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

____

ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

____

Between:

JOHN DOHERTY AND MARY DOHERTY

Appellants

and

JOHN NICHOLAS BRENNAN AND IRAINA KERR, FIXED CHARGED RECEIVERS FOR PINPOINT PROPERTY LIMITED TRADING AS MORTON PINPOINT

Respondents

____

Before: Stephens LJ, Treacy LJ and McCloskey LJ

____

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] Nicholas Brennan and Iraina Kerr are described as the fixed charge receivers of Pinpoint Property Limited, a firm of estate agents (hereinafter "*the second Receivers*" and "*Pinpoint*" respectively). They were the Plaintiffs in the proceedings at first instance. John Doherty and Mary Doherty, the Defendants, are the Appellants in this appeal. The proceedings at first instance were an application by the second Receivers under Order 113 of the Rules of the Court of Judicature seeking summary possession of the property at 32 Culmore Point, Londonderry ("*the property*").

[2] The case was heard by Deputy High Court Judge Sherrard ("*the judge*") in the Chancery Division on 5 March 2019. The second Receivers' application was

granted. The judge pronounced his decision *ex tempore*. An order was made granting summary possession of the property to the second Receivers.

The Wider Litigation Framework

[3] From the bundle of evidence the following litigation history can be distilled:

(a) The property was the subject of a deed of charge dated 4 December 2008. The mortgagors were the Appellants and the mortgagee was Mortgage Business Plc.

(b) The Appellants having allegedly defaulted in their repayments, on 3 April 2013 ejectment civil bill proceedings were brought against certain tenants, giving rise to an ejectment order made by a District Judge on 26 June 2013.

(c) The ensuing judicial review challenge of the District Judge's order by the first named Appellant ended when on 13 March 2014 judgment was given refusing leave to apply for judicial review.

(d) On 8 July 2013 the Appellants initiated proceedings in the Chancery Division seeking the removal from office of the first Receivers. They also brought separate proceedings against the Bank based on an alleged failure to provide them with inspection of documents relating to the mortgage. Both actions were dismissed.

(e) The Appellants appealed to the Court of Appeal against the dismissal of their proceedings challenging the validity of the appointment of the first Receivers. On 30 June 2015 their appeal was dismissed on all issues save one, namely whether the person who purported to appoint the first Receivers had been duly authorised to make the appointment. This issue was remitted to the trial judge.

(f) On 25 July 2016 the Chancery Judge decided *ex parte* that the appointment of the Receiver had been duly authorised.

(g) On 14 February 2017 the Chancery Judge set aside the immediately preceding order.

(h) On 9 March 2017 there was a scheduled substantive hearing before the Chancery Judge. The judge acceded to the first - named Appellant's request for an adjournment, relisting the case for hearing on 4 May 2017. On the latter date the case did

not proceed on account of the volume of court business. These earlier proceedings in the Chancery Division remain extant and uncompleted.

(i) Meantime on 12 January 2017 the second Receivers had been appointed. On 20 June 2018 they initiated the present proceedings under Order 113. This culminated in the decision and Order of the deputy judge of 5 March 2019 under appeal to this court.

It was confirmed to this court that the appointment of the second Receivers was not brought to the attention of the Chancery Court in the extant proceedings in that division.

The Decision at First Instance

[4] In his *ex tempore* judgment, which has been transcribed, the judge recorded that he had heard certain evidence (unspecified), together with submissions from counsel on behalf of the second Receivers (Mr Keith Gibson) and the first-named Appellant, who was unrepresented. He continued:

> *"…. I am satisfied that there was a valid mortgage deal and a properly executed mortgage deed incorporating the terms and conditions that are currently before the court. I am satisfied that the terms and conditions before the court were known by the Defendant and indeed he signed his name to the mortgage deed that incorporates those terms and conditions. In particular whenever I look at the terms and conditions I am alert to the power to appoint an attorney and the power to appoint a receiver ….*
>
> *Having considered this matter I am satisfied that the defendants find themselves in default and fall foul of paragraph 16 of the terms and conditions which requires the mortgage debt to be paid immediately. I am satisfied that this in and of itself gives the right of the mortgagee to appoint a receiver as can be seen in paragraph 18 of the terms and conditions. I am satisfied that the receiver presently before the court was correctly appointed. …..*
>
> *Order 113 applications can effectively only be granted if there is no arguable defence. I do not consider that the absence of clarity with regard to the previous receiver is an arguable defence."*

The judge made the order for summary possession of the property pursued by the second Receivers accordingly.

The Appellants' Case

[5] It would appear from the excerpts from the decision of the judge reproduced above that the Appellants contested the case on the ground that the issue regarding the validity of the appointment of the first Receivers remained to be determined by the court, in the uncompleted Chancery proceedings. This is further confirmed by the skeleton argument of the first-Appellant and the Notice of Appeal. The latter, in substance, formulates two separate inter-related grounds. The first is that the order under appeal should not have been made in circumstances where the earlier proceedings remained undetermined. The second is that the new proceedings giving rise to the order under appeal were impermissible and in breach of the well-known "rule" in *Henderson v Henderson* [1843] 3 HARE 100. A perusal of the affidavits at first instance reveals that the Appellants also raised a new issue not previously canvassed in the earlier proceedings namely the contention that the instrument appointing the first Receivers was not a valid deed. The deputy judge did not engage with this issue.

[6] To summarise, the Order 113 application was contested on the sole ground that the earlier proceedings remained uncompleted and it was improper that there should be two separate sets of proceedings before the same court raising the same issue.

The Second Receivers' Issue

[7] As appears from the passages reproduced at [4] above, the judge made a series of discrete conclusions *en route* to his decision whereby he acceded to the Receiver's application for an order for summary possession of the property. Each of these was related to specific aspects of the terms and conditions of the mortgage deed. The validity of the appointment of the second Receivers was not mentioned.

[8] It rapidly became apparent to this court that the issue of the validity of the second Receivers had not been considered at first instance. The evidence includes a deed of appointment of the <u>first</u> Receivers. This document is dated 23 January 2013 and is purportedly "*signed for and on behalf of The Mortgage Business Plc*" by an "*Authorised Person*" whose signature is indecipherable. This instrument, on its face, appointed two named persons of an identified corporation as "*receiver of the property*" and authorised them "*… to enter upon and take possession of the same in the manner as specified in the Mortgage ….*" This was presumably the legal authority for the 2013 ejectment proceedings.

[9] The evidence relating to the fate of the first Receivers is threadbare. It is confined to a single sentence found in a letter dated 10 February 2017 from the Bank's solicitors to the Appellants:

> "*We can confirm that Touchstone CPS have been disinstructed to act as receiver over the above property.*"

(Touchstone CPS were the first Receivers).

The evidence relating to the appointment of the second Receivers is, in substance, confined to a document exhibited to an affidavit sworn by a director of Pinpoint. This document, which is not a deed, is dated 12 January 2017 and bears the title "*Appointment of Fixed Charge Receiver*". On its face the Bank is the appointor and the second Receivers are the appointees. The document bears a single signature, that of "*Jennifer Matthews ... duly authorised by The Mortgage Business Plc*".

[10] The aforementioned Jennifer Matthews, who is an associate solicitor in the firm of solicitors representing the second Receivers in these proceedings, has sworn an affidavit. This contains averments *inter alia* that in December 2016 her firm was engaged by the Bank for the purpose of appointing a fixed charge receiver over the property. Ms Matthews exhibits to her affidavit a document entitled "*Power of Attorney*". This is dated 25 July 2016 and, by its terms, the Bank –

> "*… hereby appoints the persons described in the schedule below* [namely TLTNI LLP] *jointly and severally to be the Attorneys of the Company and in the name of the Company and on its behalf and as its act and deed or otherwise …. (2) to sign any instrument necessary to appoint receivers in relation to such land mortgaged, charged or secured to the Company where the amount advanced by the Company to be secured in relation to that land was less than £2 million.*"

The period of the appointment is stated to be 25 July 2016 to 24 July 2017, unless sooner revoked. There is an impenetrable squiggle adjoining the words "*Authorised Attorney*" followed by the names, addresses and occupations of two purported witnesses.

[11] In a recent decision of this court, *Smith and Hughes v Black and Others* [2017] NICA 56, an appeal against a decision at first instance that the title of the Plaintiffs, who claimed to be validly appointed receivers and as such brought mortgage repossession proceedings, had not been established with the result that their action for possession could not succeed and was dismissed. The Lord Chief Justice stated at [10]:

> "*It was common case that by virtue of section 1(1) of the Powers of Attorney Act (NI) 1971 a power of attorney could only be conferred by deed.*"

The judgment continues at [12]:

> "*The methods of proof of handwriting in modern documents are set out in Volume 12A of Halsbury's Laws of England:*

> *"Except when judicial notice is taken of official signatures, or where an apparent or purported signature is deemed by statute to be the actual signature, the handwriting or signature of unattested documents may be proved in the following ways:*
> *(1) by calling the writer; or*
> *(2) by a witness who saw the document written or signed; or*
> *(3) by a witness who has a general knowledge of the writing, acquired in any of the ways mentioned earlier ; or*
> *(4) by comparison of the disputed document with other documents proved to the judge's satisfaction to be genuine; or*
> *(5) by the admissions of the party against whom the document is tendered; or*
> *(6) in particular cases, by a document purporting to be a solemn declaration in a prescribed form made before a prescribed person."*

The court concluded at [13]:

> *"None of the material introduced by the Appellant met the standard for proof of the hand writing and the judge was correct in the circumstances so to conclude. Since the deed of appointment of receiver was executed by the named person …. on foot of the unproved power of attorney the validity of the said deed remained unestablished."*

[12] There is no material distinction between *Smith v Black* and the present case. The same principles, which are an elementary reflection of onus and standard of proof in civil proceedings, apply. Mr Gibson's submission that it sufficed for a member of the firm of his instructing solicitors to exhibit the Power of Attorney to an affidavit fails to address the governing principles. His second submission, which was that no issue regarding the validity of the appointment of the second Receivers had been raised at first instance, is equally forlorn as it fails to engage with the juridical reality that the onus of proof rested on his clients, the second Receivers. Both the Power of Attorney and the instrument of appointment were placed before the court at first instance without proper proof. It follows that the order of the judge cannot stand and an order of remittal will follow *(infra*).

The Henderson v Henderson Issue

[13] An extensive dissertation on the *Henderson v Henderson* principle is not necessary in the context of this appeal, given the conclusion in [12] above. This court is also mindful that it has received limited assistance on this issue. However, and subject to the two foregoing observations, given the thrust of the Notice of Appeal

(see [5] *supra*) and the remittal of these proceedings to the Chancery Division, where the point may foreseeably resurface, the issue should properly be addressed.

[14] Some analysis of the parties to and nature of the various proceedings belonging to the litigation history summarised in [3] above is appropriate:

(i) In the 2013 ejectment proceedings the plaintiffs were the first appointed receivers and the defendants in occupation of the property were tenants of the Appellants.

(ii) The second legal proceedings were an application for judicial review brought by the Appellants against the district judge who had made the order in the aforementioned proceedings.

(iii) In the third (uncompleted) proceedings the plaintiffs are the Appellants and the defendants are the first Receivers.

(iv) In the present proceedings the plaintiffs are the second Receivers and the defendants are the Appellants.

[15] What has become known as the "rule" in *Henderson v Henderson* was formulated by Sir James Wigram VC in the following terms, at 319:

> "…… *I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*"

The "rule" invites two observations in particular. First, it is a procedural principle. Second, it is not framed in absolute terms. As its terms make clear, it is directed to the proper invocation of the process of the High Court. It is also linked to the "*ut sit finis litium*" principle which gives expression to the public interest in the finality of

litigation. Thus in cases where a party to litigation relies on this "rule" the main question for the High Court, exercising its inherent jurisdiction, is whether there has been any misuse (or abuse) of its process.

[16] Formulating the "rule" in its broadest terms, the Privy Council decided in *Yat Tung Investment v Dao Heng Bank* [1975] AC 581 that it is an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. Lord Kilbrandon's formulation was considered subsequently to be rather too wide by the High Court of Australia in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, which preferred to express the principle in narrower terms:

> *"… there will be no estoppel unless it appears that the matter relied on as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it."*

In this jurisdiction the principle was considered in *Lough Neagh Exploration Limited v Susan Morrice and S Morrice & Associates* [1999] NI 258 at 286 – 288. The central theme of the treatise of the principle in the judgment of Carswell LCJ may be said to be the intrinsic elasticity of the principle.

[17] In *Jelson (Estates) v Harvey* [1984] 1 All ER 12 Goulding J formulated one aspect of the principle in the following terms at 16b:

> *"Where there is litigation of a certain question or issue before the court resulting in a final or substantial order which decides it, then it is well established that it is too late (save in exceptional cases) for a party to adduce in subsequent litigation against the same opponent, or one privy to him, a fact that might well have been brought forward on the previous occasion. That doctrine, however, does not apply where there is a mere procedural defect and the court has never gone into the merits though both parties were before it."*

On appeal the Court of Appeal did not dissent from any aspect of this formulation.

[18] In *Johnson v Gore Wood* [2001] 2 WLR 72 the House of Lords endorsed a "*broad merits-based*" approach to the application of the *Henderson* principle in circumstances where it was contended that the Plaintiff's second action was an abuse of the process of the court. There the Plaintiff, having already brought a claim against his solicitors on behalf of his company, alleging professional negligence, commenced a second personal claim arising out of the same circumstances. His explanation was that he had insufficient funds to bring both claims simultaneously and he was motivated by avoidance of the risk that the company would become insolvent if the first claim was

delayed or complicated by the advent of the second claim. Their Lordships held that the second action was not an abuse of process.

[19] Two subsequent decisions of the English Court of Appeal are indicative of a more restrictive approach to the *Henderson* principle: *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14 and *Aldi Stores v WSP London* [2007] EWCA Civ 1260. This orientation is also evident in *Otkritie Capital Investment v Thread Needle Asset Management* [2017] EWHC Civ 274. One can identify in these decisions the influence of some of the modern developments in civil litigation, in particular proactive judicial case management and the overriding objective.

[20] Returning to the present case, while on 26 June 2013 the first Receivers were successful in their ejectment civil bill proceedings against the occupants of the property, tenants of the Appellants, it is evident that this was not efficacious to recover possession of the property. It appears that one or both of the Appellants either re-occupied the property or exercised physical control over it in some other way: see the affidavit of the Bank's surveyor sworn on 22 June 2018. While the affidavit evidence bearing on this important issue is distinctly vague, the first-named Appellant confirmed, in response to a question from this court, that his occupation of the property has not been disputed and is not in dispute. His statement to this effect did not extend to the second-named Appellant.

[21] Following the ejectment proceedings in 2013 there followed a new and protracted litigation chapter, still extant, in which the Appellants sought to establish that the first Receivers had not been validly appointed. The most recent litigation phase, the present proceedings, has entailed a new action brought by the second Receivers against the Appellants seeking summary possession of the property. The central issue in these proceedings, namely the alleged unlawful possession of the property by the Appellants or either of them during a more recent period up to and including the present has not previously been litigated, whether between these parties or at all. Thus the current proceedings entail no infringement of the *Henderson v Henderson* principle.

Omnibus Conclusion and Order

[22] For the reasons given the appeal succeeds on the basis set forth in [12] only. The case is hereby remitted to the Chancery Court for fresh consideration and adjudication by the deputy judge or any other judge of the Chancery Division. The main (not necessarily the only) issues to be addressed are the proof and legal effect of (a) the Power of Attorney and (b) the instrument of appointment of the second Receivers. There may also be issues of company law to be examined. Remittal will enable the assigned judge to conjoin the two Chancery cases and bring both to completion. As is made clear in [20] above, the continued possession of the property by the first named Appellant was conceded by him to this court.

Costs

[23] The first-named Appellant is entitled to recover the outlay incurred as regards the Notice of Appeal, subject to the question of whether any fee waiver has been granted. Both Appellants are unrepresented litigants and there is no evidence that they have incurred any other potentially recoverable legal costs or outlays. There shall, therefore, be no order as to costs *inter-partes* with the exception noted. The appropriate order for costs in the Chancery Division will be a matter for the assigned judge.