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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **09/09/2013**

2009 No 89199

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

GE MONEY SECURED LOANS LIMITED

Plaintiff;

and

1. GERALD JAMES MORGAN (otherwise GERALD MORGAN)
2. KAREN MARTINA MORGAN (otherwise KAREN MORGAN)

Defendants.

MASTER ELLISON

[1] This is an application for leave to enforce a suspended order for possession made on 11 January 2010 pursuant to a charge registered as a burden on a Land Registry folio. The dwelling is the home of the defendants and they are its registered owners. The charge was registered in the folio on 6 August 2007 and secured a credit agreement ("the agreement") regulated by the Consumer Credit Act 1974 and dated 12 April 2007 on the strength of which the plaintiff granted to the defendants a total loan facility of £15,845 with a monthly rate of interest 1.229% per month (variable) repayable over a period of 50 months. At the date of the affidavit grounding the suspended order and sworn on 7 October 2009 the interest rate was then stated to be

0.833 per cent per month. At the date of the hearing on 11 January 2010 the amount of the contractual monthly instalment was stated to be £387 and the arrears £3,770, the last payment having been made on 7 January 2010 for £50, and the balance outstanding under the agreement and charge was stated to be £13,814. At that hearing, at the request of the plaintiff's solicitors, neither defendant being in attendance or represented, an order for possession was made but suspended on the terms that the defendants pay £546.50 monthly (all-in so as to include the normal monthly instalment and a contribution towards the arrears).

[2] At the hearing on 24 July 2013 of the plaintiff's application for leave to enforce that suspended order Mrs Quinn, solicitor from the firm McCartan Turkington & Breen appeared for the plaintiff and Miss Brennan of Housing Rights Service also attended as the first defendant had asked for the Service's assistance which had been given at the initial hearing of the application of 17 April 2013 when the first defendant had attended in person. On 24 July Miss Quinn announced the outstanding balance to be £22,737 and confirmed that the term of the repayment period in the agreement had expired in May 2012, the contractual monthly instalment having been £347 immediately prior to that expiry and the last payment having been £100 on 30 June 2010. At the initial hearing of the application for leave the first defendant had proposed monthly instalments of £350 each and the last payment was announced (contrary to what was said at the hearing on 24 July) as having been £594 in October 2011. At that first hearing Miss McNally of Housing Rights Service

had explained that the arrears had arisen and the default of the terms of the suspended order had occurred because of bad money management which also involved other, unsecured, debts. At the second and final hearing before me on 24 July Miss Brennan explained that she had had some difficulty in obtaining recent instructions from the first defendant, who had told Housing Rights Service on 19 June that he was concerned that he would lose his job inside the succeeding few months. He had also informed Housing Rights Service that there were approximately £2,000 of arrears of instalments on his first mortgage with Preferred Mortgages PLC ("Preferred"). There was no financial statement available at hearing but Mrs Quinn for the plaintiff said that from an earlier financial statement there would appear at that time to have been a satisfactory level of income for the defendants but no payment was being made on her client's second mortgage.

[3] However, it was also explained that the estimated value of the property was £135,000 and the amount due on the first mortgage, at some £155,000, meant that there would be no equity whatsoever available for the plaintiff in the event of a sale. When I asked why in such circumstances the plaintiff was seeking leave to enforce a suspended order for possession the plaintiff's solicitor (having agreed that the situation for her client was one of total negative equity) indicated that the plaintiff was not intending to lease the property and accepted that it would not be in a position to sell, but one course that it would consider in the event of an order for possession leading to eviction would be to transmit the keys, and therefore possession, to the

solicitors acting for the first mortgagee. Miss Brennan observed that any steps taken to enforce the plaintiff's order for possession would merely incur additional expense and indebtedness to no benefit for the plaintiff whatsoever.

[4] I agree with Miss Brennan. The traditional reasons for mortgagees to take possession are (predominantly) to sell or (rarely) to protect its security. Though the plaintiff is not minded to rent out the property if it should obtain possession to enforce, I suspect strongly that it would have no power to do so under the relevant provisions of the first mortgage contract and section 18 of the Conveyancing Act 1881. In this connection I refer to my judgment in Swift Advances Plc v Heaney (2010/154636) (the reasoning in which I adopt generally for the purposes of this judgment) handed down earlier today and the decision of Stamp J in Julian S Hodge & Company v St Helens Credit Ltd & Anor [1965] EGD 143 (dealing with the virtually identical provisions of section 99 of the Law of Property Act 1925) quoted therein. I also refer to my judgment in Heaney where it expresses concerns about the prejudice that may be caused to a first mortgagee by granting possession to a second mortgagee who has no prospect in the foreseeable future of having any equity available to it in the event of sale. Whatever the attitude or capacity of the defendants with respect to their mortgage commitments in the present case, in the event that possession were delivered to a plaintiff with no ability to sell, the defendants would be deprived altogether of motivation to make payments on their first mortgage which would be likely to suffer dramatic default or

deterioration in the current level (if any) of default. (In that connection, Mrs Quinn mentioned that she had spoken shortly before the hearing to the solicitor for Preferred who indicated that her client had an order for possession which it intended to enforce.) Moreover the first mortgagee, which would at present face a substantial shortfall in the event of sale, would be deprived of all opportunity to come to an arrangement for payment with the borrowers and/or wait until the housing market picks up substantially before obtaining possession and selling. The risk of vandalism would compel it to sell the vacant property at a significant loss whether it wanted to or not. Therefore significant prejudice could be caused to the first mortgagee, which is not a party or notice party to these proceedings, by an order granting this plaintiff leave to enforce.

[5] The present case is distinguishable from Heaney in that the relief being sought by the plaintiff is leave to enforce a suspended order for possession already made as opposed to a primary order for possession. Accordingly I must consider the legislation relevant to the Court's discretion to stay orders in general including those for possession in mortgage actions. Sections 86(3) and 55(1)(a)(iv) of the Judicature (Northern Ireland) Act 1978 deal with the circumstances in which a stay of proceedings or execution may be granted and Order 45 rule 9 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that a court may stay any of its orders on the ground of matters which have occurred since the order in question was made and upon such terms as it thinks just. In the present case it seems likely that the total

absence of equity for the plaintiff developed or became apparent or certain only after the suspended order for possession was made on 11 January 2010. Moreover section 3(1) of the Human Rights Act 1998 requires a court to read and give effect to primary and subordinate legislation so far as possible in accordance with the Convention rights of the parties, and the defendants' rights to respect for their home would (for the time being at least) outweigh the plaintiff's right to its possessions in the special circumstances of this case.

[6] Section 86(3) of the 1978 Act enables a court "acting on equitable grounds" to stay any proceedings or the execution of any of its process subject to such conditions as it thinks fit. In his article in NILQ (1986) Vol 37 No 4 Professor Wallace warned against reliance on this provision to defer a legal mortgagee's common law right to possession (which the plaintiff in this case does not have as its order for possession was on foot of a registered charge) as he considered that the subsection "is merely intended to provide statutory confirmation of pre-existing equitable powers and discretions" which were not used prior to the 1978 Act to defer a legal mortgagee's right to possession. However this warning disregards the fact that subsection (2)(a) had already addressed explicitly the court's duty to give the same effect "as heretofore" to "all equitable estates, titles, rights, remedies, reliefs etc" and subsection (2) is expressly stated in terms to be subject (in part at least) to subsection (3) which is not in terms limited by a repetition of "as heretofore" or similar words. Moreover "equity" is rightly stated to be "an equivocal term" in my venerable Wharton's Law Lexicon (10th Ed, 1902), which added that "the difficulty lies

in drawing the dividing lines between the several senses in which it is used." My 1986 Edition of The Little Oxford English Dictionary defines "equitable" as "fair; valid in equity" but the latest edition omits any reference to the latter meaning of that word as attributed by Professor Wallace to its use in section 86(3) – as does each of the several other dictionaries I have consulted running to less than 1,000 pages. Moreover my Oxford Companion to Law by Professor David Walker (1980) includes the following:-

> "The basic meaning of equity is evenness, fairness, justice … In a secondary meaning the term is used as contrasted with strict rules of law …"
>
> (Emphasis added)

All of the numerous dictionaries I have consulted specify as the first or only meaning of the word "equitable" the word "fair" (or similar) and it seems reasonable to infer that that is its primary – or, as Professor Walker puts it, basic – meaning. It is plainly possible, therefore, to "read and give effect " to section 86(3) in a manner compatible with the Convention rights of the parties as required by section 3(1) of the Human Rights Act by attributing to "equitable grounds" the meaning "grounds of fairness"(or similar). However that may be, as appears from the following paragraphs, I am satisfied that the grounds on which I intend to stay enforcement in the present case are "equitable" whether as envisaged by Professor Wallace or otherwise.

[7] I quote (as I did in Heaney) from the judgment of Mr Justice Deeny in a specific performance action in which he upheld the defence of impossibility in Titanic Quarter Ltd v Rowe [2010] NICh 14:-

"[20] I respectfully agree with the dicta of Megarry VC in *Tito v Wadell* [1977] Ch 106; [1977] 3 All ER 129 at 311, 312:

> `it is old law that in specific performance cases "the court will not make any order in vain". See *New Brunswick and Canada Railway and Land Company Limited v Maggeridge* (1859) 4 Drew 686 at 699, per Kindersley VC. The usual instances of cases of the courts refusing to make orders that would be useless are cases where the interest that will be obtained by the decree is a very short tenancy, or a partnership which could promptly be determined by the other party.
>
> I do not, however, think that the refusal of equity to make futile orders is limited to cases of transient interest. In this case I cannot see what utility there would be for anyone in providing that a small number of isolated plots should be re-planted with coconut and other trees in the hollows beside the pinnacles. It is highly improbable that the coconuts would ever fruit, and the plots would be surrounded by other plots not replanted in this way which would make access difficult or impossible for the owner. It would be a sheer waste of time and money to so this, and I do not think that the court ever should, in its discretion, make an order which it is convinced would be an order of futility and waste."

[21] As Lord MacDermott said in connection with the remedy of certiorari in *R (McPherson) v Ministry of Education* (1973) 6 NIJB, the court should not make an order that will beat about the air.'

(Emphasis by underlining added)

[8] Moreover in the present case had the Court been aware at the hearing of the application for the Order for possession that total negative equity pertained for the plaintiff, the making of the Order might not have been considered "proper" in accordance with Schedule 7 to the Land Registration Act (Northern Ireland) 1970 which confers a discretion on a court whether to

grant a chargee an order for possession of registered land and imposes a duty on the court not to do unless it is satisfied that such a course would be proper.

[9] I am satisfied that an order giving the plaintiff leave to enforce would be an order of futility and waste and that enforcement of the order dated 11 January 2010 should continue to be stayed until the plaintiff obtains evidence at some future date that there would be equity available to justify a sale in the event that leave to enforce is granted.

[10] I will hear submissions as to costs.