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Ref:	**STE10419**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered:	**24/10/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

HSBC BANK PLC

Plaintiff/Appellant:

and

IVAN ROBINSON

First Defendant:

and LOUISE ROBINSON

Second Defendant/Respondent:

Before: GILLEN LJ and STEPHENS LJ

STEPHENS LJ (giving the judgment of the Court)

Introduction

[1] On 18 November 2011 the HSBC Bank plc ("the appellant") issued an originating summons against Ivan Robinson ("the defendant") seeking possession of approximately 100 acres of agricultural land the title to which is registered. The possession proceedings were brought on foot of a mortgage dated 18 June 2008 entered into by the defendant to secure his indebtedness to the appellant on four bank accounts. On 21 December 2011 the appellant obtained an order for possession but there were various stays on the execution of that order until 25 January 2015 when it was agreed that the stays were to be removed after a further twelve weeks. By a summons issued on 17 October 2016 the defendant's daughter, Louise Robinson ("the respondent") applied to the Master to be joined as a second defendant to the possession proceedings and for an order staying execution of the order for possession on the basis that she had an interest in the agricultural lands by virtue of a proprietary estoppel which interest was an overriding interest as she was in actual occupation of the agricultural lands on 18 June 2008. Master Hardstaff refused both applications but on appeal and by order dated 21 March 2017 Madam Justice McBride added the respondent as a second defendant to the possession proceedings and granted a stay of the order for possession on condition that the respondent

issued a writ endorsed with a statement of claim within 14 days. The appellant appeals against both of those orders.

[2] Mr Keith Gibson appeared on behalf of the appellant and Mr McCausland appeared on behalf of the respondent, Louise Robinson. There was no appearance on behalf of the defendant, Ivan Robinson. We are grateful to both counsel for their assistance on the hearing of this appeal.

Factual background

[3] The agricultural lands are situate at Ravara Road, Ballygowan, County Down. The title to the agricultural lands is registered in various folios in the land registry. There is a farmhouse and farmyard adjoining the agricultural lands ("the home"). The home is also situate at Ravara Road, Ballygowan so that the postal address of the home and of the agricultural lands are the same.

[4] The defendant was born on 25 October 1948 and is now 68. The farm including the home, had been purchased in 1958 by the defendant's father who passed it to the defendant in 1981 when he was 33. The defendant is a dairy farmer with at one stage a dairy herd of some 300 cows. The respondent states that in 2006 "the farm had fallen on hard times and it was difficult to make ends meet."

[5] On 20 June 2008 the defendant mortgaged the agricultural lands to secure a loan from the appellant and also to secure the debt of the defendant across four bank accounts held by him with the appellant. The mortgage was of the agricultural lands. It did not include the home. The respondent in her affidavit grounding her applications for a stay and to be joined as a second defendant ("the respondent's affidavit") does not state whether and if so when she became aware of the mortgage. That issue is simply not addressed by her.

[6] Unfortunately, in late 2008 the defendant began to experience problems with his dairy herd in that over a period of time some 100 of his cows died and there was a reduction in milk yield in the rest of the herd. The defendant states that it was subsequently found that the deaths were as a result of a particular brand of sugar beet contaminating the soil by introducing Molybdenum. The defendant stated that these difficulties caused cash flow problems in 2009 and he then details all the meetings which took place with the appellant over the period up to the commencement of the possession proceedings in 2011. It is clear that this was a period fraught with increasing financial difficulties for the defendant.

[7] The respondent in her affidavit has stated that she was aware in 2006 that the farm had fallen on hard times and it was difficult to make ends meet. Accordingly she then had some knowledge as to the finances of the farm. She states that since about 2007 she helped the defendant "with the bills." We consider that this presented her with the ability to learn more about the finances of the farm in 2007. However, she does not provide any further detail as to the level of her knowledge as

to the financial difficulties facing the farm in 2007. In the period 2008 – 2009 at a time when the respondent asserts that she was living at home and working on the farm we consider that it would have been obvious to her that the finances of the farm were being substantially adversely impacted by the loss of 100 cows and the reduction in milk yield. We consider that there is an appropriate inference that the respondent knew of the increasingly precarious financial position of the farm from 2006 onwards.

[8] On 18 August 2011 the appellant commenced possession proceedings against the defendant on foot of the mortgage. An affidavit from the appellant's solicitor sworn on 28 September 2011 deposed that the total debt of the defendant on foot of the four accounts at that time was £670,222.32 and that the last payment made by the defendant was £2,465.00 on 16 April 2010. As at the date of this appeal that still remains the last payment.

[9] On 28 September 2011 a "Notice to defendant in lender's action for possession of dwelling house" under Order 88, rule 4A was sent by the appellant to the defendant at his home address at Ravara Road, Ballygowan. Also on the same day a "Notice to non-defendant occupier in lender's action for possession of land" under Order 88, rule 4B was sent to "The Occupiers" at the home. The notice to the occupiers was sent to the home in an envelope addressed to "The Occupiers" then setting out the address of the defendant which on the respondent's case was also at the time her address. That notice brought possession proceedings to the attention of the occupier stating that if an occupier considered that they had a right which should be determined in these proceedings they may apply to be added as a defendant and that any such application should be made as soon as possible. The notice to occupier was ambiguous as it stated that the appellant was claiming possession of "the above mentioned property" which was stated to be the address at Ravara Road, Ballygowan. That is the address of both the home and of the agricultural lands so that it would not be clear to a recipient of the notice as to whether possession was being sought of the home or of the agricultural lands or of both. The agricultural lands should have been identified accurately in the notice by reference to the approximate area of 100 acres at the Ravara Road address adding in the land registry folio numbers. The respondent in her affidavit does not state whether she received this notice and if she did whether she spoke to the defendant about it enquiring as to and resolving any ambiguities. The evidence on behalf of the appellant is that the notice was sent to the occupier. Her evidence is that she was an occupier. We consider that the onus was on the applicant when making an application for a stay to put forward a sufficient factual basis for the court to form a view about matters such as her knowledge and delay. Absent evidence from the respondent the appropriate inference is that she received the notice and given her close family connection with the defendant that she discussed it with him. On that basis we consider that in 2011 the respondent had knowledge of the mortgage, of the massive debt owed to the appellant, and of the possession proceedings. We also consider that she had an opportunity to but did not seek to be joined as a defendant

and also had an opportunity to but did not seek to make any case that she had an equitable interest in the agricultural lands.

[10] On 21 December 2011 the defendant was ordered by Master Ellison within 70 days to deliver possession to the plaintiff of the agricultural lands. The respondent in her affidavit does not state whether and if so when she became aware of this order. That issue is simply not addressed by her.

[11] On various dates including on 8 October 2012 the defendant applied for a stay of execution of the order for possession until the conclusion of his application under Section 140B of the Consumer Credit Act 1974 to make adjustments to various matters including to the size of the credit and to the rates of interest. The application for a stay and the application under the Consumer Credit Act was transferred from the Chancery Master to the Chancery Judge and listed for trial on 5 – 6 March 2014. The defendant was ill and the matter was relisted for trial on 25 June 2014. The defendant filed and served a Notice of Intention to Act in Person on 11 June 2014. He subsequently appointed his sixth firm of solicitors and the trial was moved from 25 June 2014 to 28 January 2015. The respondent in her affidavit does not state whether and if so when she became aware of the application for a stay by the defendant or of the application under the Consumer Credit Act. That issue is simply not addressed by her.

[12] On 25 January 2015 the defendant and the appellant agreed that the defendant's application for a stay be dismissed on the merits and that the order of Master Ellison dated 21 December 2011 be stayed for a further period of 12 weeks. The effect of that order was that as between the defendant and the appellant the order for possession would be implemented 12 weeks after 25 January 2015.

[13] The appellant had taken steps to enforce the order for possession through the Enforcement of Judgments Office and a date for eviction of the defendant from the agricultural lands had been provided by the EJO of Thursday 3 November 2016. On 17 October 2016 approximately two weeks prior to eviction and approximately half a decade after possession proceedings had been commenced, the respondent applied to be joined as a second defendant and applied for a stay of the order of possession. On 27 October 2016 Master Hardstaff refused the applications and on 1 November 2016, two days prior to the date of eviction the respondent appealed to the Chancery Judge. The respondent in her affidavit does not state whether and if so when she became aware of the eviction process nor does she state what if anything prompted her to make these applications in October 2016 rather than at an earlier and more appropriate stage. Those issues are simply not addressed by her. We consider that there is an appropriate inference that she was only prompted to do so because of the imminence of eviction from the agricultural lands. The issue of delay also bears on the strength of the respondent's case. If it was a strong case then we would have expected it to have been made at an earlier stage.

[14] The respondent's application to be joined as a second defendant and for a stay was grounded on her affidavit sworn on 17 October 2016. That affidavit requires analysis.

[15] In her affidavit the respondent states that she was born on 18 January 1984. She was the only child of her parents and they all lived in the house adjoining the agricultural lands ("the home"). Sadly the respondent's mother died on 27 February 1987 when the respondent was three. She and her father continued to live in the home. The respondent attended Victoria College Prep School and then Friends School Lisburn until taking her GCSEs. Then in 2001 at the age of 17 she moved to Shropshire to study at Harper Adams Agricultural School on a course designed as a substitute for A levels. Between 2002 and 2005 she took an HND course in agriculture and animal production at the Harper Adams Agricultural School obtaining a merit qualification followed by a degree in animal science between 2005 and 2006. She returned home in 2006 taking up employment primarily with Hilltown Livestock Market.

[16] The respondent gives some details as to her own involvement in the financial side of the farm which we have already set out. She also states that in 2006 upon her return from England "she took up employment" and "unfortunately this was done out of necessity as the farm had fallen on hard times and it was difficult to make ends meet." She goes on to state "that virtually all of my income received in this time was committed to keeping the farm and the house afloat." We would observe that no document has been exhibited by the respondent to support the proposition that in order for the farm business to make ends meet her income had to be used to support the enterprise and to keep it afloat. Furthermore, there is no document exhibited as to what financial contribution she made. Finally, we would also observe that if that was the situation then in 2006 the farm finances must have been in a parlous condition to her knowledge.

[17] The respondent states that since September 2013 she has been running the farm paying all the bills and with sole responsibility for the stock. In the absence of any averment to the contrary we consider that it is likely that she knew of the mortgage and of the massive debt owed to the appellant and that she had known of both of these matters since 2011 upon receipt of the occupiers notice or at the very latest since September 2013 when she has been running the farm.

[18] The classic threefold test for proprietary estoppel is representation, reliance and detriment. However a representation is intertwined with reliance and detriment so that for instance the quality of the relevant assurances may influence the issue of reliance. We consider the evidence in the respondent's affidavit in relation to those three factors.

[19] In relation to the nature of the representations made to her by the defendant and the belief which was known to and encouraged by the defendant the respondent stated that she acted:

> "in the expectation and understanding of both my father and I that I would be given ownership *when the time came*." (emphasis added)

She also stated that she:

> "would receive ownership of the farm. My father confirmed this to me on many occasions."

And she went on to state that:

> "it has always been my desire to take over the farm. Furthermore my father has always told me that the farm was mine to take over …"

No information was given by the respondent as to exactly what was said by the defendant, what was meant by "when the time came" and what she took out of the representations. Many sons or daughters have the expectation of taking over a farm or a business and many parents wish that the farm is passed on to the next generation and inform their son or daughter that they will pass it on. Ordinarily that does not mean that the parent is prevented from running the farm or business in whatever way he considers appropriate and this in turn means that the ordinary expectation of the son or daughter is to receive the farm or business as it is at the relevant date so that they receive whatever it is possible *at that date* for the parent to pass on. We consider that it is impossible to accept that the respondent considered that she would obtain the whole farm free from any debt and that it is far more likely that she had an appreciation that she would receive whatever the defendant had the capacity to pass on to her at the relevant time whether on his death or at some earlier time of his choosing.

[20] In relation to reliance the respondent states that she relied on what her father told her and committed her life and her education to the farm.

[21] In relation to detriment the respondent stated that the farm represented a "huge financial and time commitment for" her. She states that her earliest memory was of being out on the farm with her father. That after school she would return home immediately and work until 10.00 p.m. at night. That her life revolved around helping her father. That whilst in England she returned home at every opportunity to help on the farm and that partaking in the course was simply to better equip her to take over the farm.

[22] An assessment of the strength of the respondent's case for a proprietary estoppel also includes an assessment of the likely remedy if she establishes liability. Detriment is relevant not only to whether there is an enforceable proprietary estoppel but also the timing and the quantification of the detriment is relevant to the nature of any relief. If a proprietary estoppel is established then the court has to

consider how to satisfy the equity as opposed to satisfying the expectation. The respondent asserts that she had the benefit of an equitable interest as at 18 June 2008 based on the detriment that had occurred to that date. Satisfying that equity might result in a modest award to the respondent. At present it is not possible to even roughly calculate the equity but that is a consequence of the failure of the respondent to set out a calculation or even a preliminary calculation. The burden is on the respondent in applying for a stay to enable such a calculation to be carried out. After 18 June 2008, if the respondent knew of the precarious financial position of the farm and with that knowledge decided to take the risk of continuing to work on the farm, then satisfying any further equity might also result in a modest award. There is no attempt by the respondent in her affidavit to provide quantification of the financial commitment by providing specific figures or by providing figures for the time commitment or to break it down as between the period pre and post 18 June 2008. Furthermore there is no attempt to provide by way of documents exhibited to the affidavit independent verification of the financial commitment. None of the farm accounts is exhibited to the respondent's affidavit so the court is unaware as to whether she has received any financial benefit and if so the nature of that benefit. Her tax return or PAYE slips are not exhibited so that the court has no information as to her income. In fact there are no exhibits to the respondents' affidavit. We consider that her affidavit does not attempt to analyse the equity to establish what if any relief she would obtain *if* she was successful in establishing a proprietary estoppel.

[23] The respondent's affidavit contains the following two final paragraphs:

> "18. I intend to furnish the court with supporting documentation as soon as practicable.
>
> 19. I reserve the right to swear a further affidavit upon receipt of any further documentation in this matter, should documentation be able to assist the court."

We would observe these two paragraphs have no impact not only because no supporting documents were in fact supplied but primarily because it is the obligation of the applicant to put forward sufficient facts to enable the court to form an assessment as to whether a stay is appropriate.

[24] On 10 May 2017 the respondent issued a generally endorsed Writ of Summons in the Chancery Division against both the defendant and the appellant. That writ did not comply with the condition imposed by Madam Justice McBride by her order dated 21 March 2017 which required the writ to be endorsed with a Statement of Claim.

Failure to comply with the condition imposed by the order dated 21 March 2017

[25] In these proceedings which were commenced by originating summons the court had jurisdiction to permit the respondent's case against the appellant to be made by way of counterclaim, see Order 28 rule 7 and the respondent could also join the defendant as a defendant to the counterclaim, see Order 15 rule 3. In this case the learned judge exercised discretion to require the respondent to bring a separate action and imposed a condition that a writ endorsed with the statement of claim should be issued. There has been a failure to comply with the condition imposed by Madam Justice McBride in that a generally endorsed writ was issued rather than a writ endorsed with the statement of claim. Order 45 rule 8 provides that

> "A party entitled under any judgment or order to any relief subject to the fulfilment of any condition who fails to fulfil that condition is deemed to have abandoned the benefit of the judgment or order, and, unless the Court otherwise directs, any other person interested may take any proceedings which either are warranted by the judgment or order or might have been taken if the judgment or order had not been given or made."

Paragraph 45/10/1 of the Supreme Court Practice 1999 states that the effect of this rule is to make "the fulfilment of a condition subject to which a party is entitled to relief of the essence of the judgment or order. Thus where an order was made for relief from forfeiture conditional on the performance by defendants of certain conditions some of which they declined to carry out, it was held that the order fell to the ground, and that the position was the same as if the application for relief had been refused (*Tabot v Blindell* [1908] 2 KB 114)."

[26] As there has been a failure to comply with the condition the question arises as to whether there is no stay of the order for possession so that there can be no appeal against an order which has fallen to the ground. This was a question which we raised during the course of the hearing of the appeal. On behalf of the appellant we were informed that it was a point which had deliberately not been taken as it was anticipated that the respondent would apply to the court under Order 45 rule 8 to "direct otherwise" or alternatively apply to the court for an extension of time and that this would just add to the delay. On that basis no letter was sent to the respondent's solicitor making the point and a decision was made to proceed with the appeal. On behalf of the respondent we were informed that the decision not to endorse the writ with a Statement of Claim was a reflection of lack of financial resources on the part of the respondent and that the point, if was to have been made, ought to have been made by the appellant.

[27] In light of those responses we considered it appropriate to continue with hearing the appeal against the order for a stay whilst making it clear that there is to

be compliance with conditions in court orders and an extension of time or a direction otherwise should not perceived to be nor should it be a simple formality.

The test on appeal and the grounds of appeal

[28] An appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he or she exercised discretion under a mistake of law (*Evans v Bartlam* [1937] AC 473) or in disregard of principle (*Young v Thomas* [1892] 2 CH 134) or under a misapprehension as to the facts, or that he or she took into account irrelevant matters (*Egerton v Jones* [1939] 3 All ER 889 at 892) or failed to exercise his or her discretion (*Crowther v Elgood* (1887) 34 Ch D 691 at 697) or the conclusion which the judge reached in the exercise of his or her discretion was "outside the generous ambit within which a reasonable disagreement is possible" (*G v G* [1985] 1 WLR 647.

[29] The appellant contends that there were a number of mistakes of law as follows:

> (a) The learned judge did not apply the correct test when she came to exercise her discretion to grant a stay of execution. She stated that the "test for the exercise of the discretion remains whether the interests of justice demand that it should be exercised." The appellant contends that discretion should only be exercised in "rare and compelling circumstances."
>
> (b) The learned judge incorrectly applied a triable issue test when assessing the strength of the respondent's claim for a proprietary estoppel.

[30] The appellant contends that there was a misapprehension as to the facts in that the respondent was not in actual occupation of the agricultural lands on 18 June 2008.

[31] Finally, the appellant contends that the learned judge in stating that she did not "find any evidence that the appellant has delayed unduly in this case …" misapprehended the evidence as to delay and accordingly failed to take that delay into account in the exercise of discretion as to the grant of a stay.

The test in relation to the exercise of discretion to stay the execution of the order for possession

[32] As we have indicated the learned judge stated that the test for the exercise of discretion remains whether the interests of justice demand that it should be exercised. She then stated that whilst not laying down rigid rules in determining that question consideration should be given to all the circumstances of the case and that in a case of this type she considered that the following matters were particularly relevant:

a) The identity of the applicant and the capacity in which she brings the claim.
b) The nature of the claim being made.
c) The strength of the case.
d) Whether there has been undue delay in bringing the claim.
e) Any prejudice which the defendant may suffer if a stay is granted.
f) Any prejudice the applicant may suffer if the stay is not granted.
g) Whether there are alternative forms of relief open to the applicant.

The appellant whilst accepting that all the circumstances of the case should be considered and that the matters listed by the learned judge were relevant contended that the test for the exercise of discretion was whether the case was "a rare and compelling case."

[33] The court's power to stay proceedings or to stay execution of a court order may be exercised under particular statutory provisions, or under the Rules of the Court of Judicature (Northern Ireland) 1980 or under the court's inherent jurisdiction. As Moore-Bick J was recorded as stating at first instance in *Reichhold Norway ASA & Anor v Goldman Sachs International* [1999] 2 All ER (Comm) 174; [2000] 2 All ER 679 "the court's power to stay proceedings … is exercised under a wide range of circumstances to achieve a wide variety of ends." The ends to be achieved range from at one end of the spectrum a stay of proceedings to facilitate alternative dispute resolution or mediation or for offers to settle to at the other end the purpose of protecting legal and equitable rights which may be shown to exist *Judge v Belton* (1875) IR 9 CL 414 and *Northern Ireland Housing Executive v McAuley* [1974] NI 233 at 235 or staying civil proceedings until criminal proceedings have been determined, *Attorney General of Zambia v Meer Care & Desai (a firm) and others* [2006] EWCA Civ 390; *Akciné Bendrové Bankas Snoras (in bankruptcy) v Antonov and another* at [2013] EWHC 131 (Comm) at paragraph 18 and *Polonskiy v Alexander Dobrovinsky & Partners LLP and others* [2016] EWHC 1114 (Ch) at paragraphs 132 to 139 or staying one set of proceedings until another has been determined as in *Reichhold*. However none of the ends to be achieved by a stay is merely to temper the rigours of the law. The purpose of a stay is to achieve justice according to the law not to thwart or delay the outcome of litigation. The ability to grant a stay is not a charter for evasion or delay. Mr Gibson correctly conceded that the test of "rare and compelling circumstances" could not possibly apply to all applications for a stay. We consider that any overarching test covering all these diverse areas and ends is the test of securing the interests of justice. The question remains as to whether in cases of this kind there should be some other test, namely "rare and compelling circumstances."

[34] The discretionary power in question in these proceedings is contained in Section 86(3) of the Judicature Act (Northern Ireland) 1978 ("the Judicature Act") which provides:

> "(3) 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 his process, subject to such conditions as it thinks fit."

The discretion contained in that sub-section can be exercised at any stage of the proceedings and also in a wide variety of circumstances and to achieve a wide variety of ends.

[35] Mr Gibson relied on the decision in *Reichhold* in support of the appellant's contention that the test to be applied in cases of this kind was that a stay would only be granted in rare and compelling circumstances. That case involved an application by Goldman Sachs International to stay proceedings against them in England pending the final determination of arbitration proceedings commenced by the plaintiffs against Jotun AS ("Jotun") in Norway. Reichhold had purchased the shares in Jotun Polymer Holding AS ("Polymer") which was a subsidiary of Jotun. Goldman Sachs acted on behalf of Jotun in that sale of its subsidiary Polymer to Reichhold. Reichhold contending that it had paid too much for Polymer commenced arbitration proceedings against Jotun in Norway and also commenced an action in England against Goldman Sachs relying on *Hedley Byrne & Co v Heller and Partners Limited* [1963] 2 All ER 575. The claim against Goldman Sachs depended on whether it owed a duty of care at all to Reichhold let alone as to whether it was negligent. Both of these issues did not arise in the arbitration proceedings in Norway. The proceedings in England against Goldman Sachs were not vexatious, oppressive or an abuse of process. An important issue was what if any role a court had to decide whom a plaintiff may or may not sue. It was contended on behalf of Reichhold that it is a fundamental principle that a plaintiff making a bona fide claim, not tainted with abuse, oppression or any vexatious quality, may sue in the English court any defendant over whom the court has jurisdiction. At first instance the case involved a careful weighing of numerous competing interests applicable to the particular facts of that case. On appeal the appellant made a number of submissions including that to uphold the judge's order would open the door to a flood of applications, some successful and some unsuccessful, would involve the court in trying to adjudicate on matters which are barely justiciable, would introduce a new dimension of uncertainty and would give a charter to evasive and manipulative defendants. In answer to this floodgates argument it was accepted by counsel for the applicant:

> "That the grant of stay such as this would be a rarity, account always being taken of the legitimate interests of the plaintiffs and the requirement that there should be no prejudice to plaintiffs beyond that which *the interests of justice were thought to justify*." (emphasis added)

That was an acceptance by counsel of the rarity *in the particular circumstances of that case* and a reference to *the interests of justice test*. Lord Bingham CJ then stated at page 185(j) that:

> "I for my part recognise fully the risks to which Mr Carr draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases *of this kind* in rare and compelling circumstances. Should the upholding of the judge's order lead to the making of unmeritorious applications, then I am confident that judges will know how to react." (emphasis added).

We do not consider that Lord Bingham was purporting to limit the general extent of the discretion under the equivalent of Section 86 of the Judicature Act to "rare and compelling circumstances" but rather his observation was as to the effect that careful consideration of the particular circumstances of each individual case would have when undertaken by judges (not least commercial judges), namely that in cases of "this kind" it would be found that the outcome of a stay being granted was limited to rare and compelling circumstances. On that basis the floodgates would not open. We also note that Lord Bingham referred to, without disagreeing with, that part of the first instance judgment in which Moore-Bick J stated that "the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion i*n the interests of justice*" and subject only to statutory restrictions (emphasis added). We do not consider that *Reichhold* is authority for a general restriction on the exercise of discretion under section 86(3) of the Judicature Act to rare and compelling circumstances. The test is, and remains, whether the interests of justice demand that discretion should be exercised. However, what *Reichhold* does emphasise is that all the circumstances of each individual case should be subjected to the most careful analysis as was conducted in that case by reference to a large number of competing interests and was conducted, for instance, in the case of *Woolwich v Boyd and Another* [2015] NICH 16 by Deeny J.

[36] We consider that the learned judge did apply the correct test namely the interests of justice when considering discretion to grant a stay of enforcement of the order for possession.

[37] The learned trial judge without being exhaustive listed out factors to be taken into account in the exercise of discretion in cases of this kind. We agree with that list but also emphasise that the context of any application for a stay of enforcement is that a party has obtained a judgment and is being held out for a period of time of the benefits of litigation. We note and agree with the comments of Deeny J at paragraph [7] of his judgment in *Swift Advances plc v Maguire and McManus* [2011] NICH 16 as to the central importance of "an orderly property market, which in turn is central to the proper conduct of a modern state." The fact that this is not an application for a stay of proceedings but rather an application for the stay of enforcement of a judgment is also a factor to be taken into account in the exercise of discretion.

Triable issue

[38] The learned judge having identified that one of the factors to be taken into account in the exercise of discretion was the "strength of the case" being made by the applicant went on to state that "in determining the strength of the … case I have to decide whether there are "real triable issues" or a "serious question to be tried" or whether the case is hopeless on the basis, for example it is statute barred, as was the case in" *Woolwich v Boyd and Another.* The learned trial judge then applied that test and in doing so took the respondent's case at its height.

[39] We agree that the strength of the case is a factor to be taken into account but do not consider that factor should be simply whether there is a triable issue or an arguable point or a serious question to be tried. The discretion is more nuanced and multifaceted. The stronger the case the more likely a stay of enforcement will be granted but even in such circumstances it is necessary to consider what will be the likely relief. A strong case may lead to a modest equity in which circumstances when considered with all the other discretionary factors a stay may not be granted. A somewhat weaker case in relation to primary liability could still lead to a stay being granted particularly if the claim was made timeously. Furthermore, a weaker case if sustained might lead to a substantial equity so that after consideration of the other discretionary factors a stay might be granted. We accept that in considering the strength of a case a judge may make allowances for the fact that "experience shows that provisional views of probable outcome can readily be shown to be fallacious when a matter is tried out" see *McCullough v BBC* [1996] NI 580. However, if there is simply no evidence being put forward by the applicant for a stay in relation to a particular issue then there is simply no room for that allowance to be made. This is an area in which a provisional view as to the strength of the case should be made and the applicant for a stay has the obligation to put material before the court to enable that material to be analysed so that as accurate a view as possible can be formed rather than taking a case at its height.

[40] We consider that the learned judge did not apply the correct principle when considering the strength of the respondent's case incorrectly confining her consideration to whether there were "real triable issues" or a "serious question to be tried."

Actual occupation

[41] The appellant contends that there was a misapprehension as to the facts in that the respondent was not in actual occupation of the agricultural lands on 18 June 2008. It is correct that there is no express averment in the respondent's affidavit that she was in actual occupation on that date but this does not mean on the basis of proper inferences which can be drawn from other primary facts, that the learned judge was incorrect to come to a factual conclusion as to occupation. For our part we consider that there was substantial evidence as to occupation in the respondent's affidavit. She states that she returned home in 2006 and has remained living in the

home since then. She states that although she worked in the Hilltown Livestock Market she also worked on the farm before and after work. This was a dairy farm so that this means on at least five days each week she was carrying out all the normal activities of a dairy farmer on a farm. There was ample evidence that the respondent as a farmer working on the farm was in occupation of it.

[42] We dismiss this ground of appeal.

Delay in bringing the application

[43] The learned judge concluded that:

> "Delay is also a factor to be taken into account in the exercise of the discretion. I do not find any evidence that the Appellant has delayed unduly in this case although again this may be a matter to be explored further at trial in respect of whether delay acts as a bar to equitable relief."

[44] The question of delay was raised before the learned judge but it appears to have received modest attention in the submissions. We are certain that if a detailed forensic analysis had been afforded to the learned judge that she would not have come to that factual conclusion.

[45] The forensic analysis undertaken in this court demonstrates that there was substantial delay on the part of the respondent. We consider that the respondent knew of the increasingly precarious financial position of the farm from 2006 onwards, that in 2011 she knew of the mortgage, of the massive debt owed to the appellant and of the possession proceedings. We also consider that in 2011 she had an opportunity to but did not seek to be joined as a defendant and also had an opportunity to but did not seek to make any case that she had an equitable interest in the agricultural lands. We consider that the respondent was only prompted to make her claim by virtue of the imminence of eviction. We consider that there was clear evidence of delay on the part of the respondent for a period of approximately half a decade, that the learned trial judge misapprehended the evidence as to delay and failed to take that delay into account in the exercise of discretion as to the grant of a stay.

Exercise of discretion

[46] We have allowed the appeal in relation to both the test applied by the learned judge in relation to the strength of the respondent's case and also in relation to the question of delay. We consider that those issues having been raised before the learned judge it would be appropriate for this court to exercise its own discretion rather than remitting the matter back to the trial judge.

[47] As we have indicated there was substantial and unexplained delay on the part of the respondent in relation to a claim for a proprietary estoppel. We consider that the claim for a proprietary estoppel on the evidence presented to date faces difficulties both in relation to primary liability and even if liability is established then in relation to any resulting equity. On the present evidence our assessment is that any equity even if liability was established would be modest. Under such circumstances of inordinate delay and our assessment of the strength of the respondent's claim discretion should have been exercised to refuse to grant a stay.

Conclusion

[48] We allow the appeal.

[49] We remove the stay on execution of the order for possession.

[50] The respondent has commenced separate proceedings and any claim which she wishes to make can be made in those proceedings. We set aside the order joining her as a second defendant in the possession proceedings.

[51] We will hear counsel in relation to costs.