Neutral Citation No: [2018] NICh 12 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McB10618** *Delivered:* **20/04/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between

LISA HUNTER

Appellant

and

JULIE LAGAN

First-named Respondent

and

CONRAD LAGAN

Second-named Respondent

_____

McBRIDE J

Introduction

[1] This is an appeal from the decision of His Honour Judge Fowler QC in the County Court Division of Fermanagh and Tyrone, sitting at Dungannon, on 23 June 2017 whereby he ordered that Lisa Hunter ("the appellant") vacate and surrender possession of premises situate and known as 1 Shanroy Park, Pomeroy, Dungannon, Co Tyrone, BT70 2RP, ("the premises") and further ordered that Julie Lagan and Conrad Lagan ("the respondents") pay £3,000 damages to the appellant on foot of her counter-claim.

[2] There is no cross appeal in respect of the award of damages and therefore that Order will stand.

[3] The appellant was represented by Mr Coyle of counsel. The first-named respondent was represented by Mr Elliott and the second-named respondent was represented by Mr Gilmore of counsel. I am grateful to all counsel for their ably researched and presented skeleton arguments.

[4] The parties agreed that the matter should proceed on the basis of agreed facts and agreed that the court should not hear any oral evidence.

Agreed Facts

[5] The following facts were agreed by the parties:

(a) The premises were the former matrimonial home of the respondents and were held in their joint names.

(b) After the respondents separated the second-named respondent remained living in the premises whilst the first respondent moved to separate accommodation.

(c) The second-named respondent entered into a relationship with the appellant and there are two children of this relationship. Throughout this relationship the appellant resided with the second-named respondent in the premises.

(d) The relationship between the appellant and the second-named respondent broke down in September 2011. The appellant remained living in the premises with the children and the second-named respondent moved out of the premises at that time.

(e) On 25 January 2014 the respondents entered into a matrimonial agreement which provided that the premises be sold and the net proceeds of the sale were to be divided 60/40 in favour of the first-named respondent.

(f) Since the date of separation the first-named respondent had continued to service the mortgage payments and she has continued to do that until the present date. The appellant has always resided in the premises rent free.

(g) By ejectment civil bill dated 30 April 2014 the second-named respondent sought recovery of possession of the premises from the appellant. On 10 April 2015 the court struck out these proceedings on the basis of undertakings entered into by the appellant and the second respondent.

(h) The undertakings provided as follows:

> "The defendant, Lisa Hunter, shall be at liberty to remain in occupation of the property situate known as 1 Shanroy Park, Pomeroy, Co Tyrone, without interference from the plaintiff, Conrad Lagan, upon the following conditions:

1. (i) the defendant must co-operate fully with the marketing of the said property for sale, including the erection of a "For Sale" sign;

(ii) the defendant shall continue to maintain the property to a reasonable standard;

(iii) the defendant shall vacate the said property no later than 14 days after the acceptance of a contract for sale unless otherwise agreed;

2. (i) The plaintiff shall through the solicitor acting on his behalf in relation to the sale of the said property inform the defendant's solicitor forthwith upon completion. The plaintiff further undertakes that the entirety of the net proceeds of sale received by him … shall be held on account for a period of 3 months from the date of notification.

(ii) For the avoidance of any doubt the undertakings herein do not create any landlord and tenant relationship between the parties herein.

(iii) Further, and for the avoidance of doubt, the undertakings herein do not confer any equitable rights upon the defendant in respect of the said property …"

(i) When these undertakings were signed by the appellant and the second respondent they each had the benefit of legal representation including experienced counsel.

(j) The premises were subject to a mortgage in the sum of approximately £96,000. The first-named respondent averred in an affidavit sworn on 11 January 2017 that the appellant's partner, Declan Rafferty, had offered to purchase the premises in the sum of £120,000.

(k) A contract for sale of the premises was entered into between the respondents and Connor Murphy whereby the respondents agreed to sell and Connor Murphy agreed to buy the premises in the sum of £96,000. The memorandum of sale was signed by Mr Murphy on 12 January 2016 and signed by the respondents on 28 January 2016.

(l) Although a contract for sale of the premises had been entered into on 28 January 2016 the appellant remained living in the premises. Over the Christmas and New Year of 2016/17 the appellant went to England. Upon her return she was

unable to gain entry to premises as the locks had been changed by the first respondent.

(m) The appellant issued a civil bill on 9 January 2017 seeking an injunction together with damages for breach of contract formed by the undertakings entered into by her and the second respondent on 15 April 2015 and damages for trespass to goods.

(n) On 12 January 2017 the court granted an interim injunction requiring the respondents to permit the appellant to resume occupation of the premises until further order of the court.

(o) On 24 January 2017 the first respondent counter-claimed for possession and mesne profits and on 25 January 2017 the second respondent counter-claimed for possession of the premises.

(p) The matter was heard by His Honour Judge Fowler QC and on 23 June 2017. He ordered the appellant to deliver up vacant possession of the premises within 4 weeks and ordered the respondents to pay damages of £3,000 to the appellant.

(q) By Notice of Appeal dated 29 June 2017 the appellant appealed against the order for vacant possession. No cross appeal has been lodged.

Ruling by the Learned Trial Judge

[6] After hearing the evidence the Learned Trial Judge held that the appellant had no title to the property, had lived rent free in it for over 13 years and in the event of an order for possession being made, would not be rendered homeless as her partner was building a property. In these circumstances he made the order for vacant possession.

Submissions by Counsel

[7] Counsel on behalf of the appellant submitted that the undertakings created a contractual licence. In determining whether the licence terminated upon the acceptance of a contract for sale as set out in condition 1 (iii) he submitted that the court had to interpret this condition in light of all the other undertakings. In particular he submitted that the existence of condition 2 (i) which referred to the net proceeds of sale being held on account for 3 months meant that the parties contemplated and agreed that the sale referred to in condition 1 (iii) was a sale at "open market value" and therefore these words must be read into condition 1 (iii). He submitted that not to do so had the effect of rendering the undertakings illogical and absurd.

[8] Mr Coyle submitted that the sale was not at open market value. In particular he submitted that it was a contrived sale as it was a sale to the first respondent's

partner, at an undervalue. He referred to the affidavit of the first respondent which averred that the premises were worth considerably more than the sale price of £96,000. In addition he submitted that the sale price, being equal to the mortgage, was contrived and designed to prevent the appellant having access to any net proceeds of sale.

[9] He submitted that condition 1 (iii) was not established and therefore the licence did not terminate 14 days after the contract for sale was agreed on 28 January 2016 as this sale was not at open market value.

[10] In the alternative Mr Coyle contended that if the contractual licence had terminated, it would be unconscionable in the circumstances which existed for the respondents to require the appellant to vacate the premises and therefore she could remain in the premises on foot of an estoppel licence.

[11] He submitted that an estoppel arose because the second respondent induced the appellant to enter into the undertakings on the basis of a promise or representation that surplus funds from the sale of the premises would be held on account to enable her to make a claim for maintenance for her 2 children under Schedule 1 of the Children (NI) Order 1996 ("the 1996 Order"). In the events which happened the respondents acted unconscionably by entering into a contrived sale at a price equivalent to the mortgage, which was in breach of the promise made to the appellant. Such actions deliberately frustrated the appellant's ability to have any claim under the 1996 Order satisfied by the second respondent and she had therefore sustained a loss.

[12] He therefore submitted that she could remain in the premises on foot of a licence by estoppel and the estoppel would remain in place until the premises were sold at market value.

[13] Counsel for the respondents submitted that the appellant was in occupation by reason of a contractual licence created by the undertakings. Once the contract for sale was entered into the appellant's right to remain in the premises terminated within 10 days thereafter and thereafter she had no right to remain in occupation. The Learned Trial Judge in the circumstances was right to make an order for possession. Counsel submitted that the terms of the contractual licence were unambiguous and there was no basis to imply a term that the sale had to be at open market sale. Counsel further submitted that no estoppel arose on the facts of the case.

Consideration

[14] The appellant has no legal, equitable or other beneficial interest in the premises. Her right to reside in the premises initially arose on foot of an oral licence granted by the second respondent. Thereafter, her right to reside in the premises was based on the undertakings which were entered into by the appellant and the

second respondent on 10 April 2015. On foot of the undertakings dated 10 April 2015 the appellant was granted a right to reside rent free in the premises subject to certain conditions. In accordance with Condition 1(iii) she had to vacate the premises "no later than 14 days after the acceptance of a contract for sale unless otherwise agreed".

[15] I am satisfied that the undertakings created a contractual licence and the terms set out therein govern when the licence was to terminate.

[16] A contract for sale was agreed by the respondents on 28 January 2016 whereby they agreed to sell the premises for a figure which would discharge the mortgage only and as a result there were no net proceeds of sale.

[17] To decide whether the appellant's licence terminated 14 days after the contract for sale was agreed on 28 January 2016 it is necessary to determine the meaning of condition 1 (iii) and in particular to determine whether it means the licence to occupy the premises terminates upon a contract for sale being agreed or whether it means the sale must be at open market value. On the basis of the evidence before the court it appears that the sale was at less than open market value.

[18] In interpreting the terms of the contractual licence set out in the undertakings, the court is required to apply the techniques of construction of the ordinary law of contract to ascertain the intention of the parties. Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at page 912 (1)-(5) gave the following guidance in constructing a contract:

> "(1) 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 in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the `matrix of fact', … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. …
>
> (4) The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

> (5) … If one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had …"

[19] Applying Lord Hoffman's principles the contract is to be interpreted principally by ascertaining what the parties would reasonably have been understood to have meant by using the words that they used in the undertakings against the relevant background which was reasonably available to them at the time when the agreement was made. To ensure that Judges do not apply Hoffman's principles in a manner which means they reconstruct a contract so that it reflects one which the parties ought to have made rather than the one they have made, the Supreme Court in *Arnold v Britton* [2015] AC 1619 has re-emphasised the primacy of language in the interpretation of contracts. Lord Neuberger at paragraphs [16] - [23] set out seven factors relevant to interpreting a written contract. Relevant to the present case he said:

> "[17]…The exercise of interpreting a provision involves identifying what the parties meant...that meaning is most obviously to be gleaned from the language of the provision….Unlike commercial common sense and the surrounding circumstances the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing to that provision.
>
> [18]… the clearer the natural meaning the more difficult it is to justify departing from it…
>
> [20]…when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed…it is not the function of the court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice..."

[20] I am satisfied that the undertakings are drafted in clear and unambiguous terms and therefore should be given their natural and ordinary meaning unless there is some basis upon which I should find that the words used did not express the intention of the parties. The relevant background circumstances include the fact the appellant was advised by experienced counsel and as appears from the undertakings, everyone focussed on defining the circumstances in which the licence

would terminate. The parties agreed the words which appear in the undertakings. If the parties had wished to make the licence terminate upon sale at market value then they could and should have said so. If the appellant simply failed to do this because she was imprudent or had poor advice, that is not a reason for the court to interpret the clear words used in a different way simply to relieve her from the consequences of her imprudence or poor advice. In light of all the circumstances I find that there is no basis upon which the primacy of language should not govern the interpretation of the undertakings.

[21] Whilst I must have regard to the primacy of language especially where the words used are clear and unambiguous I also accept that I should interpret the contract having regard to the entire agreement and the background circumstances which existed at the time it was entered into. Having regard to all the undertakings I do not find that the presence of condition 2 (i) means that condition 1 (iii) must be interpreted to mean that the reference to contract for sale is in fact a reference to sale at open market value. In many matrimonial agreements provision is made for net proceeds of sale to be held in a certain way. This does not mean the parties have agreed there will actually be net proceeds of sale. Indeed, it would be difficult in many cases for the parties to know whether there will be net proceeds of sale, given that the availability of net proceeds of sale is often unknown until the sale actually occurs. I therefore find that the presence of such a clause in and of itself does not mean the sale referred to in condition 1 (iii) must be a reference to an open market sale. Rather I am satisfied that if the parties had wished to ensure there would be surplus funds by way of a sale at market value the parties and or their legal representatives would have inserted into the undertakings such a clause. No such clause was ever inserted and in these circumstances I find no reason to depart from the plain and natural meaning of the words used in condition 1 (iii). In addition I am satisfied that the agreement reads logically without the need to add the words Mr Coyle submitted should be added. I am further satisfied that the addition of the words suggested by Mr Coyle into the agreement would materially alter its meaning in a manner which is not merited on the evidence or in law. I therefore find that the appellant's licence to occupy the premises terminated 14 days after the contract for sale was agreed on 28 January 2016, notwithstanding the fact it was a sale at less than market value.

[22] Mr Coyle further submitted that, because the second respondent led the appellant to believe that there would be a surplus from the sale which would ensure any claim she made under the 1996 Order for child maintenance would be satisfied, it would now be unconscionable for the respondents to terminate her licence in circumstances where they had entered into a contrived sale designed to frustrate her from making and having such a claim satisfied.

[23] An estoppel licence typically arises when there is a representation by the licensor which is relied upon by the licensee to his or her detriment, in circumstances where it is unconscionable for the licensor to resile from his representation. If an estoppel arises the court has then to determine how it should be satisfied. In

satisfying the equity the court must do "justice" between the parties and impose a remedy which is fair and proportionate.

[24] I am satisfied no estoppel arises in this case. There is no evidence before the court that any representation or promise was made to the appellant by either of the respondents that the premises would be sold at market value or at a price which would ensure there would be net proceeds of sale to satisfy any claim the appellant may make under the 1996 Order.

[25] In support of her case that an estoppel arises the appellant in her affidavit dated 9 January 2017 simply avers that:

> "The whole balance of the settlement predicated a sale at market value in order that an application be made by me on behalf of my children and those of Conrad Lagan for payment by him pursuant to Schedule 1 of The Children (Northern Ireland) 1996."

The appellant therefore does not make the case that any representation was in fact made to her by the second respondent that the sale was to be at market value.

[26] The second respondent in his affidavit sworn on 12 January 2017 states that his understanding was that his solicitor would hold any net proceeds from the sale and the appellant would be notified that funds were being held and this would facilitate any application by her for a lump sum child maintenance payment. He specifically denies that there was any agreement that the property would be sold at any particular price or that there would be any net proceeds of sale.

[27] I am satisfied that no evidence has been produced by the appellant that a representation was made to the effect that the property would be sold at market value or that there would be a surplus to secure an application under the 1996 Order. At its height the appellant's case is that she signed the undertakings on the understanding that the premises would sold at market value. She does not state that either of the respondents ever represented to her that the sale would be at market value. I further note that the undertakings, which were signed by the appellant, were entered into with the benefit of legal advice. I find it surprising that if such a representation had been made to her that it would not have been included in the undertakings which were signed by her having had the benefit of experienced legal counsel.

[28] If I am wrong in finding that no representation was made and that in fact a representation was made and broken by reason of a contrived sale at less than market value and at a price which yielded no security for an application under the 1996 Order, I find that the appellant has not suffered any detriment. The detriment, if any, relates to the potential to make a claim under the 1996 Order in respect of a

lump sum for child maintenance. The loss, if such a claim could not be made, represents a detriment to the children and not the appellant.

[29] I am further satisfied that an estoppel does not arise in this case as in all the circumstances there is no unconscionability. This is because the undertakings state clearly at Clause 2(iii) that the undertakings did not confer any equitable rights upon the defendant in respect of the property. The appellant as a legally represented person therefore knew and understood what she was agreeing to. In addition the civil bill which seeks relief in this case on behalf of the appellant is framed solely on the basis of a breach of a contractual licence rather than the breach of a licence by estoppel and I am therefore satisfied that the appellant did not consider that an estoppel licence arose and this is now something she has only belatedly claimed.

[30] In all the circumstances I therefore find that a licence by estoppel does not arise.

[31] If I am wrong in finding that the appellant did not have the benefit of a licence by estoppel I am satisfied that the award of damages of £3,000 is more than sufficient to satisfy the equity of any such estoppel licence as the appellant has resided rent free in the premises for over 13 years and the first-named respondent has been liable for ongoing mortgage payments without receiving any benefit from the premises.

[32] I therefore dismiss the appeal and affirm the order of His Honour Judge Fowler.

[33] I will hear counsel in respect of costs.