Neutral Citation No: [2016] NICh 9

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

Delivered:	4/2/2016

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

2015/090344

IN THE MATTER OF 28 WELLESLEY AVENUE, BELFAST

BETWEEN:

KEITH FARRELL & CATHERINE FARRELL

Plaintiffs;

-and-

SIMON BRIEN & MARTIN MALLON

Defendants.

15/090346

IN THE MATTER OF 5 DUNLUCE AVENUE, BELFAST

BETWEEN:

KEITH FARRELL & BRIAN FARRELL

Plaintiffs;

-and-

SIMON BRIEN & MARTIN MALLON

Defendants.

McBRIDE J

Applications

[1] In each of these actions the respective Plaintiffs have issued Originating Summons seeking to recover possession of premises pursuant to Order 113 Rules of the Supreme Court (NI) 1980 on the grounds that they are entitled to possession and the defendants are in occupation without licence or consent.

Factual background

[2] The proceedings concern dwelling houses situate and known as 28 Wellesley Avenue Belfast and 5 Dunluce Avenue Belfast ("the premises"). In each action the Plaintiffs are the legal owners of the premises. As legal owners of the properties they respectively executed legal charges to secure their indebtedness to Northern Bank Limited ("the bank").

[3] The Plaintiffs each failed to make repayments due to the Bank and the Bank brought Order 88 proceedings seeking orders for possession against the Plaintiffs and an occupying tenant.

[4] The occupying tenant voluntarily gave up possession.

[5] The Order 88 proceedings stand adjourned.

[6] By instruments of appointment dated 7th May 2014 the Bank appointed the Defendants as receivers of the premises.

[7] Pursuant to case management by the Court the Plaintiff, Keith Farrell filed affidavits sworn on 25th September 2015 and 9th December 2015 and an affidavit on behalf of the Defendants was sworn on 13th November 2015. On the day of hearing the Defendants sought leave, which was granted, to file a further affidavit from Lesley Bourke, the General Counsel and Company Secretary of the Bank. The Defendants had requested an early hearing because they had negotiated sales of the premises and wished to complete as soon as possible. The matter was listed for hearing before me on 20th January 2016.

[8] I am grateful to all counsel for their helpful skeletons arguments and oral submissions.

Issues in Dispute

[9] Although the affidavits of the Plaintiffs raised a number of potential legal arguments, Mr Ringland QC who appeared with Mr Heaney on behalf of the

Plaintiffs abandoned most of these arguments. His only submission to the Court was that the appointment of the defendants as receivers was invalid and consequently they were in occupation without licence or consent.

[10] Mr Gowdy on behalf of the Defendants submitted that the receivers were validly appointed and the defendants, as receivers had a right to possession of the premises.

[11] To determine this application it is necessary to consider 3 issues:-

(a) The relevant test for making an Order 113 order.

(b) The law relating to the appointment of Receivers.

(c) Whether on the facts, as set out in the affidavit evidence filed the test for making an order 113 possession Order was met.

Order 113 – The legal test

[12] Order 113 is a summary procedure which enables a person to bring proceedings for an Order for possession when he alleges the land is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his.

[13] Mr Gowdy drew the attention of the Court to the case of Her Majesty's Principal Secretary of State for Communities and Local Government v Praxis Care, persons unknown [2015] NICh 5 in which Deeny, J when considering the test applicable to the grant of an Order under Order 113, stated at paragraph [11], "The defendant must show an arguable case….it must be a genuine defence to the Plaintiff's claim for possession and not a mere quibble. See a not dissimilar situation with regard to setting aside a statutory demand: Allen v Burke Construction [2010] NICh 9"

[14] It is clear from this and other authorities, that the Court cannot make a possession order pursuant to Order 113 unless, taking the defence at its height, there is no or no arguable defence.

Appointment of Receivers

[15] It was accepted by all counsel, the power to appoint a receiver had arisen as the mortgage monies were due and owing, as required by Section 19 Conveyancing and Law of Property Act 1881 (the Act) and further pursuant to Section 24, of the Act the power was exercisable.

[16] The sole issue in dispute was the validity of the appointment of the Defendants as receivers.

[17] The formalities required for appointment of receivers can vary according to the source of appointment. Under the Act the formalities required to appoint a receiver are set out in section 24 which provides, "a mortgagee entitled to appoint a receiver ….may then, by writing under his hand, appoint such a person as he thinks fit to be receiver." The method of appointment of receivers under the legal charge is set out at Clause 8.1 and provides "The bank may by an instrument signed on behalf of the bank appoint a receiver over the mortgaged property…"

[18] As appear from the instruments of appointment the receivers were appointed pursuant to the bank's statutory powers under the Act and pursuant to its powers under the legal charge. Mr Gowdy, on behalf of the defendant submitted that the formal requirements for appointment of receivers under the statute and the legal charge were essentially the same. For the purposes of these proceedings he accepted the Plaintiff's submission that, in determining whether the defendants were validly appointed the Court should consider whether the formalities set out in Clause 8.1 of the legal charge were complied with.

[19] Mr Ringland QC on the authority of Merrow Limited v Bank Of Scotland [2013] IEHC 130 submitted that the general rule is that the applicable formalities set out for the appointment of receivers must be complied with strictly, otherwise the appointment is invalid. In Merrow the appointment of the receiver was held to be invalid, as the appointment had not been made pursuant to a Deed, as required by the terms of the debenture entered into between the parties. In the course of his judgment Gilligan J surveyed the relevant authorities about the appointment of receivers and concluded at paragraph [29]: "Since a receiver's authority is derived from the instrument under which he is appointed, an appointment is not valid unless it is made in accordance with the terms of that instrument. This principle has been recognised by the leading commentators in this area and accepted and applied by the courts throughout the common law world." At paragraph [32] he referenced commentary by Forde, The law of Company Insolvency (2008) that: "Formalities set out in the security instrument must be scrupulously followed; if they are deviated from to any appreciable extent the appointment will be a nullity."

[20] Thus the appointment of a receiver is valid, only when the necessary formalities set out in the source of appointment (whether under the Act or the security instrument), are strictly followed.

[21] Gilligan J further concluded at paragraph [44] that "an invalidly appointed receiver may be a trespasser…"

[22] When a receiver is validly appointed, he has all the powers set out in the source of appointment

Discussion

[23] The Plaintiffs submitted that the appointment of the receivers was invalid as the instrument of appointment failed to comply with the requirements set out in Clause 8.1 of the legal charge in 3 respects:-

(a) The instrument was not signed "on behalf of the bank" because it did not state on the face of the document that the witnesses were signing on behalf of the bank.

(b) The signatures on the instrument only witnessed the fixing of the common seal (which did not in fact occur) and did not operate to execute the entirety of the instrument.

(c) The instrument was not a Deed as no seal was affixed.

[24] In response Mr Gowdy submitted that the requirements of Clause 8.1 were fully complied with. The signatures on the instrument were by bank officials, as confirmed by the affidavit of Lesley Bourke, the affidavit evidence of one of the Plaintiff, Keith Farrell and the words "authorised signatory" which appeared on the face of the instrument under each signature. He further submitted that the signatures at the end of the document were not simply witnessing the last clause of the document but were intended to and did give legal effect to the entirety of the document. Further Clause 8.3 of the charge did not require the appointing instrument to be a deed and therefore it did not have to be sealed.

Findings

[25] I am satisfied that the instrument of appointment did comply with all the requirements of Clause 8.1 and therefore the appointment of the defendants as receivers was valid.

[26] In particular the instrument of appointment was clearly signed on behalf of the bank as appears from the following:-

(a) The affidavit evidence of Lesley Bourke sworn on 9th December 2015 in which she states that the instrument of appointment was executed by bank staff who were authorised to execute documents on behalf of the bank.

(b) The affidavit of the Plaintiff, Mr Keith Farrell sworn on 9th December 2015 in which he states that the instrument of appointment was "executed by bank staff".

(c) On the face of the instrument the words "authorised signatory" are written under each signatory.

[27] The submission of Mr Ringland Q.C. that the words "signed on behalf of the bank" need to appear on the face of the instrument is adding to the formalities required under clause 8.1.

[28] I can find no basis on which the Court should conclude that the signatures operated only to witness the fixing of the seal. Such an approach would mean that each line or paragraph of an instrument would have to bear a signature to have legal effect. This is a novel argument, for which no authority was cited. I find that the signatures, appearing at the end of the document were intended to and operated to give legal effect to the entire document.

[29] The lack of a seal is irrelevant as Clause 8.1 did not require the appointment to be made by Deed.

[30] Therefore, as the defendants were validly appointed they have the power to take possession of and deal with the premises in accordance with Clause 8.3 of the legal charge.

Conclusion

[31] In light of my findings the defendants as validly appointed receivers have established not just an arguable defence to the application but an absolute right to be in possession of the premises.

[32] I have considered whether there is some issue or question that requires to be tried or that for some other reason there ought to be a trial. In light of my findings, I do not believe that there is a question that requires to be tried. I do not give any further directions as to the further conduct of the proceedings for this reason and also because such a direction would cause further unnecessary delay and expense.

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