

**Neutral Citation No. [2011] NIMaster 3**

<i>Ref:</i> <b>2010/141770</b>
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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

<i>Delivered:</i> <b>6/04/2011</b>
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2010/141770

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

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BETWEEN:

**NORTHERN BANK LIMITED**

**Plaintiff;**

**and**

- (1) DAVID ERNEST ARMSTRONG**
- (2) ALMA ARMSTRONG**

**Defendants.**

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**MASTER ELLISON**

[1] This is an ex-parte application for substituted service in a mortgage action of an order dated 18 January 2011 whereby Deputy Master Archbold directed that each of the defendants do within 28 days after personal service deliver to the plaintiff possession of a dwelling-house the title to which is registered in a freehold Land Registry folio ("the property"). That order was made because of arrears of instalments due on foot of a registered charge dated 7 August 2001 between the defendants of the one part and the plaintiff

of the other part. The property is the home of the defendants. The ex-parte application was for liberty to serve the order on the first defendant "by posting same by first class post in an envelope addressed to the first defendant" at the address of the property.

[2] The application for substituted service was supported by an affidavit of Stephen K Gowdy of King & Gowdy, Solicitors for the plaintiff in which he states as follows at paragraph 2:-

"On 19 January 2011 I instructed Securway (NI) Limited to effect personal service of the order made in this matter on 18 January 2011 on the defendants. I am advised by Graeme Robinson, a process server employed by Securway (NI) Limited and believe as follows:-

(a) He called at the defendant's dwelling-house ("the premises") on 22 January 2011. The door was opened by a male in his late teens who confirmed that it was the residence of the defendants. He further said that Alma Armstrong would be back shortly but did not know when David Armstrong would return.

(b) Mr Robinson returned to the premises at 3.55 pm on 22 January 2011 and met with a female who identified herself as the second-named defendant and personal service was effected on her. The second defendant stated that the first defendant worked away during the week and she was unable to say when it would be suitable to meet with him.

(c) Mr Robinson returned to the premises at 5.30 pm on 15 February 2011. There were no lights or cars at the property although there was a dog running around. Mr Robinson sent a letter of appointment to Mr Armstrong seeking to meet with him for the purpose of service.

(d) Mr Robinson again visited the property on 18 February 2011. There was a car at the property which had a registration mark with (sic) 'EDA' which appeared to be the first defendant's initials. He met the second defendant who said that her husband, the first defendant was not at home and she did not know when he would be back."

[3] The principles applicable in this jurisdiction to an application for substituted service of an order for possession upon one of two co-habitee defendants are set out in the judgment of Mr Justice Girvan (as he then was) in Abbey National Plc v Grugan (Chancery Division) delivered 7<sup>th</sup> March 1997; [1997] 8 BNIL 50. In that case the second defendant wife did not sign the deed of charge, but her husband the first defendant forged her signature on the charge and suppressed information and documents about subsequent possession proceedings brought by the plaintiff by (inter alia) intercepting mail addressed to her. An order for possession was made on 2<sup>nd</sup> December 1991 and was followed by an application for an order for substituted service by post to which the court acceded. Mr Grugan intercepted the envelope addressed to his wife and containing a copy of the order. In setting aside the order for possession Girvan J stated as follows in the penultimate paragraph of his judgment:-

"The second point to emerge is in relation to the question of service of proceedings in cases such as these where a husband and wife or other co-habitees are joined as defendants. Postal service may not be adequate as a means of bringing notice of the existence of the proceedings to the parties in view of the risk that one of the parties can intercept mail if the parties are living together. In this instance personal service of the order would or might have avoided some of the problems that

have arisen in this case. This illustrates the fact that the court should be slow to order substituted service of an order in a case (sic) as this. Personal service should be the normal rule and the court should only be prepared to order substituted service if it is absolutely certain that the form of substituted service would be such as to bring the order to the actual attention of the parties and that personal service is not possible."

(Emphasis added)

[4] In light of these principles I penned an order on 15 March standing the application over pending further affidavit evidence. I asked the Chancery Office to notify the plaintiff's solicitors of that order and that further endeavours to effect personal service on the first defendant would appear necessary having regard to the principles about substituted service in Abbey National Plc v Grugan. A letter notifying the plaintiff's solicitors in accordance with that request was sent and prompted a reply dated 21 March 2011 in the following terms:-

"Dear Sir

**Northern Bank Limited v David Ernest  
Armstrong & Alma Armstrong**

We refer to your letter of 16 March 2011.

We should be obliged if you would arrange for this matter to be listed so that representations can be made to the Master.

We would point out that four visits have been made to the property. A letter of appointment has been sent to the first defendant which he did not comply with. It is also quite clear from the evidence that Mr Armstrong is at (property address). In light of that we fail to see what

further reasonable steps could be taken in the matter.

We look forward to hearing from you.

Yours faithfully.”

[5] Accordingly the matter was listed for further submissions on 28 March when Mr Wilson, solicitor of King & Gowdy appeared. He made essentially the same points as in his firm’s letter and, when asked for his observations on the principles set out in the Grugan judgment, stated the following:-

- (a) the first defendant has been written to at his home address a number of times;
- (b) the first defendant’s wife was well aware of the proceedings and was being evasive;
- (c) while she was being evasive, it would seem “incredible” that she would not inform her husband. The Grugan judgment was not engaged because there is a reasonable presumption that the defendant is aware of the judgment and order. There is no question that this is his home.

[6] In light of the Grugan principles and the fact that in my experience the interception and concealment by co-habitees of mail about court proceedings are all too common (whether because of fraud or over-solicitousness), it seems to me ingenuous to deem incredible the proposition that a defendant spouse might suppress information about repossession proceedings from her co-defendant husband. The unauthorised interception of mail is an offence

under section 1 of The Regulation of Investigatory Powers Act 2,000, is a serious mischief in mortgage actions and may constitute contempt of court.

[7] I have a practical difficulty with the Grugan principles inasmuch as on the face of the judgment they require a court to be “absolutely certain”, and find myself applying the principles with a measure of pragmatism to avoid procedural gridlock or the disproportionate damage to reputation which may be caused by service by advertisement. However it seems clear to me that further steps to endeavour to serve personally are required in this case as at this juncture it does not appear that personal service is impossible. The order which I shall make will be that the ex-parte application for substituted service continues to be stood over pending the filing of further affidavit evidence.