

Neutral Citation No. [2011] NIMaster 5

Ref: 2008 No 4149

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

Delivered: 13/06/11

2008 No 4149

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
CHANCERY DIVISION

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**BETWEEN:**

**NORTHERN BANK LIMITED**

**Plaintiff;**

**and**

**RHONA MARGARET GUY**

**Defendant.**

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**MASTER ELLISON**

[1] This is a dispute about the costs of an application brought by the plaintiff bank by originating summons filed 14 January 2008 for an order for possession of a dwelling pursuant to an order charging land made in the Enforcement of Judgments Office on 26 October 2007. The defendant is the sole occupier and registered owner of the dwelling house, the title to which is registered in a Land Registry freehold folio. The order charging land was made to secure the sum of £3,584.57 due under a judgment dated 11 August 2006 together with £73.20 the costs and expenses of registration of the order charging land making a total of £3,657.77 together with interest at the

rate of 8 per cent per annum from the date of its registration as a burden on the folio. As at the date of swearing on 7 February 2008 of the grounding affidavit of Stephen T Gowdy, solicitor, of the firm King & Gowdy there was secured by the order charging land the monies I have mentioned together with interest of £76.80 making a total of £3,734.57 with continuing interest on the principal.

[2] The matter was first heard on 11 March 2008 before me when counsel for the defendant requested an adjournment on the basis of a recent application for legal aid. I adjourned until 16 April 2008 when I made an order for possession to be delivered up within 28 days from service but, as I was informed that regular payments were being made to the Enforcement of Judgments Office, stayed enforcement until 1 December 2008 and directed that the matter be listed for review on 25 November 2008. On the latter date the matter came before Master Bell who recorded that I had indicated when making the order for possession that upon the review I would take into account payments made to date, that £1,000.00 had been paid on that date to the plaintiff's solicitors and monthly payments of £40.00 had been made and monthly payments of £80.00 were to be made to the Enforcement of Judgments Office. The stay was continued until 23 June 2009 to which date the review was adjourned.

[3] On 7 January 2009 the plaintiff issued a summons seeking leave to enforce the order for possession and an order for the costs of the proceedings. In an affidavit in support of the summons sworn on 19 December 2008

Mr James Wilson of the plaintiff's solicitors explained that he had discovered that, notwithstanding the representations at hearing about payments by the defendant to the Enforcement of Judgments Office, any such payments were being made in respect of debts which had priority over the plaintiff's debt at that Office and as a result the sum then secured by the order charging land was £2,983.69. On 3 February 2009 the matter came before Master Redpath who was told that the debt would be paid off within the following three months by way of monies paid direct by the defendant's employer to the Enforcement of Judgments Office under an Attachment of Earnings Order and that a further £500.00 had been paid on 28 January 2009. The stay was further extended until 23 March 2010 but the matter was not adjourned.

[4] On 17 August 2010 the plaintiff issued another summons seeking liberty to enforce and costs, supported by an affidavit of Mr Wilson sworn 11 August 2010 recording payments by the defendant totalling £2,459.89 and a balance then secured of £1,768.26 and claiming plaintiff's costs as a mortgagee. On 18 October 2010 and 26 November 2010 Mr Wilson appeared and informed me that negotiations were ongoing. On 17 January 2011 the matter came before me again when it was announced that the balance due was now "very small", namely £644.00 together with costs.

[5] On 9 May 2011 Mr Wilson again appeared for the plaintiff and Mr Cooper of Cooper Wilkinson Solicitors appeared for the defendant. It was stated that the remaining balance due was £244.00. There followed argument about costs. For the defendant Mr Cooper contended that the possession

proceedings were unreasonable and disproportionate given the amount of the debt in the first instance, the prospect of payments under an Attachment of Earnings Order and those made by way of lump sums. For the plaintiff Mr Wilson rejected those arguments, relying primarily on Order 62 rule 6(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 (“the Rules”) in support of his case that the plaintiff should in essence be entitled to its costs as mortgagee.

[6] Order 62 rule 6(2) reads as follows (so far as relevant):-

“Where a person is or has been a party to any proceedings in the capacity of ... mortgagee, he shall be entitled to the costs of those proceedings, insofar as they are not recovered from or paid by any other person, ... out of the mortgaged property ... and the court may order otherwise only on the ground that he has acted unreasonably ...”.

[7] Article 49 of the Judgments Enforcement (Northern Ireland) Order 1981 provides as follows:-

“49. Subject to Articles 46(3), 47, 48 and 52, an order charging any land shall have the like effect as a charge on that land created by the debtor in favour of the creditor.”

[8] An order charging land is to that extent equated with a voluntary mortgage or charge created by the debtor in favour of the creditor – as it is under Article 52(1) of the 1981 Order which confers on an owner of an order charging land “for the purpose of enforcing his charge, the powers of sale of a mortgagee under a mortgage by deed ...” and also confers the right to apply to the court for an order for possession for the purpose of sale. In England

and Wales the equivalent orders are charging orders made under the Charging Orders Act 1979 and, as section 3(4) of that Act provides that a charging order takes effect and is enforceable as an equitable charge, it has been held that the holder of a charging order is entitled to add the costs of enforcing the order (ie obtaining possession and sale) to the security: Holder v Supperstone [2001] 1 All ER 473 per Evans-Lombe J; Ezekiel v Orakpo (4 November 1994, unreported) per Carnwath J; Fisher & Lightwood's Law of Mortgage (13<sup>th</sup> Edition 2010) at page 1074. The similar provisions of Article 49 of the 1981 Order and the other provisions of that Order I have mentioned persuade me that in this jurisdiction an order charging land is to be deemed a mortgage for the purposes of Order 62 rule 6(2) of the Rules.

[9] Costs are in the discretion of the court, but that discretion must be exercised in accordance with rule 6(2) and with the following principles as set out in the judgment of Mr Justice Girvan (as he then was) in National & Provincial Building Society v Chambers (1996, unreported) Chancery Division No. 1481:-

“A mortgagee is normally entitled to add to the debt secured by the mortgage costs incurred in proceedings properly instituted by the mortgagee. Such costs are not recoverable from the mortgagor personally unless in a particular case he has become personally liable to pay such costs. The jurisdiction to deprive the mortgagee of costs and to order that it pay the costs would only be exercised if the mortgagee has been guilty of gross misconduct or has incurred costs which the court considers should not be borne by the mortgagor in justice. It is the duty of the mortgagee so to pursue his remedy as not to incur unnecessary costs. Hence he must bear the costs of proceedings so far

as they are mistaken or useless and the court may except from the general costs the costs of a particular issue on which the mortgagee has failed although the remainder of the action was justified”.

[10] While this is a very small debt, it might not have been addressed so quickly but for the existence of these possession proceedings. As things stand, some considerable time has passed since 3 February 2009 when Master Redpath was told that the balance then due would be paid within three months. The plaintiff was entitled to apply for an order for possession on foot of the order charging land and there has been no misconduct or other matter which would justify the court in disallowing the plaintiff’s costs.

[11] The order which I will make in respect of costs will be for legal aid taxation of the defendant’s costs and that the plaintiff is entitled to add to its security its costs of this action, such costs to be taxed in default of agreement.

[12] In the present case it is clear that sufficient equity is available in the dwelling to meet the amount recoverable including plaintiff’s costs. I add that an alternative type of costs order, namely for payment of costs by the defendant personally, may be available where there is insufficient equity to address in full the amount recoverable under the order charging land. A further scenario is where the plaintiff brings possession proceedings with notice that there was no equity to meet any of the amount recoverable. This could lead to an order disallowing the plaintiff’s costs of the mortgage action and, where appropriate, an award of costs in favour of the defendant: see the requirements of Order 88 rule 5A(2)(b), (d) and (e) and 5A(3) of the Rules;

Northern Bank Limited v Brolly [2002] NIJB 223 per Girvan J; also The Law of Mortgages in Northern Ireland by Charles O'Neill at page 218.