

Neutral Citation No: [2019] NICH 14

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

Ref: McB11081

Delivered: 25/10/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

SANTANDER (UK) PLC

Plaintiff/Respondent;

-and-

LIAM McALARY

Defendant/Appellant.

**McBRIDE J**

**Application**

[1] This is an appeal against:-

- (a) the Order of Master Hardstaff dated 20 December 2018 whereby he refused the defendant/appellant's application dated 3 August 2018 for a stay of a possession order granted on 26 July 2016 in respect of property situate and known as 59 Culnady Road, Upperlands, Maghera, BT46 5TN ("the property") and
- (b) the Order of Master Hardstaff dated 22 July 2016 whereby he granted a possession order in respect of the property.

The property consists of a dwelling house and 0.4 acre garden.

**Representation**

[2] The appellant/defendant ("the appellant") was represented by Graeme Watt of counsel and the plaintiff/respondent ("the respondent") was represented by

Keith Gibson of counsel. I am extremely grateful to both counsel for their very detailed and carefully researched skeleton arguments.

### **Chronology of proceedings**

[3]

- a) 11 September 2015 - The respondent issued an originating summons seeking possession of the property.
- b) 22 July 2016 - Court granted a possession order in respect of the property with a three month stay. Both the appellant and respondent were legally represented at the hearing.
- c) 3 August 2018 - The appellant applied for a stay of the possession order.
- d) 20 December 2018 - Following a hearing on 5 November 2018 the Master refused the appellant's application for a stay.
- e) 14 March 2019 - The respondent gave an undertaking to refrain from enforcing the possession order pending the outcome of this appeal.

### **Background**

[4] As appears from the affidavit evidence of Edmund Sinclair, solicitor the appellant executed a legal charge dated 29 April 2008 in favour of the Abbey National Plc in respect of the property to secure the repayment of the sum of £215,000 advanced by the respondent to the appellant. The charge was registered in the Land Registry on 2 June 2008. The charge incorporated the Abbey National Standard Mortgage Conditions (August 2007) Northern Ireland Edition ("Mortgage Conditions").

[5] The charge and conditions contained a number of covenants for repayment of the monies. In particular it contained the following material covenants:-

- (a) Condition 8 provided that the appellant covenanted to pay the monthly account on the date appointed by the respondent and at monthly intervals thereafter until the whole of the loan and interest due thereon and the whole of or any further advances that may be made by the respondent to appellant and the interest due thereon and all other monies payable to the respondent by the appellant are fully repaid.
- (b) Condition 24.1 provided that the whole of the principal monies secured by the charge shall be treated as being due one month following the date of the creation of the charge.
- (c) Condition 24.2 provided that the respondent was able to give notice to require the money owed by the appellant to be repaid immediately if the appellant was more than two months late with any payment under the mortgage conditions.

- (d) Condition 24.3 provided that the respondent was permitted to take possession of the property if the conditions in paragraph 24.2 had been breached and it had power to exercise its statutory power of sale provided for by Section 19(1) of the Conveyancing Act 1881.

[6] The appellant defaulted in payment of the mortgage and by letter dated 6 June 2014 the respondent advised that as of the date of the letter there were arrears of £6,621.81 due and the current balance was £227,570.81. Attached to this letter was a Notice to Quit.

[7] As of the date of Mr Sinclair's affidavit dated 1 July 2016 the last payment made by the appellant was on 30 September 2015 and the amount remaining due under the mortgage was £230,044.15. The amount of arrears as of the date of originating summons being 11 September 2015 was £11,461.22. The original term of the mortgage was 25 years. As of the date of the grounding affidavit the remaining term of the mortgage was 17 years and 4 months.

#### **New affidavit proposed to be filed on behalf of the appellant**

[8] The appellant changed solicitors after 20 December 2018. His new counsel Mr Watt advised the court that the arguments he intended to make before this court had not been advanced before the lower court. He advised that he intended to seek leave to adduce new evidence consisting of affidavit evidence of the appellant and his nephew Mr Joseph Bradley, as this was required to enable him to properly advance the arguments he now intended to present to the court.

[9] In an affidavit sworn on 3 August 2018 the appellant averred that he built the property and presently resides in it. After he built the property he then mortgaged the property to Abbey National Plc in return for an advance of £215,000 which he used to fund a divorce settlement and to build a body repair shop. As a result of ill-health, a decline in business and a second divorce he ceased trading. By 2015 he accepts that he was in arrears of the mortgage payments due and owing and as a consequence the court made a possession order in respect of the property on 7 July 2016.

[10] The appellant is currently on benefits and avers that he is unable to pay the mortgage and/or the arrears.

[11] He avers that the property is in substantial negative equity. He originally placed the property on the market for sale, but since 2016 no offers have been made on the property. The appellant now wishes to sell the property to family members. He recognises that the sale will be a "shortfall sale" because the proceeds of sale will not be sufficient to pay off the entire debt due to the respondent.

[12] The appellant's nephew Joseph Bradley by affidavit sworn on 3 August 2018 avers that he wishes to purchase the property on behalf of the Bradley family to prevent the eviction of the appellant. On 16 June 2019 he filed a second affidavit indicating that he wished to purchase the property encumbered for £125,000 cash.

[13] The appellant filed two valuation reports. One from Burns and Company Commercial dated 13 February 2019 and a second one from H A McIlwrath and Sons dated 22 February 2019. Both valuers value the property at £125,000.

[14] As of 27 August 2019 the mortgage balance is £218,488.

### **Submissions by the appellant**

[15] Mr Watt in a very cleverly crafted, well researched and detailed skeleton argument which appropriately referenced a number of authorities submitted that the court had jurisdiction to stay proceedings to enable a mortgagor to effect a shortfall sale, that is a sale where the proceeds of sale are likely to be insufficient to discharge the debt due.

[16] He specifically relied on the cases of *Palk v Mortgage Services Funding Plc* [1993] 2 All ER 481 and *Barrett v Halifax Building Society* [1995] 28 HLR 634 in which the English courts had permitted a mortgagor to effect a shortfall sale.

[17] In *Palk* the mortgagors negotiated a shortfall sale. The mortgagee refused to consent to this sale and obtained an order for possession with a view to letting the house and postponing sale to achieve a better price. The possession order was suspended pending the mortgagor's application for a shortfall sale under Section 91 (2) of the Law of Property Act 1925. The Court held that the court had an unfettered discretion under this provision and on the facts of the case considered that it was just and equitable to order such a sale.

[18] This approach was followed in *Barrett* where the court permitted a shortfall sale by the mortgagor under section 91(2) of the Law of Property Act 1925 in circumstances where the mortgagee had a possession order and wished to sell the premises which were in negative equity.

[19] In both these cases the court based its jurisdiction to order a shortfall sale upon the provisions of section 91 (2) of the Law of Property Act 1925 which provides as follows:-

“In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding that –

- (a) any other person dissents; or
- (b) the mortgagee or any person so interested does not appear in the action;

and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.”

[20] Mr Watt acknowledged that the Law of Property Act 1925 did not apply in Northern Ireland. He submitted however that the courts in Northern Ireland had an unfettered discretion to order a shortfall sale by a mortgagor by reason of the provisions of Order 88 Rule 1(1) and Order 31 Rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980 which he submitted contained very similar provisions to Section 91 (2) of the Law of Property Act 1925.

[21] Mr Watt submitted that the court should exercise its discretion to order a shortfall sale by the mortgagor in this case as such a sale would not disadvantage the mortgagee and would be advantageous to the borrower. In particular the mortgagee’s security would be fully realised as it would obtain the best price that was likely to be obtainable in the current market, at an early date. In addition such a sale would be advantageous to the borrower in the following respects:-

- (a) His payments of capital and interest would be reduced; (and the lender would be put back in funds).
- (b) The costs of sale would be reduced or eliminated as the purchaser had been identified thereby reducing the costs burden on the borrower and
- (c) A sale by a vendor in possession would, as is almost universally recognised, realise more than a repossession sale – See *Northern Bank v Jeffers* [1996] NI 497 at 504.

In summary his submission was that a shortfall sale did not compromise the lender’s security whereas a refusal to order such a sale would be at the borrower’s expense.

### **Respondent’s submissions**

[22] Mr Gibson on behalf of the respondent submitted that the application should be refused for the following reasons:-

- a) The court lacked jurisdiction either at common law or under statute to stay proceedings on the basis of a shortfall sale. The only power of sale arose on foot of the mortgage contract and the Conveyancing Act. In both of these situations the power was given to the mortgagee only and not the mortgagor.
- b) The only jurisdiction the court had to stay proceedings arose under Section 36 of the Administration of Justice Act 1970 and under its inherent jurisdiction.

He submitted that Section 36 did not empower the court to suspend a possession in order to permit the mortgagor to sell the premises where the proceeds of sale would not be sufficient to discharge the mortgage debt.

- c) The English cases did not apply in Northern Ireland as their jurisdiction was based on the 1925 Law of Property Act which did not apply in Northern Ireland.
- d) Order 88 did not give a mortgagor a power of sale.
- e) Order 31 did not give a mortgagor a power of sale as it was only an enabling provision.
- f) Even if *Palk* applied it was distinguishable on its facts. In *Palk* the mortgagor was being financially prejudiced as the mortgagee had obtained possession and was then proceeding to let the property because it wanted to wait for the market to rise. In the meantime the rental payments were not sufficient to cover the interest payments due resulting in Mrs Palk facing an ever increasing debt. He submitted that the facts of this case were not on all fours with *Palk* as the mortgagee in this case wished to sell the property and not rent it. As noted in *Krausz* by Millett LJ *Palk* did not support the making of an order where the mortgagee is taking active steps to obtain possession and to enforce its security by sale.
- g) Although in *Barrett* the court permitted a shortfall sale when the mortgagor wanted to sell the property he submitted this case was wrongly decided as per Millett LJ in *Krausz*.
- h) Even if the power existed it did not extend to permitting the court to give directions regarding the mode of sale and the identity of the purchaser as the appellant sought in this case.
- i) Therefore in all the circumstances he submitted that the court should dismiss the stay application.

## Consideration

[23] Appeals from the Master are generally dealt with by way of a rehearing. Although the judge will give weight to the previous decision of the Master the judge is not fettered by the previous exercise by the Master of his discretion. This is particularly so in cases where new evidence is admitted and/or new arguments are made.

[24] Mr Watt advised the court that he had not been instructed in the lower court and that the argument he was now making to this court had not been previously made before the Master. As a result he sought to file new evidence. Mr Gibson adopted a neutral stance in respect of the admission of new evidence.

[25] The court has a discretion to admit new evidence. Girvan J in *Lough Neagh Exploration Limited v Morris* [1999] NIJB 43 set out some guidelines for the exercise of this discretion. He said:-

- “1. Parties have a duty to put their case properly and fully before the Master and adduce all available evidence at that stage...
2. A party seeking to adduce fresh evidence before the judge in chambers on appeal should advance a sound reason for the failure to adduce that evidence before the Master.
3. A party seeking to adduce such additional evidence carries the burden of establishing that the interests of justice would be better served by the admission of additional evidence rather than by refusing to admit it.”

[26] I consider that the new evidence should be admitted in this case on the basis that the appellant has advanced a sound reason why this evidence was not adduced before the Master namely that the present argument about a shortfall sale had not been made before the Master. I also consider that it is in the interests of justice to admit the evidence because it enables the appellant to make an argument which may prevent him being evicted from his home.

[27] The primary question the court has to address is whether it has power to stay the order for possession granted by Master Hardstaff on the basis of a proposed shortfall sale by the mortgagor.

[28] This involves a consideration of the inter-relation of two areas of the law relating to a mortgage of a dwelling house, namely:

- (a) The circumstances in which the mortgagor is entitled to an order for sale of the mortgage property.
- (b) The circumstances in which the court has jurisdiction to stay an order for possession.

[29] At common law a legal mortgagee had the right to enter into immediate possession of mortgaged property once the mortgage was created (see *Four Maids v Dudley Marshall (Properties) Ltd* [1957] Ch 317) and this right was strictly protected as appears from the dicta of Russell J in *Birmingham Citizen's Permanent Society v Caunt* [1962] 1 All ER 163 at page 182, when he said:-

“...the legal mortgagee under an instalment mortgage under which, by reason of default, the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline to make the order or to adjourn the hearing, whether on terms of keeping up the payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. The sole exception to this is that the application may be adjourned for a short time to afford to the mortgagee a chance of paying off the mortgage in full or otherwise satisfying him...”

[30] As a result of the harshness the common law could cause Parliament intervened to curtail the mortgagee's right to possession by enacting section 36 of the

Administration of Justice Act 1970 as amended by section 8 of the Administration of Justice Act 1973. It provides as follows:-

“(1)Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2)The court—

(a) may adjourn the proceedings, or

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—

(i) stay or suspend execution of the judgment or order, or

(ii) postpone the date for delivery of possession,

for such period or periods as the court thinks reasonable.

(3)Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.”

[31] The effect of section 36 is that the court has power to suspend a possession order when a mortgagor wanted to sell the mortgaged property only if the court is satisfied that the sale proceeds will be sufficient to discharge the entirety of the mortgage debt - See *N& P Building Society v Lloyd* [1996] 1 All ER 630. Mr Watt accepted that section 36 did not come to the aid of the appellant.

[32] Similarly I consider that the inherent power of the court does not assist the appellant as the court’s inherent power, as set out by Russell J in *Caunt*, only permits it to adjourn or suspend an order for possession for a short period of time to allow the indebtedness to be discharged in full.

[33] The English cases cited by Mr Watt in which the mortgagor was permitted to effect a shortfall sale, founded their jurisdiction on the Law of Property Act. This Act does not apply in Northern Ireland and therefore I consider that these cases cannot be relied upon to give this court jurisdiction to make an order for a mortgagor to effect a shortfall sale.



[34] I am also satisfied that Order 88 does not give the court jurisdiction to order a shortfall sale by a mortgagor. Order 88 (1) provides as follows:-

“This Order applies to any action by a mortgagee or a mortgagor or by any person who has the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following released namely -

- (a) Payment of monies secured by the mortgage,
- (b) Sale of the mortgaged property.
- (c) Foreclosure.
- (d) Delivery of possession to the mortgagee by the mortgagor or by another other person who is or is alleged to be in possession of the property.
- (e) Redemption.
- (f) Conveyance of the property or its release from the security.
- (g) Delivery of possession by the mortgagee.
- (h) An enforcement order or time order where a regulated agreement is secured by a mortgage.”

[35] As appears from the provisions of Order 88 not all the reliefs are equally available to both parties. In particular under Order 88 (1) (d) the right to an order for possession applies only to a mortgagee and not a mortgagor.

[36] Order 31 (1) provides as follows:-

“1. Where in any cause or matter in the Chancery Division relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.”

[37] Although Mr Watt submitted that Order 31 (1) gave the court jurisdiction to order a shortfall sale by a mortgagor I reject this argument. Order 31 (1) is a rule of court made pursuant to the Judicature Act 1980. It is an enabling provision which gives the court a general power to order sale. It is to be contrasted to Section 36 which is a specific provision in primary legislation which sets out specifically the circumstances in which a court can suspend a possession order. I therefore consider that the general powers set out in Order 31 (1) must give way to the specific

statutory powers set out in section 36. As section 36 does not give the court jurisdiction to suspend a possession order on the basis that the mortgagor wants to effect a shortfall sale I consider that Order 31 (1) does not give it jurisdiction to make such an order.

[38] Further, I consider that Order 31 (1) does not provide the relief contended for by the appellant. Order 31 rule 1 sets out a general power of the court to order sale. Order 31 rule 4 under the heading, "*Mortgage, exchange or partition under order of court*" however provides:-

"(4) Rules 2 and 3 shall, so far as applicable and with the necessary modifications, apply in relation to the mortgage, exchange or petition of any land under an order of the court as they apply in relation to the sale of any land under such order."

[39] As appears Order 31 rule 4 does not refer to the power of sale set out in Order 31 rule (1). I consider that by not referring to rule 1 it is thereby recognising that orders for sale of mortgaged premises are made under a different provision, namely Order 88. Accordingly I consider that Order 31 does not give the court power to order a shortfall sale in respect of mortgaged property by a mortgagor.

[40] If I am wrong about the court's jurisdiction to order sale under Order 88 and Order 31 and these provisions give the court a similar power to section 91 (2) of the Law of Property Act 1925, I nonetheless consider that this court should not follow the decisions in *Palk* and *Barrett* for a number of reasons.

[41] Firstly, I consider that *Palk* was wrongly decided. In particular section 36 was not argued before it. I consider that if section 36 had been argued the court may have considered that its powers to order sale under the 1925 Act were restricted to circumstances where the sale would pay off the entirety of the debt.

[42] Secondly, I consider that there is a danger in the *Palk* approach as noted by Thompson "*When Mortgage Property Should Be Sold*" 1998 Conv 125 at 132:

"What this seems to say is that in any case of negative equity a mortgagor can expect the court to order a sale of the property against the mortgagee's will thereby depriving it of its status of being a secured creditor and moving it to the dubious prospect of successfully pursuing a personal action against the erstwhile mortgagor. This seems very difficult to justify."

I therefore do not consider that this court should follow *Palk*.

[43] Thirdly, I consider that *Palk* is not authority for the proposition that the mortgagor can sell at a shortfall in circumstances where the mortgagee intends to sell the property. This was the view expressed by Millett LJ in *Krausz* when he said at page 30:-

*“Palk v Mortgage Services Funding Plc* was a case in which the mortgagee had no wish to realise its security in the foreseeable future, whether by sale or foreclosure. It established that in such a case the mortgagor might obtain an order for sale even though the proceeds of sale would be insufficient to discharge the mortgage debt. It does not support the making of such an order where the mortgagee is taking active steps to obtain possession and enforce its security by sale. Still less does it support the giving of the conduct of the sale to the mortgagor in a case where there is negative equity, so that it is the mortgagee who is likely to have the greater incentive to obtain the best price and the quickest sales.”

In the present case I am satisfied that the mortgagee is taking active steps to obtain possession to enforce its security by sale and accordingly *Palk* does not apply.

[44] Fourthly, insofar as *Barrett* is authority for the proposition that the court can order a shortfall sale in circumstances where the mortgagee wants to sell the premises, I consider *Barrett* was wrongly decided. This case has been the subject of criticism by the English Court of Appeal in *Cheltenham and Gloucester plc v Krausz* [1997] 1 All ER 21. Phillips LJ was very critical of the *Barrett* decision and at pages 26 and 27 set out a number of difficulties arising from that decision. He concluded by saying,

“It seems to me that the procedure followed and the decision reached in *Barrett’s* case tend fundamentally to undermine the value of the mortgagee’s entitlement to possession.”

Similarly Millett LJ in relation to *Barrett* said at page 30:

“I have serious doubts whether that case was rightly decided”

I accept the criticisms made by Phillips LJ and Millett LJ in *Krausz* about *Barrett* and accordingly I consider that this court should not follow it.

## **Conclusion**

[45] Consequently I am satisfied that the only basis upon which this court can stay proceedings is on foot of Section 36 of the Administration of Justice Act and under its inherent jurisdiction. In this case the mortgagor wants to sell the mortgaged premises but there will be insufficient funds to discharge the mortgage debt in its entirety. Accordingly, as was accepted by the appellant he is unable to fulfil the conditions set out in Section 36. Accordingly I refuse his application for a stay and therefore dismiss his appeal.

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