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| **Neutral Citation No: [2018] NICh 23**<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **McB10731**<br><br>*Delivered:* **28/06/2018** |

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

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**CHANCERY DIVISION**

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**SWIFT 1ST LTD**

**Plaintiff**

**v**

**JOHN CHARLES QUINN**
**and**
**ITA QUINN**

**Defendants**

_____

**McBRIDE J**

**The Application**

[1] This is an application by the Swift 1st Ltd ("the bank") whereby it seeks leave of the court to enforce the repossession order ("the repossession order") made by Master Ellison on 18 June 2007, when he ordered as follows:

> "UPON THE APPLICATION of the plaintiff by originating summons filed on 6 December 2006
>
> …
>
> AND Donna Quinn and Ciaran Quinn having been sent notice as occupiers,
>
> AND UPON HEARING the solicitor for the Plaintiff, the defendants not appearing and not being represented,
>
> IT IS ORDERED that each of the defendants do within 28 days after service by prepaid ordinary post upon the First Defendant and by personal service upon Second

> Defendant of this Order, deliver to the Plaintiff possession of the property described in the schedule.
>
> BUT this Order is suspended and is not to be enforced without the leave of the court while the defendants pay to the Plaintiff equal sums of £1,600 on or before the last day of every calendar month in respect of both the normal monthly instalments becoming payable under the mortgage dated 16 March 2006 and the arrears thereof now due, the first such payment to be made on or before 30 June 2007.
>
> …
>
> **Schedule**
>
> The premises situate at and known as 196 Bush Road, Dungannon, County Tyrone BT71 6EZ."

[2] The matter was listed for hearing on 28 June 2018. After hearing submissions by Mr Gibson who appeared on behalf of the bank and from Mr Quinn who appeared as a litigant in person with the assistance of a McKenzie Friend, I gave an extempore judgment setting out briefly my reasons for granting the plaintiff's application.

[3] The defendant thereafter issued a Notice of Appeal to the Court of Appeal. The Court of Appeal asked for a transcript of my extempore judgment. The administrative staff had difficulty in transcribing the judgment, due to a fault in the recording. I have therefore now prepared this written judgment setting out, in full, the reasons for my decision to grant the bank leave to enforce the repossession order.

**History of Proceedings**

[4] In or around March 2013 the bank applied to the court for leave to enforce the repossession order on the ground that the defendants had breached the terms of the order by reason of default in making the payments set out in that order. The bank did not issue a summons seeking leave to enforce the repossession order but rather wrote a letter to the Court office, accompanied by an affidavit, asking the court office to list the case before the Master. According to Mr Gibson this was the normal practice at that time.

[5] This application was grounded on the affidavit of Michael Bennett, Solicitor sworn on 5 March 2013. In this affidavit he averred that the possession order was served on the first-named defendant by ordinary first class post and served personally on the second-named defendant. He further averred that the defendants had failed to comply with the terms of the stay provided in the repossession order in that the required payments as set out in the repossession order had not been maintained. He then listed the payments due and the payments which had been

made from June 2007 to March 2013 and averred that the arrears due and owing in respect of this period totalled £289,136.60 as of March 2013.

[6] In response to that affidavit Mr Quinn filed an affidavit dated 18 June 2013 in which he set out a number of grounds of defence the making of the repossession order. In particular he averred that the mortgage deed was defective and unenforceable and that he had a counterclaim against the plaintiff for breach of its statutory duties relating to its conduct in respect of the lending. Mrs Quinn also filed an affidavit sworn in October 2013 in which she opposed the plaintiff's application on similar grounds and in addition averred that the mortgage was procured by reason of undue influence. She sought, *inter alia,* the following relief:

> "(a) That the order for possession made on 18 June 2007 be set aside.
>
> (b) An order setting aside a mortgage created between the plaintiff and the first and second defendants.
>
> (c) Delivery up of the said mortgage for cancellation…."

[7] In light of the contents of the affidavits filed by the defendants the court directed that the summons be converted to a writ action and thereafter the parties filed pleadings in the normal way. This case then had a protracted case management history. Initially it was managed on the basis that the bank's application to enforce the repossession order would be heard together with the defendant's defence to the making of the repossession order and his counterclaim for damages. Ultimately, when I reviewed the case on 15 November 2017 all the parties agreed that, notwithstanding the approach taken to date, the defendants needed in the first instance to have the repossession order set aside and therefore needed to first seek leave to extend the time for appeal, as the time for appeal was long since sped.

[8] Accordingly, on 17 November 2017 the defendants issued a notice of appeal against the making of the repossession order and on the same date applied for an extension of time to prosecute this appeal.

[9] The application for an extension of time to appeal was heard and determined on 16 February 2018. The defendants were each represented by counsel. After hearing all the submissions I refused to extend time to appeal on the grounds that there was inordinate delay; the defences raised were known about in 2013 and there was no merit in any of the proposed defences. The order refusing an extension of time to appeal has not been appealed by any of the parties.

[10] After refusing to extend time for appeal on 16 February 2018 I directed that the defendants be at liberty to file further affidavit evidence. The purpose of permitting the defendants leave to file such further affidavit evidence was to enable

each of them to set out whether they disputed the bank's case that they had have breached the terms of the repossession order and to further set out the basis upon which they contended the court should exercise its discretion to either amend the terms of the repossession order or to otherwise impose a stay on the repossession order. The bank's application for leave to enforce the repossession order was then listed for hearing on 13 April 2018.

[11] When the matter was listed for hearing on 13 April 2018, it was adjourned to 10 May 2018 as the second defendant's solicitors indicated they wished to apply to come off record. It is unclear from the court files whether such an application was ever made but when the matter was relisted on 10 May 2018 before Sir Ronald Weatherup, both Mr and Mrs Quinn indicated they had dispensed with their respective legal teams and appeared as litigants in person. They requested that Mr Scullion be appointed to act as their McKenzie Friend. This application was granted by Sir Ronald Weatherup and the case was further adjourned to allow Mr Scullion time to consider the papers.

[12] On 29 May 2018 the defendants lodged a number of documents in court including a "NOI-Notice of Interest", "SOI-Statement of Interest", "Memorandum of Trust Deed" and "Special Delivery Receipts".

[13] When the case was relisted on 7 June 2018 Horner J directed as follows:-

> "(1) The defendant shall make any amendment to his skeleton argument on or before 15 June 2018,
>
> (2) This case shall be listed for hearing on 28 June 2018 at 10.30 am."

[14] On 15 June 2018 the defendants lodged an affidavit sworn by them on 15 June 2018. On 26 June 2018 they lodged a "Notice of application for private hearing" and on 28 June 2018 the defendants lodged a "Memorandum of Trust" dated 26 June 2018 and a "Deed of Power of Attorney" dated 21 May 2018.

**Hearing on 28 June 2018**

[15] Mr and Mrs Quinn appeared as litigants in person assisted by Mr Scullion as their McKenzie Friend. Mr Gibson appeared on behalf of the bank.

[16] Mr Scullion applied to the court to have a right of audience on the basis that he had been given this right on foot of the Deed of Power of Attorney dated 21 May 2018. I refused his application on the basis set out in *Fulton v AIB (unreported)* that a litigant in person's right to represent himself in court is a personal right and therefore cannot be assigned to a third person either by way of Deed of Power of Attorney or otherwise. Mr Scullion then applied to be granted a right of audience under the inherent jurisdiction of the court. He submitted that the defendants were

unable to run the case themselves due to a lack of knowledge and he further submitted that the court would treat a McKenzie Friend more leniently than a solicitor or barrister. Mr Gibson opposed the grant of a right of audience on the basis that the right of audience was only given to lay persons in exceptional cases. He further submitted that both Mr and Mrs Quinn had the benefit of legal aid and notwithstanding this had dismissed their legal teams and chosen to be litigants in person. He submitted that the sole reason they had done this was to prolong the case and indeed they had been successful in this pursuit to date as the case had already been further adjourned to allow Mr Scullion time to read the papers.

[17] The Judicature (NI) Act 1978 ("the 1978 Act") sets out those who have a right of audience in the High Court. Outside of this scheme the court has an inherent power to grant rights of audience. Mr Scullion does not qualify under the statute and accordingly he is only entitled to have such a right if the Court exercises its discretion to grant him such a right under its inherent jurisdiction. This jurisdiction had been considered in a number of cases, most recently in *Fulton.* As appears from this jurisprudence a right of audience will only be granted in exceptional circumstances. Mr Scullion submitted that a right of audience should be granted to him because he believed the court would treat him more leniently than it would treat a legally qualified barrister or solicitor. That submission is entirely misconceived. This court treats all representatives in the same way in accordance with its duty to ensure a fair trial. No exceptional circumstances were brought to the attention of the court by Mr Scullion why he should be granted a right of audience. Accordingly, I refused the application, as to do otherwise would be to drive a coach and horses through the parliamentary intention set out in the 1978 Act.

[18] The defendants also sought a private hearing. Mr Quinn sought this on the basis the case involved equity. Given that the only parties present in the court were the parties and court officials he agreed that the case was de facto private and he did not therefore pursue this application further.

**Submissions**

[19] Mr Gibson on behalf of the bank submitted that the defendants had failed to comply with the terms of the repossession order and specifically had not complied with the terms of the suspension and accordingly the court should grant leave to enforce the repossession order. He further submitted that the defendants had failed to set out any basis upon which the court should exercise its discretion to further stay or suspend the repossession order.

[20] Mr Quinn referred to the documents he had handed into court and submitted that he had "tendered payment by way of equitable asset on 16 May 2018 as per the Recognition of Trust Act 1987" and submitted that the court should dismiss the bank's application.

**Consideration**

[21] Where a lender seeks an order giving liberty to enforce an existing repossession order there are a number of procedural steps the lender should take. These are set out in detail in O'Neill, The Law of Mortgages in Northern Ireland, SLS (2008) at paragraphs 10.161 – 10.165.

[22] Whilst the bank did not issue a summons in this case a letter was sent to the court office, in accordance with the practice at that time, asking for the case to be listed for the purposes of seeking leave to enforce the repossession order and this letter was accompanied by an affidavit. Notwithstanding the fact no summons was issued, I am satisfied that the defendants had notice of the application and no objection was ever taken by the defendants as to the court's jurisdiction to hear and determine the bank's application. Accordingly, I am satisfied the court had jurisdiction to hear and determine the application.

[23] I was further satisfied that all the necessary proofs for this application in respect of service were in order. In addition counsel for the bank advised the court at the hearing that the amount due and owing as of the date of hearing was £289,138.17, there were arrears of £99,619.14 and a current monthly instalment of £1,389. The last payment was a payment of £100.40 made on 4/5/18 from the benefits agency and advised that the property was in negative equity.

[24] The defendants submitted that they had tendered payment which was now in the possession of the bank and referred to the following documents as proof of tendered payment:

(a) A Memorandum of Trust. The Memorandum of Trust states that the "Tut-Tut Private Trust 14018jc" has been created voluntarily and in writing by the settlors (the defendants). The trustees of the trust are named directors of the bank and the document declares that they are "accountable to manage, employ or dispose of the equitable asset in accordance with the terms of the trust and the special duties imposed upon them by the law of the settlors". It further sets out that in the event of breach of the trust by the trustees the settlors appoint "Eamonn; doing business as (dba) MR EAMONN SCULLION …as a special trustee to compel specific performance of the delinquent trustees." The document further states that as the trust complies with the 3 rules of certainty it is a valid trust. The document is then signed by the defendants. It is not signed by anyone on behalf of the bank.

(b) A NOI (Notice of Interest). This document was signed by both defendants as settlors and dated 16 May 2018. In it the settlors declared that all interest in the "debt title 06/111558…are withdrawn and further provided that "all rights, titles, interest and possession to the property with title to the equitable asset, with special title:180514jc….and is reserved in the private for specific confidential purposes only."

(c) A SOI (Statement of Interest). This document purports to assign trust property title number 180514jc to the trustees in the "Tut-Tut Private Trust 140518jc. This document was signed by each defendant on 16 May 2018.

(d) A Deed of Trust dated 16 May 2018. In this document the defendants purport to assign the Tut-Tut private trust 140518jc, "for the special specific purpose of the trust as set out in the private express trust declaration".

[25] When determining an application for liberty to enforce a repossession order the court must first determine whether the bank has established that the terms of the suspension set out in the repossession order have been breached. If so the court must then go on to consider whether to it should exercise its discretion to stay, suspend or otherwise postpone the order of delivery of possession in accordance with its powers under the Administration of Justice Acts or inherent jurisdiction.

[26] I have considered the documents relied upon by the defendants as evidence of payment being tendered. I consider that the documents are legally meaningless and it is unclear to me how the documents constitute "tendering payment". Further, these were unilaterally entered into by the defendants and were not signed by the bank. They are not therefore binding on the bank. In addition the bank's evidence is that payment has not been tendered and has submitted sworn evidence that the debt remains outstanding.

[27] I am satisfied on the basis of the evidence of Mr Bennett, which is not contradicted by the defendants, that mortgage arrears have accrued as set out in his affidavit and therefore the terms of the suspension of the repossession order have been breached. I am further satisfied that the documents submitted by the defendants do not show payment was in fact made and find that these documents were compiled in a deliberate attempt by the defendants, in particular Mr Quinn, to delay and obstruct the bank in enforcing its security.

[28] In accordance with section 36 of the Administration of Justice Act 1970 as amended by section 8 of the Administration of Justice Act 1973 the court has power to adjourn, stay, suspend or postpone delivery of possession and these powers can be exercised subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage as the court thinks fit, "*if it appears to the court that in the event of the court exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage…*".

[29] Although the court gave the defendants an opportunity to file affidavit evidence setting out the basis upon which they opposed the bank's application and to set out any basis upon which the court should stay, suspend or postpone delivery of possession of the property, no such evidence was ever provided by the defendants to the court. In the absence of any proposals for payment of the debt there is no evidence before the court that, "*the mortgagor is likely to be able within a reasonable*

*period to pay any sums due under the mortgage…"* Accordingly, the court is unable to exercise the powers available to it under the Administration of Justice Acts to adjourn, suspend or postpone delivery of possession.

[30] In addition to its powers under the Administration of Justice Acts there is an argument that the court may have a discretion in possession actions under section 86(3) of the 1978 Act as it states a court acting on equitable grounds may stay any proceedings subject to such conditions as it thinks fit. Professor Wallace in "Mortgagees and Possession" (1986) 37 NILQ 349 considers that this section merely provides a statutory basis for a pre-existing equitable powers and that before this enactment there were no equitable powers to defer the lender's rights to possession and hence it cannot assist a mortgagee. In light of this and in light of the fact the statutory powers under the Administration of Justice Acts are not being activated in this case, I consider that the court should not exercise any inherent power it may have to stay these proceedings for up to 28 days.

[31] Accordingly, I granted the bank's application.