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

Delivered: **09/09/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

SWIFT ADVANCES PLC

Plaintiff;

and

JUSTIN HEANEY

Defendant.

MASTER ELLISON

1. This is an application for possession of a dwelling pursuant to a charge registered as a burden on a Land Registry folio. The dwelling is the defendant's home and he is its registered owner. The charge secures principal and interest due under a regulated consumer credit agreement within the meaning of the Consumer Credit Act 1974 ("the 1974 Act") described as a Fixed Sum Credit Agreement ("the agreement") which was executed by the defendant on 29 November 2007 and signed for and on behalf of the plaintiff on 5 December 2007. The agreement and charge secured an advance of £16,600 together with a broker's fee of £1,000, a loan administration fee of £450 and interest. The agreement states a variable interest rate of 15.39 per cent per annum, an APR of 18.2 per cent (variable) per annum, a total charge for credit of £54,401 and a monthly repayment figure of £236.67 payable over 300 months or 25 years. As at the date of hearing on 15 May 2013 the arrears on the agreement and charge (in essence an instalment mortgage) were stated to be £10,173.48, the overall balance £39,055.70, the contractual monthly instalment £236.70 and the last previous payment £270.00 received on 15 September 2011. The rate of interest has been 15.39 per cent per annum at all relevant times since inception of the mortgage. The defendant was nineteen years old when he entered into the transaction and is the sole occupier of the dwelling, which he bought at an uncertain date not long before the agreement and charge the subject of these proceedings.

2. The defendant defends and counterclaims pursuant to the provisions of sections 140A and 140B of the 1974 Act. He claims that an unfair relationship exists because of the following as set out at the end of his counsel's skeleton argument:-

> "28. The Defendant's case then is that an unfair relationship did in fact exist between the parties down to a number of factors.
>
> 29. The overly aggressive actions of the Plaintiff's broker which pressurised the Defendant into taking a loan which he did not want or need.
>
> 30. The lack of information given to the Defendant at the time of signing the loan to make him aware he would be paying the broker a commission and paying for administration fees out of the amount loaned.
>
> 31. The lack of a credit check by the Plaintiff who (sic) were happy to give a loan unsuited to the Defendant because there was a property to act as security despite how this may have affected the Defendant.
>
> 32. The unfair interest rate imposed by the Plaintiff which it is the Defendant's submission is much higher than the norm for a loan of this type to the Defendant's detriment."

3. On the hearing of this matter David Dunlop of counsel appeared for the plaintiff instructed by Robert G Sinclair & Co and Aidan Barry Corrigan of counsel appeared for the defendant instructed by McDermott, McGurk and Partners. After initially reserving judgment I asked counsel to address me on concerns I had given that there was no equity whatsoever for the plaintiff as second mortgagee. I shall deal first with the claim that an unfair credit relationship exists.

<u>Is there an unfair credit relationship?</u>

4. Section 140A(1) and (2) of the 1974 Act provides as follows:-

> "(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following -

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement);

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

5. The court therefore has a wide discretion to take into account such matters as it may consider relevant when assessing the fairness of the relationship between the creditor and the debtor. If the court finds that the credit relationship is unfair, it has sweeping powers under section 140B(1) which reads as follows:-

"(1) an order under this section in connection with a credit agreement may do one or more of the following –

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made between any persons".

6. Where a creditor or surety alleges that the relationship between the creditor and debtor is unfair to the debtor, the onus is on the plaintiff to satisfy the court that the credit relationship is fair in the particular case: section 140B(9).

7. The defendant alleges that he was unfairly pressurised by a broker, whom I shall call Mr B, into entering into the transaction. There is no evidence from Mr B himself and he is neither a party nor a notice party to these proceedings. However, accepting the defendant's evidence at face value, Mr B (whose firm had entered into an accreditation agreement with the lender, but according to established principles would be regarded as the agent of the borrower, not the lender) contacted him about six or seven times "over a few months" and persisted in trying to persuade him to borrow much more than the £4,000 he had had in mind when he initially approached Mr B. In the course of these contacts the broker persuaded the defendant to specify home improvement as a purpose of the loan transaction to help ensure that the plaintiff would agree to the loan. Accordingly the application form for the loan specifies its purpose as "Consolidation and Improvements" when the true reason for the application was the defendant's wish to buy a car and pay off (or "consolidate") some debt, including arrears of one monthly instalment on his first mortgage to Platform Home Loans Limited ("Platform"). Mr B finally persuaded Mr Heaney to agree to take out a loan of £16,600 by telling him that he would be "debt free" within a year, as he could then arrange a remortgage which would leave him with one small mortgage payment to meet.

8. The defendant further alleges that he signed documents put before him by Mr B without any opportunity to read them and that he has "seen documentation" which was signed by him completed in a hand other than his own which he believes had been completed after his signature and not in his presence. He accepts that he signed documentation (of which there is more than one example) to the effect that he should obtain legal advice in relation to the loan, but adds that he was "only aware of this now upon reading the documentation".

9. Assuming his evidence to be accurate, the defendant may have a legitimate complaint against the broker, who should have been acting in the best interests of the borrower. I refer to my comments about the regrettable standards of many mortgage brokers in my judgments in Swift Advances Limited v Marron (2012) NI Master 9 in which I am critical of the extent of this lender's reliance on mortgage brokers to discharge functions for which they may not be properly trained or informed, and in Melbourne Mortgages Limited v Berry (2013) NI Master 3 in which I found the lender (that plaintiff's predecessor in title, Prestige Credit Limited), the broker and the borrower in that case each to have been deceitful. In the present case the plaintiff is not relying on the defendant's admission of involvement in deceit by his signature of a loan application form mis-stating – at his broker's suggestion – one of the purposes of the loan.

10. The plaintiff is correct to rely on the fact that there was ample opportunity over a period of some six weeks between signature of the application form and signature of the agreement and charge for the defendant to decide not to proceed with the matter. The plaintiff also relies, again rightly, on its compliance (albeit through the services of the broker, who in this respect can only have been regarded as an agent of the lender) with the provisions of the 1974 Act requiring unexecuted 'consideration copies' of the agreement and charge to be sent to the defendant at least 8 days before signature by him of the agreement and charge. As I pointed out in Marron, a notice of right to withdraw should have been endorsed upon the consideration copies and made plain to the borrower (if he elected to read it) that a simple phone call to the broker or lender would have been sufficient if he decided not to proceed with the transaction. These arguments, including compliance with this key requirement of the 1974 Act for the protection of borrowers in situations such as that suggested by the defendant's allegation of undue pressure from the broker, outweigh those of the defendant on this point. Moreover there is no evidence that the plaintiff was fixed with notice of any undue influence, deceit or other wrongdoing on the part of the broker concerned.

11. The defendant further relies on a lack of information to make him aware that he would be paying the broker a commission and paying for administration fees out of the amount owed. Again, the broker may be at fault. The relevant OFT guidance, that on Non-Status Lending – guidance for lenders and brokers (1997), is very clear that the broker should apprise the intending borrower of his fee or commission as soon as possible in advance of signature of the mortgage or charge and in writing. The OFT guidance appears to place a responsibility on the lender to endeavour to ensure that brokers comply with this requirement, but the responsibility for compliance rests primarily with the broker and the relevant Broker Accreditation Agreement dated 10 July 2006 at paragraph 7.4 includes this:-

> 'The broker must make (sic) it clear to the borrower the purpose and nature of any fees payable, when they will be paid and whether they are refundable.'

As I have indicated, the OFT guidelines suggest this should be put further by way of written notification from the broker at an early stage and I agree.

12. However, in the present case the amount of the broker's fee is stated as £1,000 quite prominently on the front page of the agreement, as are the loan administration fee of £450 and the various default charges payable if the borrower fails to make any payments due or otherwise breaks any terms of the agreement. Plainly the borrower ought to have read these provisions of the agreement before he signed it – moreover, on the material before me he had ample opportunity to do exactly that by reason of getting consideration copies of the agreement and charge at least a week prior to the date on which he signed those documents.

13. The defendant also complains that the plaintiff did not carry out a credit check but relied on his own certification of income and the value of the dwelling to "act as security despite how this may have affected the Defendant". The OFT Guidelines I have specified – issued as long ago as 1997 - are plainly against asset-based lending and appear to require (as I point out with more particularity in Berry) consideration of outgoings (and therefore actual available income) as well as vouched income. It is however my view that reliance on self-certification of income does not give rise to an irrebuttable presumption that a mortgage agreement or credit relationship is unfair. It constitutes irresponsible selling and (in cases where sections 140A and 140B might apply) at least points in the direction of an unfair credit relationship, but much depends on what actually happens in a particular case. For example, the plaintiff points out that regular monthly instalments were maintained for a significant time – just over a year - by the defendant until he encountered a supervening business setback resulting in a reduction of income. I agree with plaintiff's counsel that it would be hard to see how even a lender who had conducted due diligence about affordability could have predicted that development. Though the defendant in a phone conversation with an officer of the plaintiff attributed the setback to bad weather conditions, the loan was taken out shortly before the Downturn which plainly has not been good generally for small businesses. I take judicial notice that most lenders and borrowers around the time this mortgage was taken out did not foresee the Downturn and I believe this plaintiff, like this borrower, was no exception. In slight mitigation of the plaintiff's position in the present case, it commissioned a credit report dated 4 December 2007 from Equifax that revealed nothing adverse save the first mortgage to Platform of which it had already been notified. There were arrears on that first mortgage which at the amount of one

monthly instalment were relatively modest but were known to the lender and should have encouraged it to carry out a proper analysis of income genuinely available to service the loan commitment. Though in the events which happened in this case I find that the lender's failure to assess affordability for the loan adequately did not cause unfairness, I regard the steps taken to check such affordability as having been well short of satisfactory lending practice and as having the potential to cause or contribute to unfairness in other cases.

14. That leaves me to consider the defendant's claim that the contractual interest rate is unfairly high – "much higher than the norm for a loan of this type". Certainly, it strikes me as being, at "15.39% variable", on the high side, well above the rates customarily charged by high street lenders in late 2007. The APR is stated on the agreement as "18.2% APR (variable)" and at paragraph I of the terms and conditions the lender states "We have the power to change the rate of interest we charge under this agreement to reflect a change in the cost of our funds". The rate of interest has remained unchanged since inception and the plaintiff does not explain why in its affidavit evidence – and come to that, the defendant does not appear to rely on that point (at least expressly) notwithstanding the dramatic drop in the perceived cost of credit as reflected in current bank base rates (Bank of England base lending rate having dropped from 5.75 per cent at the time of the mortgage to 0.50 per cent per annum in recent years). It may be that Mr B, assuming he had the relevant broker accreditation, could have negotiated cheaper borrowing elsewhere. Indeed the OFT Guidelines I have mentioned emphasise that brokers have a duty to exercise their discretion to the benefit of prospective borrowers. For its part the plaintiff points to the risks of second charge lending. This point is highlighted by the complete lack of equity for its charge to bite on in the present case, but the plaintiff's evident willingness to rely on self-certification of income can only serve to heighten the risk generally. For my own part, while I consider the interest rate expensive it is not of such an order of magnitude that I find it either exorbitant or unfair. The remaining paragraphs of this judgment will bear out plaintiff's submission that it lends in high risk situations and I take judicial notice that this lender and its borrowers have been victims of the negative equity problem so prevalent in this jurisdiction since the Downturn in many other cases I have heard in recent years.

15. Though not relied on in this context by counsel for the defendant, my conclusions on the next topic come close to establishing an unfair credit relationship, but in my opinion do not quite do so – even when taken in conjunction with my conclusion that the mortgage was sold irresponsibly.

<u>Should an order for possession be made in the absence of equity?</u>

16. It is clear from (a) the defendant's first affidavit (unchallenged on the point) (b) the plaintiff's solicitors' representations as to drive-by valuations commissioned by their client, and (c) the amount outstanding on the first mortgage that not only is the plaintiff without any prospect of equity on a sale (beyond perhaps some distant possibility), but the first mortgagee Platform is itself facing severe negative equity, the current estimated forced sale value being approximately half of the figure due to it. The defendant's own view of the value of the dwelling in his affidavit of 25 June 2012 based on a valuation he had obtained was £60,000, but at a review hearing on 19 October 2012 the plaintiff's solicitor reported that the most recent valuation conducted for her client (presumably on a forced sale basis) was £43,900 and that she understood the amount then due to Platform was just under £100,000. The defendant and his father also attended but no legal representative appeared for the defendant at that review. This may go some way to explaining why my indication of concern on the nil equity point including the viability of any order for possession do not appear to have been picked up by the defendant's legal team until I recalled that point and drew it to the attention of both sides some weeks after the brief hearing of submissions on 15 May.

17. Accordingly I fixed a hearing for further submissions which I invited through the Chancery Office as to the implications of the fact that from the evidence and other material before me there would be no equity whatsoever available for the plaintiff in the event of a sale of the mortgaged property. I directed further skeleton arguments and that submissions should have regard, for example, to the court's duty under Schedule 7 to the Land Registration Act (Northern Ireland) 1970 ('Schedule 7') not to make an order for possession unless it would be 'proper' to do so, and the court's duty under section 3(1) of the Human Rights Act 1998 ('section 3(1)') to read and give effect to legislation so far as possible in a manner compatible with Convention rights.

18. Something may have (as it were) got lost in translation, but the plaintiff's counsel's skeleton argument did not mention either Schedule 7 or section 3(1) - both of which are important provisions of domestic legislation - at all, asserting instead that I had raised Article 8 of the Convention as a bar to enforcement of plaintiff's charge and "would effectively be denying the Plaintiff its contractual and legal entitlement (my emphasis) based on the contention that the enforcement of these legitimate contractual entitlements was offensive to Article 8 of the ECHR". As I understand this submission, if I refuse counsel's client an order for possession I would, in human rights law parlance, be erroneously presuming to apply a Convention right "horizontally" (ie in a case where neither party was a public authority) and "directly" (ie without applying the right through the vehicle of a domestic statutory or common law right). For reasons I will state later in this judgment, it is not strictly necessary for me to rely on Convention rights at all in order to

justify the conclusions I have reached in this case. My position brings to mind the following sentence from Girvan J's judgment in an insolvency matter in The Official Receiver for Northern Ireland v Kerr (2002) NI Ch 8:-

> "While it may be tempting to gambol in the apparently sunlit uplands afforded by Convention rights, before we go there we must wind our way through the more mundane minutiae of domestic insolvency law which in fact leads to a decisive answer to the applicant's claim unaffected by Convention rights."

Later in his judgment however he pointed out (in, I think, an obiter dictum) that the "Convention rights of the debtor under Article 6 give added emphasis to the requirement that decisions affecting his property rights should be taken expeditiously".

In the present case I believe that, because I must address plaintiff's counsel's submissions about the relevance of Convention rights to mortgage actions for possession generally, my approach is somewhat different from that of Lord Justice Girvan in that, although consideration of Convention rights merely gives "added emphasis" to the conclusions I have reached via domestic law principles, I shall deal with the Convention points first.

19. Mr Dunlop relies on four case-law authorities to support his proposition that "it is well established as a matter of principle that Article 8 of the Convention is not engaged in relation to the enforcement of secured loans". I have read all four cases carefully and none of them is consistent with that statement of principle, which would clearly need to be qualified significantly. They involve a 1997 judgment of the Commission of the European Court of Human Rights, a 2004 judgment of the House of Lords in the context of social housing legislation, and two judgments of the High Court of England and Wales. I quote paragraphs 5 to 8 inclusive of Mr Dunlop's skeleton argument:-

"Article 8 of the Convention

5. It is well established as a matter of principle that Article 8 of the Convention is not engaged in relation to the enforcement of secured loans. Indeed this issue has been considered by the European Court on Human rights in the decision of Wood v United Kingdom (1997) 24 EHRR 69, at 70-71 where the commission observed:-

> "*In so far as the repossession constituted an interference with the applicant's home, the Commission finds that this was in accordance with the terms of the loan and the domestic law and was necessary for the protection of the rights and freedoms of others, namely the lender. To the extent that the applicant is*

deprived of her possessions by the repossession, the commission considers that this deprivation is in the public interest, that is the public interest in ensuring the payment of contractual debts, and is also in accordance in the rules provided for by law."

6. This point is further enhanced by the later decisions of the House of Lords in Harrow London Borough Council v Qazi [2004] 1 AC989. Lord Scott observed at 1024-5.

"… social housing legislation of this character is well justifiable on public interest grounds provided for by the article: James v. United Kingdom (1986) 9 EHRR 123. If, on the other hand, the tenant has no right to remain in possession as against the landlord he cannot claim such right under article 8. To hold otherwise, to hold that Article 8 can vest property rights in the tenant and diminish the landlord's contractual and property rights, would be to attribute to Article 8 an effect that it was never intended to have. Article 8 was intended to deal with the arbitrary intrusion by State or public authorities into a citizen's home life. It was not intended to operate as an amendment or improvement of whatever social housing legislation the signatory state had chosen to enact. There is nothing in Strasbourg case law to suggest the contrary."

7. Hart J. observed that in Barclays Bank plc v. Alcorn (unrep) [2002] EWHC 498 Ch, where he said:

"It seems to me however, that her general submission on the effect of the Human Rights Act in relationship to a mortgagee's action for possession is correct, namely that the matter is regulated by s.36 of the Administration of Justice Act 1970 in a way which draws a balance which Parliament was entitled to draw between the interests of the occupants of dwelling houses and the interests of mortgagees, and does so in a manner which is proportionate and reasonable, and allows the court, in the exercise of its discretion, to apply criteria of reasonableness and proportionality in either granting or denying the mortgagee its remedy."

8. Briggs J held as follows in Horsham Properties Group Ltd v Clark and another [2008] All ER (D) 58 (Oct) at paragraph 44:-

"In my judgment, any deprivation of possession constituted by the exercise by a mortgagee of its powers under section 101 of the Law of Property Act after a relevant default by the mortgagor is justified in the public interest, and requires no

> *case-by-case exercise of a proportionality discretion by the court, for the following reasons. First, it reflects the bargain habitually drawn between mortgagors and mortgagees for nearly 200 years, in which the ability of a mortgagee to sell the property offered as a security without having to go to court has been identified as a central and essential aspect of the security necessarily to be provided if substantial property based secured lending is to be available at affordable rates of interest. That it is in the public interest that property buyers and owners should be able to obtain lending for that purpose can hardly be open to doubt, even if the loan-to-value ratios at which it has recently become possible have now become a matter of controversy."'*

(Emphasis by underlining added.)

20. The above passages from the judgments relied on by plaintiff's counsel - and particularly the parts I have underlined - are consistent with the main qualifications contained in Article 8, ie that any interference with the home must be in accordance with the law (domestic law) and necessary in a democratic society for protecting the rights and freedoms of others. The court has a duty pursuant to section 6 of the Human Rights Act as a public authority to respect Convention rights and may be acting unlawfully if it does not do so. Therefore it might find itself considering the engagement of Article 8 "horizontally", ie where neither party is a public authority. As a court, it also must pursuant to section 3(1) read and give effect to legislation, whether primary or subordinate, so far as possible in a manner compatible with Convention rights. Therefore the court is likely to find itself considering how domestic legislation relating to the rights of secured lenders and borrowers should be interpreted having regard to the requirement to do so, so far as possible, compatibly with the often competing Convention rights of the parties (and in some circumstances, the rights of others).

21. None of the authorities (save perhaps Qazi in quite another context) cited by the plaintiff's counsel Mr Dunlop is binding on a court in this jurisdiction. However I consider myself bound by the decisions of Chancery Judges in this jurisdiction. In that capacity Mr Justice Girvan stated the following in Northern Bank Limited v Brolly [2002] NICh 7 (a bank's application for sale in lieu of partition on foot of an order charging land, which is of course a species of charge):-

> "Under article 8 of the Convention the court must respect the parties' rights in relation to their home. Where a judgment creditor seeks an order for possession and sale of property jointly owned by the judgment debtor and his spouse the court must be alive to the

article 8 rights of the debtor and, in particular, the spouse whose interest is not the subject of the judgment security."

(Emphasis added)

22. The domestic legislation most commonly relied on in mortgage possession proceedings (except where the loan agreement is a regulated consumer credit agreement within the meaning of the Consumer Credit Act 1974 or where a dwelling is not involved) is the above-mentioned Administration of Justice Act 1970, section 36, as varied by the Administration of Justice Act 1973, section 8. Indeed the above passages from Wood, Alcorn, and Clark essentially confirm that this legislation (which allows the court to defer possession where it is likely that the borrower will be able to address the default in a reasonable time) is compliant with the Convention rights of the parties and affords sufficient respect for such rights in cases where it can be said to apply. (The relevance of Qazi seems to be limited to social housing legislation.)

23. However the factual situations covered by the discretion under the Administration of Justice Acts are limited in practice and I am also obliged to take account, under section 2 of the Human Rights Act, of judgments of the European Court of Human Rights including that in Kay v The United Kingdom (Application No 37341/06) [2010] ECHR 37341/06, in which it was held as follows:-

> "The requirement under Article 8(2) that the interference be `necessary in a democratic society' raised a question of procedure as well as one of substance … The loss of a home was the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of that magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation had come to an end."
>
> (Emphasis added)

This important statement of principle was reiterated in a more recent judgment of the same Court in Buckland v The United Kingdom dated 18 September 2012 (Application no 40060/08).

24. Moreover there are circumstances where there is no proposal before the court to clear the arrears or redeem the mortgage, and therefore no discretion in the

court under section 36 or section 8, but it is nevertheless correct to defer possession for a limited time, e.g. where an occupier suffers from an immobilising and life-threatening medical condition and there is evidence to the effect that a forced relocation of that person and his or her carer, or even its prospect, might shorten his or her life. In such circumstances in two recent cases I have stayed enforcement in the absence of any financial proposal, the plaintiffs' rights to their possessions having been outweighed by the court's duty to respect life and avoid inhuman or degrading treatment under Articles 2 and 3 of the Convention as well as respect for the home and private life under Article 8. As I shall explain shortly, in such and other special circumstances it appears that Schedule 7 to the Land Registration Act (NI) 1970 is the main vehicle of domestic law which permits, indeed requires, an 'indirect horizontal' application of Convention rights so as to defer, and in some cases to deny altogether, the plaintiff's expectation of possession on foot of its charge.

25. The position in England and Wales, which is somewhat different, is summarised in Fisher & Lightwood's Law of Mortgage (13th Edition, 2010) at paragraph 26.63 as follows:-

> `Where the mortgaged property is the mortgagor's home, a possession order if made and executed will constitute an interference by a public authority with the right conferred by Article 8. However, there is no inconsistency between the common law, as mitigated by section 36 of the 1970 Act and section 8 of the 1973 Act, and the Convention rights under Article 8 or Article 1 of the First Protocol.
>
> In exercising its discretion as to whether or not to grant an Order for sale of a mortgagor's home, the court should bear in mind the provisions of Article 8, and the need in any democratic society to balance the claims of creditors against the interests and rights of debtors, and not give automatic precedence to the interests of creditors.'
>
> (Emphasis added.)

26. In this jurisdiction, as I have indicated, there is a wider discretion to defer or deny a secured lender's claim to possession under Schedule 7 where, as in the present case and in the vast majority of cases I have heard over recent years, the mortgage is a charge on registered land. Over a decade before the Human Rights Act 1998 was enacted, Professor Wallace wrote this in his article Mortgagees and Possession (1986) NILQ Vol. 37 at 336:-

> `Unlike a legal mortgagee of unregistered land, the owner of a charge on registered land does not have a common

law right to possession of the land charged nor does he acquire the status of a legal owner. The Land Registration Act (NI) 1970 provides that upon registration of this charge he has –

the rights and powers of a mortgagee by deed within the meaning of the Conveyancing Acts, including the power to sell the estate which is subject to the charge….

Although this provision is somewhat ambiguous, it is submitted that it does not completely equate the position of the registered owner of a charge with that of a legal mortgagee but only gives him the powers which are conferred on a mortgagee by deed by the Conveyancing Acts. Thus, for example, in the absence of stipulations to the contrary in his deed of charge, the chargee can take advantage of the powers to appoint a receiver and to sell conferred by section 19(1) of the Conveyancing Act of 1881. If, however, he wishes to obtain possession, he must make application to the court under Schedule 7, Part I, paragraph 5(2) of the 1970 Act. It provides –

The registered owner of a charge may apply to the court for possession of the registered land, the subject of the charge, or any part of that land, and –

(a) On such application, the court may, subject to sub-paragraph (3), order possession of the land, or that part thereof, to be delivered to him; and

(b) Upon so obtaining possession of the land or, as the case may be, that part thereof, he shall be deemed to be a mortgagee in possession.

Paragraph 5(3) then states –

The power conferred on the court by sub-paragraph (2) shall not be exercised –

(a) Except when payment of the principal sum of money secured by the deed of charge has become due and the court thinks it is proper to exercise the power;

or

(b) Unless the court is satisfied that, although payment of the principal sum has not become due, there are urgent and special reasons for exercising the power.

> Thus, under paragraph 5(2)(a) the court has a discretion rather than a duty to make an order for possession and paragraph 5(3)(b) makes it clear that only in the most exceptional circumstances will a chargee be given possession when the chargor has not been guilty of any default. The court's power to refuse possession under paragraph 5(2) and its duty to do so under paragraph 5(3) are clearly potentially more favourable to chargors than the jurisdiction conferred in respect of mortgages of dwelling houses by the Administration of Justice Acts of 1970 and 1973. Therefore although the relevant provisions of the latter Acts apply also to charges on registered dwelling houses, it would seem that that application serves only to indicate particular circumstances in which it would not be "proper", within the meaning of paragraph 5(3)(*a*) of Schedule 7, Part I of the Land Registration Act, to make an order for possession. '
>
> (Emphasis added).

27. I agree with Professor Wallace. The plaintiff has a registered charge to which Schedule 7 applies. The plaintiff does not have a "contractual and legal entitlement" to possession. Moreover, by reason of section 3(1), Schedule 7 must now be considered, read and given effect in accordance with such Convention rights as apply in a particular case. However it is unnecessary to rely on section 3(1) in deciding this case. In terms of Convention rights there is no fraught question of proportionality. The plaintiff's rights to its possessions, if they can in the total absence of equity be said to have weight vis-à-vis the dwelling, are clearly outweighed by the Article 8 rights of the defendant. It is plainly not necessary in a democratic society and answers no social need for a court to make an order for the vacating of a person's home for no useful purpose. The first mortgagee, Platform, would have to face the risk that its security is vandalised: a risk recognised by Girvan J in Northern Bank Ltd v Brolly in which, as I have stated, he also acknowledged the Article 8 rights of judgment debtors faced with applications for possession. The first mortgagee would also have to contend with the virtual certainty of a dramatic default on the part of the defendant, who would have no further motivation for complying with his mortgage contract with Platform or endeavouring to do so. The plaintiff would clearly not be in a position to sell as there would be no equity to justify such an exercise.

28. Plaintiff's counsel has submitted that, notwithstanding the complete absence of equity to justify a sale his client would be entitled to possession as it would retain the power "to rent". I doubt very much that that submission is correct. Platform's mortgages in this jurisdiction generally (if not universally) contain

a blanket prohibition on letting by the borrower at clause 5.1 of their Mortgage Conditions (NI Edition) 2002. I refer to the following extracts from a report of the judgment of Stamp J in Julian S Hodge and Company -v- St Helens Credit Ltd and Another [1965] EGD 143 in dealing with a like submission to that of Mr Dunlop and having regard to the relevant provisions in section 99 of the Law of Property Act 1925, which are virtually identical to the equivalent provisions of section 18 of the Conveyancing Act 1881 which still confers powers to lease on mortgagors and mortgagees in this jurisdiction:-

> "On that ground alone, he (his Lordship), would be bound to hold that the second defendant had no right as against the plaintiffs. But in case he were wrong on that, he would deal with a further point which arose, on the footing that the second defendant had a lease. What was said on behalf of the second defendant was that by virtue of section 99 of the Law of Property Act, 1925, that lease bound the plaintiffs as first mortgagees. Section 99 provided as follows:-
>
> (1) A mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorised.
>
> (2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make from time to time any such lease as aforesaid.
>
> The section then went on to specify the leases which were authorised to be granted. By subsection (13), however, it was provided that:
>
> > This section applies only if and as far as a contrary intention is not expressed by the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.
>
> He (his Lordship), was unable to accept Mr Taylor's submission that sub-section (13) applied only to sub-section (1), and not to (2). However, Mr Taylor contended that, notwithstanding the fact that the power of leasing was excluded in the first mortgage, the mortgagor could have granted a second mortgage for a security of, say, £5,

and thereafter unless the power of leasing was excluded by that second mortgage, the mortgagee could wholly disregard the provisions of the first mortgage and grant precisely the lease that under the first mortgage the mortgagor had said he would not grant. Mr Seeley, for the plaintiffs, had pointed out that as a matter of logic and legal principle, a man could not confer a right which he had not got himself, and he (Stamp J), accepted Mr Seeley's contention that a mortgagor who had bound himself not to exercise a statutory power of leasing could not authorise a second mortgagee to do so, and that section 99 did not operate to enable a mortgagor to confer upon a mortgagee rights which the mortgagor did not himself have. The provisions of the section made it clear that the section was not intended prejudicially to affect agreements between a mortgagor and a prior mortgagee. Mr Seeley had referred to the proviso to sub-section (14), which provided that certain powers reserved or conferred by that section "shall not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement," and also to the provisions of sub-sections (15) and (16). In his (Stamp J's) opinion, section 99(2) did not put the second mortgagee in any better position that the mortgagor would have been in if the second mortgage had not been granted.'

(Emphasis added.)

29. As indicated earlier it therefore appears to me that (although, by way of added emphasis to the conclusions I have reached on more traditional principles and out of an abundance of caution and explanation I spent an earlier part of this judgment explaining its potential relevance) I do not have to rely on the Human Rights Act in refusing to make an order for possession in this case. I quote from the judgment of Mr Justice Deeny, the current Chancery Judge, in a specific performance action in which he upheld the defence of impossibility in Titanic Quarter Ltd v Rowe [2010] NICh 14:-

> `[20] I respectfully agree with the dicta of Megarry VC in *Tito v Wadell* [1977] Ch 106; [1977] 3 All ER 129 at 311, 312:
>
> > "it is old law that in specific performance cases 'the court will not make any order in vain'. See *New Brunswick and Canada Railway and Land Company Limited v Maggeridge* (1859) 4 Drew 686 at 699, per

> Kindersley VC. The usual instances of cases of the courts refusing to make orders that would be useless are cases where the interest that will be obtained by the decree is a very short tenancy, or a partnership which could promptly be determined by the other party.
>
> I do not, however, think that the refusal of equity to make futile orders is limited to cases of transient interest. In this case I cannot see what utility there would be for anyone in providing that a small number of isolated plots should be re-planted with coconut and other trees in the hollows beside the pinnacles. It is highly improbable that the coconuts would ever fruit, and the plots would be surrounded by other plots not replanted in this way which would make access difficult or impossible for the owner. It would be a sheer waste of time and money to do this, and I do not think that the court ever should, in its discretion make an order which it is convinced would be an order of futility and waste."
>
> [21] As Lord MacDermott said in connection with the remedy of certiorari in *R (McPherson) v Ministry of Education* (1973) 6 NIJB, the court should not make an order that will beat about the air.'
>
> (Emphasis by underlining added.)

30. Likewise, I do not think a court should be asked to make an order for possession of a person's property, let alone his home, in favour of a plaintiff lender not for the purpose of realising or protecting its security but apparently to hold a threat of eviction over him so as to coerce him into payment or punish him for his default. Suffice to say that if there were a mortgage condition in terms permitting a lender to take possession (in the event that equity is non-existent) for such purposes I believe it would be void, whether as being unconscionably close to a penalty *in terrorem* or under the Unfair Terms in Consumer Contracts Regulations 1999.

31. The Order I make will be to adjourn the plaintiff's originating summons generally with liberty to apply. There will be no order on foot of the defendant's application on the basis that an unfair credit relationship exists – albeit the plaintiff's approach in these proceedings to the non-existence of equity constitutes, as an OFT publication cited by Professor Goode in

Consumer Credit Law and Practice puts it, "taking steps to repossess the borrower's home, other than as a last resort" and comes close indeed to tainting this credit relationship with unfairness. (I leave open the question whether I might have come to a different conclusion on that had the defendant relied on the plaintiff's pursuit of possession notwithstanding the nil equity point as constituting, in conjunction with the irresponsible sale of the mortgage, an unfair credit relationship.)

32. I will hear submissions about costs.