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Judgment: approved by the Court for handing down | *Delivered:* **6/9/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

SWIFT ADVANCES PLC

Plaintiff;

-v-

CONOR MAGUIRE AND MARTINA McMANUS

Defendants.

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IN THE MATTER OF THE PARTITION ACTS 1868-1976
AND IN THE MATTER OF
THE PROPERTY (NORTHERN IRELAND) ORDER 1997

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DEENY J

[1] On 14 November 2007 the plaintiff obtained an order for possession against the first defendant in regard to 43 Carrogs Road, Warrenpoint, County Down, being a dwelling house comprised in registered lands Folio DN122472 of County Down. The plaintiff obtained this order for possession on foot of a second mortgage on the property the payments on which the first defendant had failed to keep up.

[2] By summons dated 23 September 2009 Martina McManus, now the second defendant, applied to the court for an order to stay or suspend execution of the said order for possession. In her affidavit of the same date she averred that she had been resident in the dwelling since August 2006 with Conor Maguire who was her partner and the father of her son born on 9 August 1996. Furthermore, she was then 14 weeks pregnant with her second child. She averred that she had only recently learnt

of the order for possession from the first defendant, as he now is, which was about to be enforced. She denied having signed any waiver of her interest in the premises which she believed she had. A stay was granted pending a full hearing of the matter. It came on before me on 20 and 21 June 2011. The court is obliged to Mr William Gowdy, counsel for the plaintiff and Mr Mark McEwen, counsel for the second defendant, for their able and erudite written and oral arguments. The first defendant did not appear and was not represented.

The Law

[3] The plaintiff relies on Section 11(1) of the Land Registration Act (NI) 1970 as providing that the register of titles shall be conclusive evidence of the title shown on that register "save as is otherwise provided or under this Act." I accept that the onus is on the second defendant whose name does not appear on that title to show that she has an interest capable of binding the plaintiff. Such an interest is contemplated by Section 38 of the Act which has the rubric "Matters which are burdens affecting registered land without registration". These are the burdens specified in Part 1 of Schedule 5 of the same Act. The second defendant in effect relies on paragraph 15 of that Schedule:

> "The right of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where –
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> (a) upon enquiry made of such person, the right is not disclosed; or
>
> (b) the right is a Schedule 6 burden."

[4] The law on this topic, relying on equivalent statutory provisions in England, was elucidated by Lord Wilberforce in his magisterial judgment, with which the other members of the House agreed, in Williams and Glyn's Bank v. Boland [1981] AC 487. At pages 502 to 504 he examines the relevant statutory background to the registration of land in comparison with unregistered land. At page 504(e) he deals with the kernel of the matter as follows:

> "In the case of unregistered land, the purchaser's obligation depends upon what he has notice of – notice actual or constructive. In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them. If not, he does not. No further element is material.

> I now deal with the first question. Were the wives here in "actual occupation"? These words are ordinary words of plain English and should, in my opinion, be interpreted as such. Historically they appear to have emerged in the judgment of Lord Loughborough LC in Taylor v. Stibbert (1794) 2 Ves. Jun 437, 439-440, in a passage which repays quotation:
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> > "whoever purchases an estate from the owner, knowing it to be in possession of tenants, is bound to enquire into the estates those tenants have. It has been determined that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon enquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests, as to the extent in terms of which it was his duty to enquire.""

[5] It is also worth reminding oneself of this section of his judgment at page 508(g)-(h).

> "But conceded, as it must be, that the Act, following established practice, gives protection to occupation, the extension of the risk area follows necessarily from the extension, beyond the paterfamilias, of rights of ownership, itself following from the diffusion of property and earning capacity. What is involved is a departure from an easy going practice of dispensing with enquiries as to occupation beyond that of the vendor and accepting the risk of doing so. To substitute for this a practice of more careful enquiry as to the fact of occupation, and if necessary, as to the rights of occupiers can not, in my view of the matter, be considered as unacceptable except at the price of

> overlooking the widespread development of shared interests of ownership. In the light of Section 70 of the Act, I cannot believe that Parliament intended this, though it may be true that in 1925 it did not foresee the full extent of this development."

[6] It is not in dispute that following this decision lenders such as the plaintiff were expected to and normally did take steps to ascertain whether there was someone in actual occupation of a property on the security for which they were lending money who might have an interest in that property over and above the ostensible owner and borrower.

[7] However, it must also be borne in mind that the legal title to property is not lightly overturned by the courts. To do so would be to undermine the whole system of conveyancing and security of title which is central to an orderly property market, which in turn is central to the proper conduct of a modern state. In Stack v. Dowden [2007] UKHL 17 [2007] 2AC 432 at paras 33 and 34 Lord Walker addressed this issue, albeit it in a slightly different factual context. I quote:

> "33. In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case. I agree with Lady Hale that this is, on its facts, an exceptional case.
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> 34. In those cases (it is to be hoped, a diminishing number) in which such an examination is required the court should in my opinion take a broad view of what contributions are to be taken into account. In Gissing v. Gissing [1971] AC 886, 909(g), Lord Diplock referred to an adjustment of expenditure "referable to the acquisition of the house". "Referable" is a word of wide and uncertain meaning. It would not assist the development of the law to go back to the sort of difficulties that arose in connection with the doctrine of part performance, where the act of part performance relied on had to be "uniquely referable" to a contract of the sort alleged: see Steadman v.

> Steadman [1976] AC 536. Now that almost all houses and flats are bought with mortgage finance, and the average period of ownership of a residence is a great deal shorter than the contractual term of the mortgage secured on it, the process of buying a house does very often continue, in a real sense, throughout the period of its ownership. The law should recognise that by taking a wide view of what is capable of counting as a contribution towards the acquisition of a residence, while remaining sceptical of the value of alleged improvements that are really insignificant, or elaborate arguments (suggestive of creative accounting) as to how the family finances were arranged."

[8] I also bear in mind the judgment of Lady Hale and in particular her dictum at the commencement of paragraph 68 of the same report:

> "The burden will therefore be on the person seeking to show that the parties did intend their beneficial interest to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon."

The relevant authorities establishing what such a spouse must show in Northern Ireland are McFarlane v McFarlane [1972] NI 59, C.A. and Northern Bank Ltd v Beattie [1982] 18 NIJB.

The Issues

[9] The court has, in effect, three decisions to be made with regard to the second defendant here. Firstly, was she in actual occupation of the property in question at the time of the mortgage taken out by Conor Maguire with the plaintiff? Secondly, has she shown that, contrary to the paper title, she has an equitable interest in the property? Thirdly, if the answer to the second question is yes what is the extent of that interest?

The Facts

[10] The plaintiff called Simon Tanner, a collections manager in its employment. He drew attention to several documents on which the plaintiff relied. There was an application form signed by the first defendant on 2 July 2006. In it there is a section marked 'occupancy details' which someone has circled 'No' i.e. there were not any other children, tenants or people living in the house. This is something that the second defendant contradicts. This application form expressly acknowledges that

the plaintiff is a sub-prime lender. There was already a mortgage on this property, in arrears. The new loan appears to have been an interest only loan to Mr Maguire at almost 12% per annum on the sum of £35,733.30. Part of that was earmarked for paying arrears on the first mortgage with Birmingham Midshires Building Society (now a part of the Bank of Scotland). I observe that the approach of lenders since the decision of the House of Lords in Williams and Glyn would be particularly relevant, one might think, to those sub-prime lenders who are choosing to lend to persons who may already be in difficulties financially, as they are inherently more likely to have to enforce their charge. See my judgment in Melbourne Mortgages Ltd v Carson & McDowell [2004] NIQB 82 at [11], where a sub-prime lender's evidence was that 30 % of charges on such loans were enforced.

[11] The plaintiff relied on a document of its own entitled "Deed of charge/mortgage" again signed by Conor Maguire in connection with this borrowing but witnessed by the second defendant Martina McManus and bearing the date 8 July 2006. I will deal with her response to this in due course.

[12] The plaintiff's witness also asserted that they had carried out a search on the electoral roll for the premises in question. At no point was the second defendant registered on the electoral roll for the premises, he said, but she was registered in 2002 at 12 Carraigh Dua Heights, Newry.

[13] Mr Tanner's evidence also drew attention to the documents from which it could be seen that part of the proceeds of the borrowing went to a premium for payment protection insurance in the sum of £4,388.30. However, as Mr Maguire had not been making contact with Swift it transpired that nobody had sought to claim on this policy, which related to accident, sickness or redundancy on the part of Mr Maguire, either on his behalf or that of the plaintiff.

[14] This case for the plaintiff put forward by Mr Tanner was then subjected to a very skilful cross examination by Mr McEwen of counsel. He established that Swift did not have any office in this jurisdiction but worked through an English broker who in turn worked through a local broker, to whom I will return in due course. That local broker in accordance with the plaintiff's procedures had instructed Mr Brian Turley MRICS to prepare a mortgage valuation report for the lender. This was a one page report but has been professionally completed by Mr Turley. One section bears the side note 'Occupancy'. Mr Turley's completion clearly states: "Details of occupants - Mr Maguire and family". This was dated 30 June 2006, i.e. pre dating the mortgage. In cross examination Mr Tanner conceded that anyone reading this with Mr Maguire's application form would have seen there was a discrepancy; see [10] above. He accepted that questions ought to have been asked. He thought somebody had said that the property was unoccupied but clearly that is not what Mr Turley found. In effect therefore the plaintiff here was on notice of other occupation of the dwelling and also on notice that Conor Maguire's claim in his

application form was misleading if he had completed it or erroneous if somebody else had completed it for him.

[15] Furthermore, Mr McEwen elicited that they had not in fact carried out an electoral roll search but had used a search engine called '192.com'. Proper examination of the underlying material would have disclosed that the family registered at the address at 12 Carraigh Dua after 2002 was called O'Grady with the necessary implication that Miss McManus had moved out i.e. consistent with the acquisition by her and Mr Maguire of the property in dispute. It is not necessary for me to deal further with the evidence of Mr Tanner and his cross examination.

[16] The plaintiff called Mr Mark McNulty, solicitor. He practises in the Newry district and he had acted in the purchase of the premises in question, he said for the first defendant. He relied on an attendance note as supporting his evidence that Mr Maguire only and not Miss McManus was his client. This small scribbled note was not reassuring to the court. He denied that he was aware of any contribution from the second defendant.

[17] Again his evidence was exposed in cross examination by Mr McEwen. It transpired that there were a number of documents clearly showing that another party had an interest in the matter. There was a letter from Mr McNulty himself of 26 April 2004 addressed to "Mr & Mrs Conor Maguire". In fact the defendants never married but they were living as man and wife. Again, he wrote a letter on 9 March 2004 similarly addressed. Again, there was what appeared to be a fax or email from the relevant mortgage broker a Mr Jim O'Connor. It asked Mr McNulty to act for the client detailed below; the names given as client are "Conor and Martina Maguire". In the light of these documents it is simply incredible for Mr McNulty to contend as he had done that his only client was Mr Maguire and that he was not aware that Miss McManus, erroneously described as Mrs Maguire, had an apparent interest in the matter.

[18] A completion statement prepared for Conor Maguire in relation to the purchase of 43 Carrogs Road, Burren, as it is there described, is also of interest and assistance to the second defendant. It discloses that the money received for the sale of 12 Carraigh Dua was £85,000. The money paid to the Nationwide Building Society to discharge the mortgage on that property was £54,121.57. Therefore the equity on that first property which went towards the purchase of 43 Carrogs Road was £30,879, leaving aside any question of fees. This bore out an averment in the second defendant's affidavit of 10 November 2009 where she said that she had contributed £15,000 (i.e. half of the above) to the deposit on the purchase of 43 Carrogs Road as well as contributing by cash to subsequent mortgage payments. It seems on the papers that this affidavit was sworn before discovery in the matter, thus bolstering the credibility of Ms McManus.

[19] Martina McManus gave evidence on her own behalf. She said that she had first met Conor Maguire when she was only 15. Her relationship commenced not long afterwards and their first child was born when she was 18. He was more than 20 years older than her. When they were instructing Messrs Tiernans, solicitors, to act for them in 1999 there was discussion about the ownership of the house that they sought to purchase. She believed it was the financial adviser who put it in the name of Mr Maguire only. Not only was he much older but he was in full time employment as a panel beater earning perhaps twice or more of what she earned as a part time shop assistant. There was no need of her earnings to obtain the necessary mortgage.

[20] However, she gave evidence that the greater part of the deposit on the new house which they bought from a builder for £55,000 or thereabouts was given to her by her mother in the sum of £5,000, previously withdrawn from the Newry Credit Union. There was a little supportive evidence for this. Her sworn testimony was that she was to be entitled to half of the house even though her deposit, thanks to her mother, was five times larger than the amount he said that he put in. I accept her evidence.

[21] When the later transaction came along she is clearly right in saying that the broker then, Mr O'Connor, was aware of her involvement in the matter. She says that she was in and out of the office of Mr McNulty, the solicitor, and again I accept her evidence in that regard. He does not seem to have enquired into why he was writing to them both. He did not even take the trouble to ascertain that they were not in fact married. She said that she would not correct someone who so described her and had frequently been referred to as Mrs Maguire, in the circumstances then existing.

[22] She did not try to deny that it was her signature on the application form nor that the writing in capitals underneath was also hers. She does not remember signing the document and does not know what she was told it was when she was given it to sign. Even in the form adduced by the plaintiff no sum of money is set out therein but it does say that the address at 43 Carrogs Road is the "property which is security for the loan". She confessed that the address she gave as a witness on the document of 23 Quayside Close, Newry was not her current address although it was one that she had kept to retain her doctor i.e. when she otherwise moved out of his district as I understand it. She admits that she did not vote in the Ward in which Carrogs Road was.

[23] She and Mr Maguire parted after she became increasingly aware of his lies to her. In addition he made no effort to solve his increasing financial problems. He rarely attempts to see their children and he does not pay her maintenance. She has been paying the payments on the primary mortgage to the Birmingham Midshires, as was, for a considerable period of time out of her own account. She continues to be employed outside the home as well as caring for her children. Documentary

evidence of that in the form of a letter of 18 May 2009 was advanced, albeit at a very late stage in the hearing. She does not know what he did with the money he borrowed from the Swift save for the amount shown on the documents to have been used to pay of arrears to the Birmingham Midshires. She was cross examined in a thoroughly professional way by Mr Gowdy. I have taken into account the points he made against her. I thought her answers had the ring of truth e.g. when she said that "Conor was not the sharpest pencil in the box." I accept her evidence in cross examination that the solicitors never asked what her interest in the property was. She thought the expression common law wife gave her rights. Therefore she did not correct people who wrote to her or referred to her as Martina Maguire.

[24] Mr Gowdy did establish that her relationship with Mr Maguire was rather more prolonged than at one point she was indicating but I do not think this is fatal to her case. Likewise she admitted to knowing what Swift Advances were, conveying disapproval, but said that she would not have signed if she had known what he was doing. This was obviously the greatest area of vulnerability for her coming as she is seeking equity in this case which she should do with clean hands.

[25] In reply to questions from the court it emerged that she had a number of GCSEs and as one of a number of jobs she has held over the years, being clearly an industrious citizen, she had helped with the accounts of a bookmaker. But her role must also take into account the great disparity in age between her and her partner. I take into account her good character i.e. that her only conviction was one for no insurance. I think we go to the truth of the form she witnessed when she admitted that the Birmingham Midshires arrears did not really surprise her. It may well be that Mr Maguire represented to her that the loan was, as it was in part, to assist with those arrears.

[26] I take into account the considerable body of documents that was produced. One of these bore out her conviction and the fact that Mr McNulty acted for her. A wide range of bills relating to telephones and retailers give her address as 43 Carrogs Road, Warrenpoint. Her bank statements change from Carraigh Dua to Carrogs Road as one would expect if she was telling the truth. The records of the Nationwide Building Society who had the mortgage on the earlier property would bear out her claim that payments were made on a variable cash basis, consistent with her claim that she paid some of them. There is a mortgage application of 2002 in her name jointly with that of Mr Maguire. Their names are jointly in the records of the Rates Collection Agency for 43 Carrogs Road. Among the documents belatedly discovered was a credit report from creditexpert.co.uk relating to her and bearing the date 23 October 2007. It not only gave her address as 43 Carrogs Road but consistently with her case said that she had resided there for 2 years 2 months. That would have been readily available to the plaintiff if they had sought to obtain such a report.

[27] In the light of all the oral and written evidence I have come to the following conclusions on the issues before me. Firstly, I am entirely satisfied that she was in actual occupation of the premises at all relevant times. Secondly, I am satisfied on the balance of probabilities that she did make contributions, in some cases directly, to the purchase of both 12 Carraigh Dua, which in equity she owned jointly with Conor Maguire and thus to 43 Carrogs Road, Warrenpoint. The equity in the previous dwelling contributed to the purchase of the premises in dispute. In addition she had often made the periodical payments on the first mortgage. Thirdly, it seems clear on all the evidence that the proper division of the interests of Conor Maguire and herself in the light of her own and all the evidence must be on a basis of equality. I therefore find that she is entitled to one half of the net equity in the premises. She is not obliged to repay the Swift loan from her share of the property.

[28] The plaintiff, standing in the shoes of Conor Maguire, with monies owing exceeding his one half equity in the property, seeks an order for sale pursuant to the Partition Acts. Mr McEwen accepts that is something the plaintiff is entitled to, particularly as no payments have been made on its arrears for a long time. I therefore grant an order for sale of the property. The primary mortgagee has the first claim to discharge of its mortgage and the balance, after reasonable expenses, is to be divided equally between Swift Advances and Martina McManus. In the unlikely event of the sale price leading to a situation where Swift Advances is repaid in full out of Conor Maguire's share of the equity he would be entitled to any balance but this is not expected to be the case.