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

Delivered:	4/10/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

ULSTER BANK

Plaintiff;

-v-

GERARD DYNES
&
THE CROWN ESTATES COMMISSIONERS
&
CLONMORE WHOLESALE LIMITED (formerly Clonmore Plant Sales Limited)

Defendants

DEENY J

[1] This is an application brought by the Ulster Bank Limited before me today. It was brought on foot of a summons received 15 August 2012. The terms of the summons are a little vague, but they are amplified to some degree in the attached affidavit and in an earlier statement of claim on behalf of the plaintiff. In any event there was a full skeleton argument in support of the application before me today from Mr Aiken of counsel and Mr Gibson of counsel helpfully responded with another skeleton argument. I therefore give leave to the plaintiff for it to seek an extension of time to bring an application pursuant to Article 293 of the Insolvency (Northern Ireland) Order 1989 to vest the lands in dispute at 154 Clonmore Road, Dungannon, County Tyrone in the name of the plaintiff, such an extension of time being needed pursuant to Rule 6.183 and Rule 12.10 of the Insolvency Rules (Northern Ireland) 1991. I shall also deal with a number of related matters including the bank's application for summary judgment against the third defendant.

[2] The position is briefly as follows. The bank has an equitable mortgage over the lands which were owned by Gerard Dynes. Mr Dynes owed the bank a considerable sum of money, in excess of £1m in 2011 and presumably more now. They issued proceedings against him on 10 August 2010, apparently unaware that he had been made bankrupt on 21 May 2010. Mr Dynes is now a discharged bankrupt.

Messrs Robert G Sinclair and Company entered an appearance on his behalf but no further defence has been proffered and Mr Gibson of counsel was unable to offer any defence to the remedy sought by the plaintiff against Mr Dynes the first defendant and so the Ulster Bank is entitled to a declaration that Gerard Dynes has ceased to have and has no interest in the property. Mr Aiken should draft a declaration more particularly for the approval of the court as he seeks that under paragraph 2 of the summons.

[3] The second defendant is properly the Crown Estates Commissioners; they were joined in another title. I give the plaintiff leave not only to amend the summons but to amend the substantive proceedings to correct the title of the second defendant. Their involvement in the matter is as follows. Mr Dynes having been made bankrupt his property vested in his trustee in bankruptcy, Mr David McClean, insolvency practitioner. Mr McClean considered the property, considered the substantial debt to the Ulster Bank and on 8 July 2011 wrote to the plaintiff disclaiming ownership of the property. The effect in law of that, as I pointed out in Duncan v Official Receiver for Northern Ireland and the Attorney General [2008] NI Ch. 20, is that the land vests in the Crown Estates Commissioners. However, as was the situation in that case and again here, in practice the Crown Estate Commissioners do not seek to take possession of such properties even though they have in law escheated to the Crown. In this particular case, on certain conditions which are not controversial, the solicitors to the Crown Estates Commissioners by their letter of 2 July 2012 said they had no objection to the Ulster Bank Limited as plaintiff seeking to vest the land on foot of their equitable mortgage. That position was confirmed by Mr Craig Dunford of counsel at an earlier review and he was excused attendance today. That of course is of very considerable importance for the bank's application.

[4] The two important matters before the court therefore are -

(1) Whether the bank may have an extension of time to bring the Art. 293 application?

(2) Whether the third defendant is entitled to defend the proceedings and to successfully resist the Order 14 application of the plaintiff? I will turn to that in due course.

As to the question of an extension of time there is no doubt the leading case in Northern Ireland, to which I will turn in a moment, is Davis –v- Northern Ireland Carriers [1979] NI 19, but that must be seen in the context of the particular Rules that apply here. Under Article 293 (1) of the Insolvency Order 1989 the bank with an interest in the lands as equitable mortgagee can apply to vest the lands of the bankrupt mortgagor when those have been disclaimed by the trustee in bankruptcy. This is what they now wish to do. However, although as counsel pointed out there is no time limit in the 1989 Order there certainly is one in the Insolvency Rules (NI) 1991 as amended. At 6.183(2) we find the following:

> "The application must be made within three months of the applicant becoming aware of the disclaimer, or of his receiving a copy of the trustee's notice of disclaimer set under Rule 6.176, whichever is the earlier."

[5] In this case it is not disputed that the insolvency practitioner concerned very properly sent the notice of disclaimer to the bank and that they received it on or immediately after 8 July 2011. Contrary to Rule 6.183 the bank did nothing about it and counsel was instructed to candidly admit on behalf of his solicitors that the point was not recognised. They had proceedings extant by then but it was not raised even before the court on review in December 2011. It was averted to in a statement of claim subsequently served on behalf of the plaintiff but no application was brought. It has only been brought by this summons of 15 August 2012 and even then in rather general terms. I have given leave to amend, but it seems to me there is a doubt as to whether this summons of 15 August 2012 does in fact comply with 6.183 substantively, so I propose to deal with this only as the application for the extension of time. If granted the remainder would be a pure formality because there is no good and substantial reason why this equitable mortgagee should not have the property vested in it and the freehold title in the property vested in it once it has been disclaimed and the Crown Estates Commissioners have said they do not seek to act on behalf of the Crown on foot of the escheat. So the real issue here is the delay and the point is being taken by the third defendant. The third defendant I have also dealt with by way of amendment at the commencement of the hearing this morning. I have amended its title to that of Clonmore Wholesale Limited formerly Clonmore Plant Sales Limited. Their involvement arises in this way. Mr Dynes in 2009 leased, or the bank would say purported to lease, to that company the property for five years at a rent which was equal to the rates. Mr Dynes was not at arm's length from the third company in which he had a former direct interest and which is still owned and directed by his wife and son Mr John Dynes who swore an affidavit in these proceedings. They do not wish to have the Ulster Bank's title vested against them, although I will return to whether that is of as much practical importance as they currently think. Their point is a simple and perfectly valid point, that the application being made to the court should have been made three months after 8 July and not on 15 August 2012.

[6] Now on foot of that one turns, as I indicated earlier, to the judgment of the Court of Appeal in Davis v Northern Ireland Carriers and to the judgment of Lord Lowry in that respect where with his customary clarity and succinctness he set out seven relevant principles to be applied where a court must exercise its discretion in a case to extend time. I pause to say that Rule 12.10 of the Insolvency Rules applies the court's general discretion under Order 3 of the Rules of the Court of Judicature to this application. The word 'must' therefore, while a word that sometimes is of great importance, is nevertheless subject to the discretion of the court to extend time. With regard to the principles advanced by the Court of Appeal

the first of those is whether the time is sped. The court will if the reason is a good one look more favourably on an application made before the time is up. That is very radically not the case here and so that must be taken to be against the bank here. Secondly, when the time limit has expired the extent to which the party applying is in default is relevant and again that must be taken against the bank here because they are approximately nine months late, albeit that they marked up the point in the statement of claim but even so it was some seven months after the notice of disclaimer. To complete the points adverse to the bank as plaintiff the sixth point of Lord Lowry was to consider whether the point at issue which the application for an extension of time would allow to be heard is of general and not merely particular significance. I think that is also against the bank here because I accept Mr Gibson's submission there is no general point. Finally, against the bank is Lord Lowry's dictum that the rules of court are there to be observed and if that applies to the rules of the court under the Rules of the Court of Judicature it applies with equal force to the Insolvency Rules. So Mr Aiken faces those four significant difficulties.

[7] However, as Gillen J said in Benson v Morrow Retail Limited [2010] NIQB 140, one must look at the matter overall with the objective of doing justice. Mr Aiken prays in aid three of the other principles adverted to by Lord Lowry. The third of Lord Lowry's principles was as follows. "The effect on the opposite party of granting the application and, in particular whether they can be compensated in costs". Mr Aiken submits that the opposite party, the other party, which could have the freehold title registered in its favour is the Crown Estates Commissioners, and as I have recited they expressly consent to this application and do not seek to have the title registered in their name. He says that must be a very strong point in favour of the plaintiff here. Mr Gibson argues, I think persuasively, that as he is a party to the action his clients constitute an opposite party also. Furthermore, he points out that under the statutory provisions for insolvency his clients have an "interest" in the property which would also appear to bring them within that rubric. I will go on to consider his submissions as if he were an opposite party without ruling finally on the point. Clearly what Lord Lowry had in mind and perhaps that is borne out by later cases, is whether someone was going to be prejudiced by giving the extension of time. He refers to the effect on the opposite party of granting the application and in particular whether he can be compensated by costs, but if he can be compensated by costs that must imply that there is something to be compensated for. But the third defendant here could never establish a freehold title. One can well see how it wants to withstand the efforts of the bank as much as possible because it is currently enjoying leasehold possession of the property. But they have no right to a freehold title. So it seems to me difficult to argue that in truth they have been prejudiced. If there is some kind of tactical prejudice that can be compensated in costs here inasmuch as it might come to that point and counsel will be allowed to address me, but it may be they are entitled to their costs of this summons. But I am not currently persuaded that there is any other prejudice to them. I am reinforced in that by the point which I made to counsel in the course of the hearing this morning, that if I were against the bank and refused them an extension of time to apply to have the lands vested in their name all they would have to do is go to the Crown Estates

Commissioners and ask to buy the title from them. I cannot see, and counsel do not offer, any major impediment to that. As I have recited the Crown Estates Commissioners do not seek to take over this industrial estate in County Tyrone and it may that they would not be difficult to talk to and that may be relevant here to the exercise of the court's discretion.

[8] Furthermore I am obliged to take into account, and I do so very readily, the fourth of the principles set out by Lord Lowry namely: "whether a hearing on the merits has taken place or would be denied by refusing an extension". Well of course the bank has not had a hearing on the merits of their claim to first of all own the land as a mortgagee and then get possession of it so they can sell it to try and claw back some of the money that they lent to the first defendant. That has always been regarded as an important point in favour of granting an extension of time. There has been no hearing on the merits here and they would be prejudiced, subject to reaching an agreement with Crown Estate Commissioners, if they were refused.

[9] Fifthly, Lord Lowry referred to whether there was a point of substance to be made which could not otherwise be put forward. Again one has to remember the context in which he was speaking there and the Court of Appeal in its later decision (Magill v Ulster Independent Clinic [2010] NICA 33) referred to by Gillen J was referring i.e. the conduct of an action and here there is very much a point of substance to be put forward. I consider it fair to say that courts when considering whether to extend time are much less likely to do so if they think the claim that is being pursued by the party seeking the extension of time is a weak or even vexatious one than they do if somebody has a good and substantial claim but they or their solicitors have unfortunately neglected a time limit. The obvious reason for that is no injustice is done to a party with a hopeless case if they are kept to the rules whereas a party which has the merits on its side can suffer substantial prejudice if it is "punished" by not being given an extension of time. Here it is not in dispute that the bank has an equitable mortgage and it is not in dispute that they lent the money to Mr Dynes on the security of these lands, so they are a party with the merits in their favour, subject of course to the important point about the lease to which I will turn in a moment.

[10] So looking at the matter in the round and seeking to do justice, it seems to me that I should exercise my discretion in favour of the Ulster Bank Limited and I do so and I grant them an extension of time to bring a substantive application pursuant to Article 293 of the Insolvency Order and Rule 6.183 of the Insolvency Rules. That can be brought forward just as soon as possible and it does not seem to me can be realistically resisted, subject of course to counsel for the defendants thinking of some fresh point.

[11] I then turn to the next issue. The Ulster Bank Limited sought under Order 14 summary relief against the defendants, by way of setting aside the lease pursuant to Article 367 of the 1989 Order and possession of the premises, as there was no arguable defence or no defence to which the court should pay heed. The third

defendant may well face formidable difficulties here. A valuation obtained in 2008 from a member of the Royal Institution of Chartered Surveyors estimated the rental value of these lands at £90,000 per annum and the value overall at perhaps £1.8m. The following year the third defendant, a company as I said, linked to the lessor Gerard Dynes, who was less than a year away from bankruptcy, obtained a five year lease where the rent was only to be equal to the rates on the property. The linkage between the third defendant and the first defendant and the fact that the rent was only confined to rates which normally a lessee would pay in any event in addition to a rent are obviously facts such as to arouse the suspicions of the plaintiff.

[12] However, it does seem to me that the third defendant has done enough to have leave to defend these proceedings. Between the bank's valuation of 2008 and the lease of 2009 there was a substantial further reduction in economic activity in this jurisdiction as in much of the world. As I pointed out to counsel the collapse and insolvency of Lehmann Brothers took place in September 2008. The market had already turned in Northern Ireland in 2007, but matters continued to deteriorate, as I have had occasion to hear evidence about it in other proceedings before this court. It seems to me therefore that it is not inherently unlikely that the value of the property fell significantly between those two years. In any event Mr Gibson pointed out that the opinion of Mr Mackle MRICS in 2008 was based on a paucity of evidence. He had only one comparable and when one reads his report one see that the alleged comparable had not in fact sold, it was merely advertised at levels which would justify his valuation. He further points to the letter, and it is only a letter, from a gentleman who does not disclose any qualifications, but practising in a firm of valuers and mortgage advisers, who points out several defects in the property such as access which the bank's valuer had apparently no information about and had not averted to. Furthermore the rates were not nominal but amounted to £19,000 in 2011. It seems to me a matter therefore that is arguable that in 2009 making such a lease was not necessarily at an undervalue because of the economic circumstances of the time and the nature of the property and that the third defendant is entitled to have that issue tried and I find in the third defendant's favour in that regard. So the plaintiff then succeeds in two regards, only, namely, it has its extension of time to bring the vesting application pursuant to Article 293 and it is entitled to a declaration that Gerald Dynes has no interest in the property.