

Neutral Citation No: [2022] NICH 1

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

Ref: McB11747

ICOS No: 21/088036

Delivered: 26/01/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

THE MORTGAGE BUSINESS PLC

Plaintiff

v

THE OCCUPIER/PERSONS UNKNOWN

and

NOEL DEVINE

Defendant

**Mr McCausland (instructed by TLT NI LLP, solicitors) for the Plaintiff
Mr Devine appeared as a Litigant in Person**

(Ex tempore)

McBRIDE J

Introduction

[1] This is an application whereby the plaintiff seeks possession of land and premises situate and known as 63 Argyle Street, Londonderry contained within Folio LY84479 Co Londonderry, ("the Property") on the grounds that the plaintiff is entitled to possession and the defendant is unlawfully in occupation, without licence or consent.

[2] The plaintiff is represented by Mr McCausland of counsel. Mr Devine appeared as a litigant in person. No other persons in occupation attended or were represented.

[3] The proceedings were brought against “The occupier/persons unknown.” At a review hearing on 3 December 2021 Mr Noel Devine was joined as a defendant to the proceedings. The court gave directions for affidavits to be filed. Mr Devine filed a document entitled “Affidavit” which he “autographed” on 5 January 2022. This document does not comply with the requirements of Order 41. As a result I invited Mr Devine to give evidence on oath and to adopt this document as his evidence. He declined to do so.

[4] The plaintiff’s application was grounded on the affidavit of Orla Kennedy, solicitor, which was sworn on 10 November 2021 and a rejoinder affidavit sworn by Ms Kennedy, solicitor, on 11 January 2022. The other material before the court consists of a document entitled “Affidavit” which is “autographed” by Diane Donnelly dated 12 January 2022 and the document entitled “affidavit” “autographed” by the defendant.

The relevant legal principles

[5] This application is brought pursuant to Order 113 of the Rules of the Supreme Court.

Order 113 Rule 1 (1) provides as follows:

“1. (1) Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over the termination of the licence) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

[6] Under Rule 2 the originating summons has to be on Form 9 (Appendix A). Under Rule 3 the application must be supported by an affidavit which sets out:-

- (a) the plaintiff’s interest in the land,
- (b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
- (c) that he does not know the name of any person occupying the land who is not named in the summons.

[7] Rule 4 provides for service of the originating summons. Where a person is named in the originating summons the summons and a copy of the affidavit in support shall be served by leaving a copy of the summons and the affidavit or sending them to the defendant at the premises. In addition where there are

unnamed persons the summons must be served by affixing a copy of the summons and a copy of the affidavit to the main door or other conspicuous part of the premises and if practicable, by inserting through the letter box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to “the occupiers”.

Evidence

[8] The plaintiff’s evidence is contained within the sworn affidavit evidence of Ms Kennedy. It avers that the property is a residential property and the registered legal owners are Seamus Donnelly and Diane Donnelly. The Donnellys entered into a mortgage deed with the plaintiff on 11 May 2007. That deed contained a number of conditions and of particular relevance is Clause 11 which stated as follows:

““Clause 11.1(e)

You must get our permission before:

- You sell the property;
- let the property...”

[9] The Donnellys (“the borrowers”), defaulted on the mortgage and the plaintiff obtained an order for possession in the High Court on 21 November 2017. Thereafter, the matter proceeded through the Enforcement of Judgments Office (“EJO”) and on 19 October 2021 the EJO gained entry to the property and changed the locks. The EJO delivered a Certificate of Delivery of the Land dated 19 October 2021 to the plaintiff. The certificate states that the bank is entitled to possession of the property in accordance with the court judgment and that the EJO delivered vacant possession of the property to the plaintiff in accordance with the court order dated 19 October 2021.

[10] At the date of the eviction Mr Roddy, an agent acting on behalf the EJO noted that the property appeared to be occupied. He noted that there were three locked bedroom doors, a TV in the living room and fresh milk in the fridge.

[11] After the Certificate of Delivery of Land was issued the keys for the property were given to a local estate agent and a note was left at the property stating that any belongings could be collected from this agent. Later a man identifying himself as Michael Mooney attended with the estate agents threatening to change the locks to the property. The plaintiff further avers on the basis of information supplied by Mr Roddy that Mr Mooney attended at the property and gained entry by using a drill and screwdriver. This incident lead to a report of criminal damage to the PSNI and this is now the subject of a police investigation.

[12] On 22 October 2021 an agent of the plaintiff attended the property and a man answered the door stating that his name was Festus and he stated that he was renting the property.

[13] The plaintiff's solicitors sent letters before action to the occupier. In addition, they wrote to the borrowers asking them to advise if they had any knowledge about the persons in occupation. In response Ms Donnelly sent a "Notice to Cease and Desist" which was addressed to the EJO and the PSNI. On 3 November 2021 she sent a notice to the plaintiff entitled "Mail Fraud."

[14] Mr Devine in his document entitled "Affidavit" and in his submissions to the court stated that he resided in the property and that he did so on foot of "a private business contract." He further stated that he had lived in the property for the past two years. He advised the court that he was not evicted on 19 October 2021 as he was present at the property behind a locked door.

[15] Although Mr Devine refused to give sworn evidence to the court about these matters I am prepared to accept for the purposes of my determination that he resided in the property since January 2020 and that he was present at the premises on 19 October 2021 and remained on the premises behind a locked door.

[16] Mr Devine has not produced any evidence of the contract under which he states he is entitled to be in occupation of the property.

[17] In her document entitled "Affidavit" and "autographed" by Ms Donnelly on 12 January 2022 she states as follows at paragraph 4:

"I continue to legally and lawfully remain in possession of this private property and that this domestic dwelling is in the private care of a friend as agreed to by the registered title owner, Seamus Donnelly, in a private capacity by a private business contract in which I do not object to in fact."

[18] Ms Donnelly did not appear and was not represented at the hearing.

Consideration

[19] On the basis of the affidavit evidence of the plaintiff I am satisfied that the plaintiff is entitled to possession of the property because there is a valid court order for possession order and there is a Certificate of Delivery of Possession issued by the EJO to the plaintiff. Accordingly, no-one is entitled to be in occupation of the land without the consent of the plaintiff as appears from Clause 11 of the Mortgage Deed. The plaintiff avers that it never gave consent to anyone to be in occupation of the lands post the possession order.

[20] Taking Mr Devine's evidence at its height he entered into occupation of the property in or around January 2020. At that stage the plaintiff had an order for possession. Mr Devine has not produced any evidence of a tenancy or lease agreement. If he did produce such a document I consider that it would not give him a right to occupy the property as such a tenancy agreement would be of no effect as the plaintiff never granted consent for such a tenancy agreement. Accordingly, Mr Devine has no lawful entitlement to occupy the property and is therefore in law a trespasser.

[21] Accordingly, I am satisfied that the conditions set out in Order 113 Rule 1 are satisfied.

[22] Secondly, I am satisfied that the originating summons and the affidavit complies with all the procedural requirements set out in Rules 2 and 3 of Order 113.

[23] I have had the benefit of an affidavit of service from Mr Rankin dated 16 November 2021. In his affidavit he avers that he served the originating summons and grounding affidavit on 15 November 2021 by affixing them to the front door of the premises and by inserting these documents in an envelope through the letter box of the premises. I am therefore satisfied that the proceedings have been served in accordance with the rules.

[24] Mr Devine submitted that the court could not deal with the application as Ms Donnelly was not in attendance at the court hearing. I am satisfied that the proceedings was served upon her in accordance with the Rules. Secondly, I am satisfied that she was notified of today's proceedings by the plaintiff's solicitors letter dated 20 January 2022 which was sent to her address by first class post. Accordingly, I am satisfied that she was aware of the proceedings and has chosen not to attend.

[25] I am therefore satisfied that it is appropriate to make an order in the terms of the originating summons and I so order. There shall be a stay of 28 days.