Neutral Citation No: [2017] NICA 60 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **STE10432** ***Delivered:*** **16/10/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PREFERRED MORTGAGES LIMITED

Plaintiff/Respondent:

-and-

DOLORES CHRISTINE JACKSON

Defendant/Appellant:

_____

Before: Morgan LCJ and Stephens LJ

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an application in relation to an appeal to this court by Dolores Christine Jackson ("the appellant") 71 who appears in person. The appeal is listed for hearing on 18 October 2017. The appellant has submitted medical evidence and she contends that she is not capable of attending court or presenting her appeal. She applies for an adjournment. The plaintiff and respondent, Preferred Mortgages Limited ("the respondent") initially stated that they were in a position to proceed with the appeal, questioned the potential contradiction in the medical evidence presented on behalf of the appellant, pointed out that the appellant's medical evidence did not give a timescale for recovery but went on then without specifically consenting to an adjournment to state that it did not want any adjournment being open ended. Subsequently the respondent consented to an adjournment provided it was not longer than for two or three weeks.

The proceedings

[2] On 28 August 2011 the respondent, as mortgagee, commenced proceedings seeking an order against the appellant for possession of a property on foot of a mortgage dated 15 February 2006 which mortgage had secured a loan to the appellant of £185,595.00 and the appellant having fallen into arrears.

[3] On 18 June 2012 Master Ellison, having heard the defendant who appeared in person, made an order for possession but suspended the order which was not to be enforced without the leave of the court while the appellant made the normal monthly payments together with additional payments in respect of the arrears.

[4] In July 2013 an application was made to the court for enforcement of the order for possession on the basis that the appellant had not made the payments set out in the order of 18 June 2012.

[5] In 2014 the appellant was represented by Carnson Morrow Graham solicitors. On 18 February 2014 the appellant swore an affidavit in which she set out what she contended were triable issues in relation to the possession action and to obtain permission of the court to counterclaim.

[6] On 29 July 2014 the appellant changed solicitors to Orr and Co.

[7] On 12 August 2014 a replying affidavit was shown on behalf of the respondent purporting to refute the contention that the appellant had any grounds to set aside the possession order and informing the court that there was now negative equity in the premises.

[8] By order of Master Hardstaff dated 18 December 2014 the respondent was given liberty to enforce the order for possession dated 18 June 2012.

[9] On 22 October 2015 when physical eviction was imminent, the appellant, who then again appeared in person, applied to stay the order for possession on the grounds set out in her affidavit sworn on the same date. The application was based on her then age of 69, her poor health and on the prospect that if the action which she had commenced against the broker's regulator for damages was successful she would be able to discharge the mortgage and that she wished to appeal the Master's order. Exhibited to the affidavit was a medical report dated 11 September 2012 which stated that:

> "This is to confirm that Mrs Jackson has the following medical problems:
>
> (1) Heart problems – sinus tachycardia.
>
> (2) Osteo and rheumatoid arthritis.
>
> (3) Planter facilities.
>
> (4) Abdominal adhesions which are not operable.
>
> (5) Painful lumps in her skins.

(6) Peripheral nerve damage.

(7) Prone to falls.

(8) Has poor eyesight.

(9) Ankylosing spondylosis.

(10) Sciatica.

(11) Swollen right arm with history of breast cancer."

[10] The respondent's skeleton argument opposing these applications is dated 13 January 2016. As well as setting out the grounds of opposition it stated that the last payment by the appellant was on 29 November 2012. It also stated that the then current approximate value of the premises was £100,000 and that the current outstanding balance on the mortgage was £154,772.70.

[11] On 7 September 2016 Master Hardstaff again ordered that the respondent was at liberty to enforce the order for possession dated 18 June 2012. The appellant appealed that order and that appeal came to the list of Horner J.

[12] On 12 October 2016 and 1 November 2016 the appellant's son, Jeremy Jackson ("the second defendant") sought to be joined in the possession proceedings on the basis that he had been and was in occupation of the premises in which he had equitable interest. Those applications also came into the list of Horner J.

[13] On 21 November 2016 a replying affidavit was sworn on behalf of the respondent in relation to the second defendant's applications.

[14] On 10 February 2017 by consent Horner J ordered that:

(1) The enforcement of the order dated 18 June 2012 whereby the appellant was ordered to deliver possession of the premises to the plaintiff be stayed for a period of 90 days from the date of this order provided always that the appellant and the second defendant do forthwith begin to market the premises for sale through the estate agent Norman Morrow.

(2) The second-named defendant be joined to this action.

(3) That the second defendant's claim to have an interest in the premises be dismissed as failing to disclose a reasonable defence pursuant to Order 18 Rule 19 of the Rules.

(4) That the second named defendant do deliver to the plaintiff possession of the premises forthwith.

(5) That the enforcement of the above order that the second named defendant do deliver to the plaintiff possession of the premises forthwith be stayed for a period of 90 days from the date of this order provided always that the appellant and the second defendant do forthwith begin to market the premises for sale through the estate agent Norman Morrow.

[15] By letter dated 12 May 2017 the appellant then again applied for a stay of enforcement of the order for possession. There were then reviews before Horner J on 13, 15 and 22 June 2017 and the appellant appeared in person at each review. By order dated 23 June 2017 the learned judge refused the appellant's application. The learned judge was also asked by the appellant for leave to appeal to the Court of Appeal and he refused leave.

[16] By notice dated 23 June 2017 the appellant applied to this court for leave to appeal.

The application for an adjournment

[17] By e-mail dated 24 September 2017 the plaintiff sent to the court office a copy of a letter dated 21 September 2017 from her GP, Dr Byrne. That letter stated:

> "This patient suffers from chronic back pain for which she needs very strong analgesia, namely morphine sulphate tablets.
>
> The patient requested that I write a letter for the court's consideration to grant a delay in her appeal which is due to start on 18 October. Furthermore, may I request that the patient's hearing be pushed to later in the day as her pain is more severe in the morning."

There was then a postscript in the following terms:

> "PS Mrs Jackson's sister (Rosaleen Lowry) died on 20 September 2017 and Mrs Jackson is to attend her funeral on Friday 22 September 2017."

The type written words "may I request that the patient's hearing be pushed to later in the day as her pain is more severe in the morning" appear to have been crossed out after the letter was typed and then a handwritten note was added as follows "I feel that the patient's ability to represent herself is impaired due to the strong analgesia".

[18] We would observe that the reason being advanced was back pain. As originally drafted the only request from the general practitioner was for the case to start later in the day not that the case should be adjourned. There is no explanation as to why that original assessment was crossed out in handwriting or as to why the handwritten note was then added to the letter. The handwritten addition does not explain the extent of the appellant's impairment or as to whether in the opinion of the general practitioner it prevented her from presenting her appeal even if she was accommodated for instance by short breaks during the course of the hearing or by the case starting later in the day.

[19] By letter dated 25 September 2017 the appellant was informed that no decision had been made as to whether to adjourn her appeal. That in order to give consideration to her request for an adjournment a further medical report from her general practitioner or from any qualified medical practitioner of her choice should be obtained and that she should make it available to the court office and to the other parties on this appeal on or before noon on 5 October 2017. She was told that the medical report should address the following questions namely:

> "1. When did the back condition commence?
>
> 2. How frequently does Mrs Jackson attend her GP in relation to the back condition?
>
> 3. When was the last occasion on which Mrs Jackson attended her GP in relation to the back condition?
>
> 4. What have been the findings on examination as to the degree and extent of any restriction of back or leg movement?
>
> 5. What have been any other findings on examination?
>
> 6. What has been the impact of the back condition on Mrs Jackson's daily activities?
>
> 7. A list of the symptoms from which she recounts that she is suffering, together with an assessment by the medical practitioner as to the reasonableness of the symptoms and the extent and degree of them.
>
> 8. Whether in the opinion of the medical practitioner Mrs Jackson is unfit to attend the hearing or whether she can attend, or whether she can attend

but requires accommodation such as breaks during the course of the hearing or for the case to start at say 11 am rather than at 10.30 am and if so what accommodation.

9. If presently unfit to attend court then the prognosis in relation to Mrs Jackson's ability to attend court."

The letter went on to inform the appellant that:

> "That the medical evidence required to demonstrate that she is unable to attend a hearing and participate in an appeal should not only identify the medical practitioner but also give details of his familiarity with the her medical condition (detailing all recent consultations), should identify with particularity what her medical condition is and the features of that condition which (in the medical practitioner's opinion) prevent participation in the appeal process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It should also enable the court to consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties."

[20] By letter dated 3 October 2017 the appellant's son wrote to the court office stating that his mother had collapsed and has been bedridden since last week. That Dr Byrne had called with her as an emergency on 29 September 2017. The appellant's son did not supply a detailed medical report as requested in the letter dated 25 September 2017 nor did he state whether that letter had been shown to Dr Byrne or whether Dr Byrne had been requested to provide that information. Accordingly, there is no evidence before us to demonstrate that such a medical report could not with reasonable diligence have been obtained. The letter from the appellant's son is in the following terms:

> "I attach my mother's medical evidence as requested. She collapsed and has been bedridden since last week. Her doctor called with her as an emergency call out and I attach his comments written on a copy of their letter and some others. She will be confined to bed while her internal bleeding goes on. I hope this is adequate to adjourn the appeal hearing."

Attached to that letter was a letter dated 9 February 2017 from the plaintiff's general practitioner which lists out the appellant's 11 medical problems in exactly the same terms as in the earlier letter 11 September 2012. There is then a handwritten note at the bottom of that letter which states:

> "I have seen the patient at home on 29 September 2017, she has an exacerbation of adhesions pain and needs bed rest."

The handwritten note is then signed by Dr Byrne.

[21] We would observe that the letter from the appellant's son refers to his mother suffering from internal bleeding but there is no reference to that in the handwritten note of the general practitioner. The reason for the appellant's incapacity is now adhesions as opposed to back pain. The handwritten note does not say for how long she requires bedrest or whether she would still require bedrest as at the date of the hearing on 18 October 2017.

Legal principles

[22] We consider that Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (CH) at paragraph [36] set out in clear terms the nature of and the impact of medical evidence supporting an application to adjourn on the basis that a party is unable to attend a hearing and participate in the trial. In relation to what is required he stated that:

> "Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination."

In relation to the impact of such evidence he stated that:

> "It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the

material as a whole (including the previous conduct of the case)."

[23] If a litigant presents inadequate medical evidence to this court or if this court considers that little if any weight should be given to that evidence then either the application for an adjournment will be refused or alternatively consideration will be given to a direction that the appeal should be heard and determined on the papers. Consideration of such a direction will take into account factors such as whether the issues are amenable to be disposed of in that way, whether there is any realistic prospect of the party attending in an appropriate revised timescale and the prospect of the party obtaining legal representation. If the course is adopted of determining the appeal on the papers then directions will issue as to the time within which the appellant has to submit written arguments, a time within which the respondent has to reply and a time thereafter for the appellant to reply to the points made by the respondent.

Discussion

[24] We have concerns about the appellant's previous conduct in this case:

(a) The appellant did not raise any substantive arguments prior to the initial order for possession dated 18 June 2012 but rather advanced those arguments some two years later in 2014. There is no reason why the appellant could not have obtained legal advice in 2011 or 2012 so that those arguments could have been advanced at an earlier and appropriate stage.

(b) The application for a stay on 22 October 2015 was only brought when physical eviction was imminent. The application could and should have been brought immediately after the order of the Master dated 18 December 2014.

(c) The claim by the appellant's son was advanced on 12 October 2016 and no reason has been advanced as to why that claim could not have been advanced in 2011 or 2012.

(d) The appellant agreed on 10 February 2017 to the enforcement of the possession order with a stay for a further period of 90 days. Accordingly all the facts that were known or could reasonably be envisaged to impact on the question of the stay resulted in an agreed period of 90 days.

(e) The appellant has failed to comply with the practice direction in that no skeleton argument has been submitted to the court.

(f) The appellant has not brought forward any evidence to demonstrate that she could not with reasonable diligence have obtained the medical report directed by the court in its letter dated 25 September 2017.

[25] The first medical reason put forward was that the appellant had chronic back pain for which she needs very strong analgesia. Given that the letter from the general practitioner does not explain the extent of the appellant's impairment and does not explain whether it would prevent her from presenting her appeal even if she was accommodated we do not consider that this is an adequate reason to adjourn the hearing of this appeal.

[26] The second medical reason is that the appellant requires bedrest but there is no evidence as to the period for which she requires it. The quality of the medical evidence required of the appellant was set out in the letter from the court office dated 25 September 2017. The medical evidence provided was wholly inadequate and particularly given the context of the way in which the appellant has previously conducted this litigation we consider that it would be a proper exercise of discretion to refuse the application for an adjournment. In the alternative to adopting that course we have given consideration to directing that the appeal should be heard and determined on the papers. We consider that there is no realistic prospect of the appellant attending in an appropriate timescale which we consider to be within a period of weeks and that there is no reasonable prospect of her obtaining legal representation. We consider that the issues are suitable to be determined on the papers and that this can be done expeditiously. That factor persuades us to grant the adjournment and to direct that the appeal will be heard and determined on the papers.

Conclusion

[27] We grant the application to adjourn.

[28] We direct that the appeal be determined on the papers.

[29] We direct that by noon on 8 November 2017 the appellant submits to the court office with a copy to the respondent's solicitor her written submissions in relation to the appeal.

[30] We will then consider those written submissions and if we consider that a response from the respondent is necessary we will direct that the response is filed by noon on 22 November 2017 with a copy to the appellant and with the appellant having until noon on 29 November 2017 to submit any reply in writing.

[31] If we do not consider that a response is necessary then we will give judgment in relation to the appeal.