Neutral Citation No: [2022] NICA 39 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE11853** *ICOS No:* **17/106251/06A/04** *Delivered:* **29/06/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND CHANCERY DIVISION

Between:

RONALD LEWIS, MICHAEL BANKS WARING AND MICHAEL HAMILTON

Plaintiffs/Respondents

and

ANTHONY BRENNAN

First-named Defendant/Appellant

and

GRAINNE BRENNAN

Second-named Defendant/Appellant

Mr Anthony Brennan appeared as a Litigant in Person
Mr Keith Gibson BL (instructed by Shean Dickson Merrick Solicitors) on behalf of the Plaintiffs/Respondents

---

Before: Keegan LCJ and Maguire LJ

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This appeal concerns long running legal proceedings regarding the repossession of a property at 2c Dorchester Park, Belfast, owned by the first and second defendants. The appeal has been lodged by the first named defendant (also referred to as the appellant in this judgment) by way of an appeal notice which is dated 1 December 2021. The appeal notice refers to various decisions made in relation to the first-named defendant but principally an order made by Colton J on

24 October 2021 which was an order refusing a stay of enforcement of an order for possession granted by Master Hardstaff dated 12 March 2018.

[2] During the currency of these proceedings the appellant also sought leave to file an amended notice of appeal against another decision, that of Huddleston J, dismissing the appeal from the order of Master Hardstaff referred to above. We allowed that issue to be put before the court for completeness sake.

[3] The order made by Huddleston J is dated 24 November 2020. It represents a settlement of the appeal from Master Hardstaff which was thereby dismissed upon consent. When the final order of Huddleston J was made Mr and Mrs Brennan had the benefit of separate counsel and solicitors who agreed the order on appeal.

[4] In this appeal Mr Brennan appeared as a litigant in person. During the course of these proceedings this court confirmed that his wife, the second-named defendant, was validly served. Mr Brennan also indicated that Mrs Brennan would not be attending the hearing but that the appeal had her support. We have proceeded on that basis.

[5] It will be apparent from the above that this appeal has now expanded to encompass three separate court orders made by three different judges. However, only one of the orders which the appellant seeks to appeal is brought within time, namely the appeal from Colton J denying a stay of enforcement of the possession order. The appeal from Master Hardstaff is substantially out of time by a period of over four years. In addition, the appeal from Huddleston J is out of time by a period of 1½ years and is an appeal from a consent order.

[6] Flowing from the above synopsis of the appeal four questions arise which this court must deal with, namely:

(i) Whether there is any merit in the appeal from the decision of Colton J to refuse a stay of enforcement.

(ii) Whether or not the Court of Appeal has jurisdiction to hear an appeal from a possession order made by Master Hardstaff on 8 March 2018.

(iii) Whether the court should extend time for appeal from the historic orders of Master Hardstaff and Huddleston J.

(iv) Whether the court has jurisdiction to take any steps to consider an appeal from a consent order made by Huddleston J in circumstances where no application has been made for leave to the court that made the order.

[7] Before answering these questions we set out some factual background as follows.

Background

[8] The history of this case is comprehensively explained in Horner J's judgment in *Bank of Scotland v Brennan & Anor* [2014] NICh 1 and McBride J's judgment in *Ulster Bank and Anthony Brennan* [2019] NICh 9. These decisions set out the background to this protracted litigation. We summarise the salient facts as follows by adopting some of the content from the judgments already generated.

[9] The narrative begins in July 2007 when at the height of the property boom in Northern Ireland the first and second named defendants purchased a property for £800,000. This was situated at 9 Upper Malone Road, Belfast. The defendants purchased the property with the benefit of a loan from the Bank of Scotland ("the bank") by way of charge dated 5 July 2007. In July 2007 the defendants moved into the property with their two children. It appears from previous judgments that upon moving into the property there were some issues with the state of the property but, in any event, it is an undisputed fact that the defendants fell into arrears with the bank.

[10] This default ultimately led to the bank serving a Notice to Quit in April 2010. Thereafter the defendants received notification that the bank was going to initiate proceedings for possession of the property. The defendants, who had attained planning permission to demolish the house and build two semi-detached houses in its place, unilaterally demolished original property sometime in mid-2010. There were various consequences of those actions which it is not productive to recite in this judgment. Suffice to say that the bank by way of originating summons claimed possession of the property in February 2012.

[11] By this stage the defendants had carried out construction work at the site and two semi-detached houses were constructed, one of which became 2c Dorchester Park. One house had an offer for sale in the sum of £400,000 and, as a result of that, a proposal was put to the bank to discharge their debt from the sale of that property and the other property.

[12] Meanwhile an order for possession was granted by Master Ellison in respect of 9 Upper Malone Road, Belfast. This was affirmed by the judgment of Horner J on 4 January 2014. The defendants appealed to the Court of Appeal.

[13] On 20 March 2015 the defendants' appeal against the decision of Horner J was settled with an agreement that a sum of £250,000 would be paid to the bank. The role of the bank as lender then ended. This was because the first-named defendant refinanced with the plaintiffs to this action in that he borrowed a sum to effectively clear the debt to the bank.

[14] Thereafter, the debt was secured against the property which came into being on the site of 9 Upper Malone Road, namely 2c Dorchester Park.

[15] The terms of the new loan which is the agreement with which we are concerned were broadly as follows. The lenders who are three private individuals lent the sum of £410,000 to the defendants on terms. £350,000 of that sum was repaid from the sale of one of the semi-detached houses built on the site at 9 Upper Malone Road, however, the remaining £60,000 remained outstanding and, as a result, an order for possession was sought and granted before Master Hardstaff on 8 March 2018. With the accumulation of interest and charges this debt has risen now to an amount over £700,000.

[16] The order for possession made before Master Hardstaff on 8 March 2018 was affirmed as a result of a settlement reached on appeal before Huddleston J in 2020.

[17] As of 28 October 2021 the subject property at 2c Dorchester Park has been possessed by the lenders. Since then steps have been taken by the lenders to deal with some planning issues and other remedial works needed to market the property. The appellant claims that this process should be reversed by virtue of the following grounds of appeal found in the appeal notice of 1 December 2021:

(i) The grounding of proceedings issued by the plaintiffs by way of originating summons, in particular, the grounding affidavit of the solicitor for the plaintiffs under Order 88 of the Rules of the Court of Judicature was unlawful at common law. As a consequence the decision of Master Hardstaff granting a possession order was:

    (a) ultra vires;

    (b) perverse;

    (c) unsafe;

    (d) amounts to bias;

    (e) unlawful at common law;

    (f) contrary to the Practice Direction of the Honourable Court issued by Master Hardstaff (Practice Direction 02/18) and also the Practice Direction 05/2005;

(ii) There were procedural irregularities in the proceedings in the lower courts that render the impugned decisions and orders in the lower courts, ultra vires, perverse, unsafe and amounts to bias.

(iii) New material information has come to light in relation to the advisors/brokers for the defendants/appellants confirming their relationship as advisors/brokers to the plaintiffs/respondents. Such new material

information creates an unfair relationship under section 140(b) of the Consumer Credit Act 1974.

(iv) New material information has come to light relating to unauthorised pension funds forming part of the loan agreement with the plaintiffs/respondents to the extent that they (unauthorised pension funds) made the loan agreement with the plaintiffs an unregulated agreement or, in the alternative, the unauthorised pension funds invalidate the loan agreement.

(v) The honourable court has jurisdiction in this matter under the Rules of the Court of Judicature (Northern Ireland) 1980, section 86 of the Judicature Act (Northern Ireland) 1978 and section 36 of the Administration of Justice Act 1970 and otherwise under common law.

(vi) The Human Rights Act 1998 has relevance importing Article 6, Article 8 and Protocol 1, Article 1.

(vii) The Consumer Credit Act 1974 has relevance.

(viii) Perimeter Guidance Manual has relevance - section 2.7(19).

Discussion of the grounds of appeal

[18] In conducting our assessment of the grounds of appeal we make every allowance for the fact that the first named defendant is a litigant in person. However, unlike most other litigants in person, he has also qualified as a barrister. That he has some knowledge of the law is clear as he supplemented his appeal notices with a well framed skeleton argument. In the skeleton argument he has rightly accepted the fact that an appeal court differs from a court of first instance. This matter is explained by Lord Kerr in *DB (Appellant) v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7 particularly at paragraph 80 which includes the following reminder:

> "…that the first instance trial should be seen as the 'main event' rather than a 'try out on the road' has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial."

[19] During oral submissions the first named defendant wisely concentrated on the alleged unfairness of proceedings in the lower court and what he said was a fundamental mistake in connection with the lender's affidavit that was placed before Master Hardstaff. In essence he submitted that the lender's affidavit was contrary to the Chancery Practice Direction 02/18 as affidavits in possession proceedings should

not be filed by solicitors. This argument relates to grounds (i) (ii) and (iii) of the original appeal and formed the centrepiece of this case.

[20] As such we think it important to restate the law flowing from the case of *Herron v Bank of Scotland* [2018] NICA 6. In that case a challenge was made to the adequacy of the bank's evidence in that an instructing solicitor, rather than the lender, had sworn the grounding affidavit. The argument was based on previous Chancery decisions in *Swift First Limited v McCourt* [2012] NICh 33 and *Santander (UK) Plc v Carlin* and *Hughes* [2013] NICh 14.

[21] In particular in *Swift First* [2012] NICh 33, a claim for possession of premises on foot of a charge, Horner J stated at [42]:

> "The defendant's central complaint has been that the plaintiff did not have legal ownership (or any ownership) of the charge and/or of the loan. This is a claim which is being increasingly made primarily by personal litigants where a mortgage or charge, particularly a sub-prime mortgage or charge, is in arrears. Investigation of this issue can result in a disproportionate expenditure of both time and money. Accordingly, when considering the conduct of any further claims where the central issue is whether or not the financial institution has the locus standi to obtain an Order for Possession, it is suggested the following course should be adopted after lists of documents have been exchanged by both sides. Firstly, there should be an inspection of those documents in the list of each party. Secondly, the solicitor acting for the financial institution should warn the proposed deponent on behalf of the financial institution of the serious consequences he or she bears personally, and the consequences for his or her employer, if he or she swears an affidavit that is false in any respect. Thirdly, the solicitor should confirm to the court that the deponent has been so advised before the affidavit is sworn. Fourthly, the deponent on behalf of the financial institution should then swear the affidavit dealing with the plaintiff's title to seek an Order for Possession."

[22] The above quotation illuminates the purpose behind the requirements that a lender should prepare the affidavit evidence grounding proceedings. It is twofold. Firstly, it ensures accuracy. Secondly, it is to allow for examination on oath. The consequences of inadequate evidence are clear as highlighted in *Santander (UK) Plc,* where the grounding affidavit contained an error, in the form of a misrepresentation that the mortgage had not been assigned. This emerged only at the stage of the appeal and was a substantial reason why that appeal was allowed by Deeny J.

[23] Of course each case will turn upon its own facts. In the *Herron v Bank of Scotland* case there were errors made which are set out in the judgment including inadequate affidavit evidence and the bank's failure to comply with an order for specific discovery. These failings were heavily criticised by the Court of Appeal although they did not ultimately lead to a successful outcome in the case for the borrower.

[24] A useful summary is found in paragraph 59 of the Court of Appeal judgment as follows:

> "(i) The *Swift First* requirements in every case to which they apply are to be observed. They are not optional. They express best practice in this sphere of litigation.
>
> (ii) Self-evidently compliance with the *Swift First* requirements assumes added importance when the duty to do so is specifically enshrined in an order of the Court.
>
> (iii) The present case illustrates the regrettably widespread *malaise* of a disturbingly widespread failure on the part of practitioners to appreciate and give effect to Order 41 of the Rules and Practice Direction 05/2005 "Preparation of Affidavits and Exhibits."
>
> (iv) The practice of affidavit evidence being provided by the solicitors representing financial institutions in this field appears relatively entrenched. The Court considers this practice inappropriate. Solicitors, self-evidently, do not have first-hand knowledge of the facts upon which repossession claims are pursued. Affidavits should be sworn by suitably senior and knowledgeable officials of the institutions concerned deposing to facts within their own knowledge and, where appropriate, containing statements of information and belief complying strictly with Order 41, rule 5. This will apply unless there is some compelling reason to do otherwise. In this way in those cases where oral evidence is required the witness will be a person who can deal knowledgeably with the factual issues under scrutiny: in short, a real witness."

[25] The above requirements were consolidated into Practice Direction 02/18 and are now embedded as good practice in possession proceedings. Whilst not a rule of law, failure to adhere to requirements may of course affect the fairness of proceedings in a particular case. We were assured that lenders now file affidavits in accordance with the Practice Direction.

[26] In this case the Master's order predated the decision in *Herron v Bank of Scotland* by one day. In any event affidavits were subsequently filed by the lender on appeal in this case. We will deal with the effect of this rectification in the concluding part of this judgment.

[27] In support of other grounds of appeal, the first named defendant sought to introduce evidence in relation to the *bona fides* of the plaintiffs who he said may be subject to other investigations. This is clearly a satellite issue which was presented in a broad and unfocussed way. We did not permit additional evidence to be filed in relation to the claims made. It follows that grounds (iv) and (v) of the appeal fall away.

[28] The other purported grounds of appeal from (vi)-(viii) are so wide and unfocussed as to have no purchase at all in this appeal. For the sake of completeness we also record that no evidence of undue influence in relation to Mrs Brennan has been substantially advanced despite some reference in the written arguments. In any event Mrs Brennan has not pursued this case before us. Thus, this is not a sustainable ground of appeal.

[29] We therefore turn to the focus of this case which as we have said relates to the validity of the Master's order which was affirmed on appeal. In doing so, we observe that many of Mr Brennan's arguments about what allegedly happened at the Masters court were in play at the appeal hearing before Huddleston J. In particular we note that there was substantial paperwork generated in that case including legal arguments which were filed in advance of the hearing. We have some observations to make about this as follows.

[30] Having examined the written arguments that were filed at the High Court and the affidavit evidence filed there we can readily see that all issues were canvassed on appeal. In particular, we note that an argument was made before the High Court that the loan agreement was unregulated and so offended the Consumer Credit Act 1974, and the Financial Services and Markets Act 2000 and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. We note that this particular claim was answered on affidavit by the lender and disputed as the lender maintained that the loan was exempt as it was a business loan where credit exceeds £25,000. Ultimately, as we have said, that appeal was settled before the High Court.

[31] So far as the late addition of an appeal point against the consent order is concerned, we note that no specific case has been made against the lawyers involved

on behalf of the first or second named defendant. We pause to observe that a separate case could of course be brought alleging negligence.

[32] Standing back from the matters of substance that we raise in relation to this appeal there are also significant procedural issues to resolve which pertain to the procedure for appeals to the Court of Appeal. These issues assume particular prominence in the appeals from Master Hardstaff and Huddleston J which we will explain in following paragraphs.

Legal principles

[33] Two of the appeals are substantially out of time. The leading judgment in relation to delay in our jurisdiction is *Davis v Northern Ireland Carriers* [1979] NI 19 where Lowry LJ stated:

> "Where a time limit is imposed by statute it cannot be extended unless that, or another statute contains a dispensing power. Where the time is imposed by rules of court which embody a dispensing power such as is found in Order 64 Rule 7 the court must exercise its discretion on each case and for that purpose the relevant principles are:
>
> (i) Whether the time is sped: a court will, where the reason is a good one, look more favourably on an application made before the time is up;
>
> (ii) When the time limit has expired, the extent to which the party applying is in default;
>
> (iii) The effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
>
> (iv) Whether a hearing of the merits has taken place or would be denied by refusing an extension;
>
> (v) Whether there is a point of substance (which in effect means a legal point of substance when dealing with cases stated) which could not otherwise be put forward;
>
> (vi) Whether the point is of general and not merely particular significance; and
>
> (vii) That the Rules of Court are there to be observed."

[34] These principles have been applied by our courts in many subsequent cases including *McArdle v Marmion* [2013] NIQB 123; *Walsh v Office of the Industrial Tribunals and others* [2021] NICA 26 and *Walsh v Department of Justice and other* [2020] NICA 34. In the aforementioned case of *McArdle v Marmion*, Gillen J distilled a number of uncontroversial propositions in this way:

> "(a) The exercise of the discretion to extend time is unfettered.
>
> (b) The discretion can be exercised even when the delay is substantial.
>
> (c) What is at the heart of the exercise is whether it would be equitable to allow the action to proceed, and in fairness and justice, the obligation of a tortfeasor to pay damages should only be removed if the passage of time has significantly diminished his opportunity to defend himself.
>
> (d) The basic question is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in the commencement."

[35] It flows from the above that Mr Brennan has to establish a good reason why an appeal against the order of Master Hardstaff and Huddleston J should be allowed to proceed. This court would only grant an extension of time upon good reason. That involves looking at the substance of the case and also the reasons given for the delay. However, before deciding on the delay issue there are some other formidable procedural hurdles for this appeal to overcome in relation to the original orders of Master Hardstaff and Huddleston J by virtue of the rules governing appeals to the Court of Appeal found in the Judicature (Northern Ireland) Act 1978 ("the Judicature Act") and the governing rules which are the Rules of the Court of Judicature (Northern Ireland) 1980.

[36] We set out the core legal provisions as follows:

The Judicature Act Section 35

> "**Appeals to Court of Appeal from High Court**
>
> (1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance

with rules of court appeals from any judgment or order of the High Court or a judge thereof.

(2) No appeal to the Court of Appeal shall lie—

(a) except as provided by the following provisions of this Part from any judgment of the High Court in any criminal cause or matter;

(b) from an order allowing an extension of time for appealing from a judgment or order;

(c) from an order of a judge giving unconditional leave to defend an action;

(d) from an order or judgment of the High Court or any judge thereof where it is provided by or by virtue of any statutory provision that that order or judgment or the decision or determination upon which it is made or given is to be final;

(e) from a decree absolute for the dissolution or nullity of marriage by a party aggrieved thereby who, having had time and the opportunity to appeal from the decree nisi on which the decree absolute was founded, has not appealed from that decree nisi;

(ea) from a dissolution order or nullity order under Chapter 2 of Part 4 of the Civil Partnership Act 2004 that has been made final, by a party who, having had time and the opportunity to appeal from the conditional order on which the final order was founded, has not appealed from that conditional order;

(f) without the leave of the court or judge making the order, from an order of the High Court or a judge thereof made with the consent of the parties or as to costs only;

(fa) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part;

(g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court, except in the following cases namely:—

(i) where the liberty of the subject or the residence of, or contact with, minors is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Acts (as defined in section 2 of the Companies Act 2006 in respect of misfeasance or otherwise;

(iv) in the case of a decree nisi in a matrimonial cause, a conditional order in a civil partnership cause or a judgment or order in an admiralty action determining liability;

(v) . . .

(vi) in such other cases as may be prescribed being cases appearing to the Rules Committee to be of the nature of final decisions;

(h) from the decision of the High Court on any question of law, whether on appeal or otherwise, under sections 120 to 156 of the Representation of the People Act 1983;

(i) from a decision granting or refusing a certificate under section 12 of the Administration of Justice Act 1969.

(j) without the leave of the High Court or of the Court of Appeal, from a decision of the High Court under the Insolvency (Northern Ireland) Order 1989."

The Rules of the Court of Judicature (Northern Ireland) 1980, Orders 58 and 59:

> ***"Appeals from certain decisions of masters, etc., to judge in chambers***
>
> 58.1.-(1) Except as provided by rules 2 and 3, an appeal shall lie to a judge in chambers from any judgment, order or decision of a master, or of a district judge in the exercise of any probate jurisdiction.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice.
>
> (3) Unless the Court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.
>
> (4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.
>
> ***Appeals from certain decisions of the Master (Chancery)***
>
> 3. An appeal shall lie to the Court of Appeal from any judgment, order or decision of the Master (Chancery) given or made on the hearing or determination of any cause, matter, question or issue ordered to be tried before him under Order 36 rule 1.
>
> ***Order 59***
>
> ***Appeals to Court of Appeal***
>
> ***Application of Order to appeals***
>
> 59.1. This Order applies, subject to the provisions of these Rules with respect to particular appeals, to every appeal to the Court of Appeal (including, so far as it is applicable thereto, any appeal to that Court from a master or from any tribunal from which an appeal lies to that Court) not being an appeal for which other provision is made by these Rules or by any other statutory provision.

3(3) Except with the leave of the Court of Appeal, the appellant shall not be entitled on the hearing of an appeal to rely on any grounds of appeal, or to apply for any relief, not specified in the notice of appeal.

3(4) A notice of appeal must be served on all parties to the proceedings in the court below who are directly affected by the appeal; and, subject to rule 8, it shall not be necessary to serve the notice on parties not so affected.

3(5) No notice of appeal shall be given by a respondent in a case to which rule 6(1) relates.

Time for appealing

4.-(1) Subject to the provisions of this rule, every notice of appeal must be served under rule 3(4) within the following period (calculated from the date on which the judgment or order of the court below was filed), that is to say:

(a) in the case of an appeal from an interlocutory order or from a judgment or order given or made under Order 14 or Order 86, 21 days;

(b) in the case of an appeal from an order or decision made or given in the matter of any proceedings under the Bankruptcy Acts (NI) 1857 to 1980, Part XX and XXI of the Companies (NI) Order 1986 [now Part 31 of the Companies Act 2006] or the Insolvency (NI) Order 1989, 28 days;

(c) in any other case, 6 weeks."

Conclusions on the four questions posed

Question (i): Appeal from the order of Colton J

[37] The order denying a stay of enforcement of the repossession order emanates from an application which was made pursuant to section 36 of the Administration of Justice Act 1970. Section 36 of the 1970 Act provides as follows:

"**Additional powers of court in action by mortgagee for possession of dwelling-house**

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The court—

(a) may adjourn the proceedings, or

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—

(i) stay or suspend execution of the judgment or order, or

(ii) postpone the date for delivery of possession,

for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.

(4) The court may from time to time vary or revoke any condition imposed by virtue of this section.

(5) . . .

(6) In the application of this section to Northern Ireland, "the court" means a judge of the High Court in Northern Ireland, and in subsection (1) the words from "not being" to "made" shall be omitted."

[38] The terms of this section clearly provide that an applicant may apply for a stay of enforcement of a possession order at any stage in proceedings on the basis that reasonable proposals are made to discharge the debt. This is a provision which is wide in its application, designed to protect homeowners from repossession unless in extremis. The facility is available at any stage prior to repossession being effected. The scope of this provision is important as in this case the repossession has now occurred.

[39] In addition, there is no evidence that any reasonable financial proposal was put before Colton J which would allow him, under the provisions of this legislation, to grant a stay.

[40] The grounds for a stay are not elucidated in the Notice of Appeal or in any of the documentation before us including the skeleton argument filed by Mr Brennan. Without evidence we cannot see any reason why a stay would be permitted in this case or why the judge was wrong to refuse a stay.

[41] As an aside, it appears to us that this is probably an interlocutory order by virtue of the fact that it may be varied or set aside and is not permanent - see *Salaman and Warner* [1891] 1 QB 734. The principle is stated as follows:

> "…a final order is one made on such an application or proceeding, that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus, the issue of final or interlocutory depended upon the nature of the application or proceedings giving rise to the order and not upon the order itself. I refer to this as the 'application' approach."

[42] The above passage was cited with approval by Morgan LCJ in *McNamee and McDannell's Application (Leave Stage)* [2011] NICA 40. It follows that an interlocutory order requires leave to appeal. However, the absence of leave it is not fatal as the Court of Appeal in these circumstances can deal with the matter itself pursuant to section 35(2)(g) of the Judicature Act.

[43] We can therefore determine the appeal in respect of the decision of Colton J notwithstanding the absence of leave from the first instance judge. We decline to grant leave and dismiss this appeal for the simple reason that there is no reasonable basis put forward for a stay of repossession. Clearly no proposals were put before Colton J and none have been put before this court. In truth this is a hopeless appeal without any discernible merit.

Question (ii): Appeal from the order of Master Hardstaff

[44] Section 35(2)(g) of the Judicature (Northern Ireland) Act 1978 empowers the Court of Appeal to hear and determine appeals from any interlocutory order or

judgment made or given by a judge of the High Court where leave has been granted by the judge or the Court of Appeal. A decision of the Master is a judgment or order of the High Court for the purposes of section 35(1). However, section 35(1) is subject "as otherwise provided in this or any other statutory provision." By virtue of section 2 of the Judicature (Northern Ireland) Act 1978 the High Court consists of the judges of the High Court. A Master is not a judge of the High Court and therefore has no power under section 35 (2)(g) to grant leave to appeal to the Court of Appeal.

[45] Order 58, rule 1(1) – (4) of The Rules of the Court of Judicature (NI) 1980apply to an appeal from a Master. Order 58 rule 1 provides that an appeal shall lie to a judge in Chambers from any judgment, order or decision of a Master. Order 58, rule 1(1) uses mandatory language that an appeal shall lie to a judge in chambers from any judgment, order or decision of a Master. By virtue of section 120 of the Judicature (NI) Act 1978, 'statutory provision' when used in the 1978 Act has the meaning assigned to it by section 1(f) of the Interpretation Act (NI) 1954 which states that 'statutory provision' means, inter alia, any provision of a statute or instrument made under a statute (by whatsoever Parliament or Assembly passed or by whomsoever made) for the time being in force in Northern Ireland.

[46] Order 58 rules 2 and 3 have made provision for direct appeals from the Master to the Court of Appeal in specified cases, by way of exception to an appeal to the judge rather than as an additional right of appeal.

[46] Unless the exceptions set out in Rule 2 or 3 apply, the Court of Appeal does not have jurisdiction to entertain this appeal from the Master. The exceptions which allow an appeal direct to the Court of Appeal do not apply in this appeal, see *Irish Cement Limited v Murphy* [2016] NICA 38.

[47] The appeal route from Master Hardstaff was to the judge who can conduct a *de novo* rehearing of the case.

[48] Therefore, leaving aside the fact that the appeal from Master Hardstaff is well out of time, the statutory provisions governing appeal to this court mean that there is no direct route of appeal from the Master's order to the Court of Appeal and this court does not have jurisdiction to determine an appeal of this nature.

Question (iii) extension of time

[49] In the circumstances outlined above it is strictly unnecessary for us to determine the application for an extension of time which is question (iii). However, we are bound to say that we can discern no good reason in law why an appeal has been lodged so long after a hearing before the Master when an appeal was also taken to the High Court. The real target of any action should be the High Court consideration of the case as that provides a *de novo* forum for consideration of these matters. It is to that order which we now turn.

Question (iv): Appeal from the order of Huddleston J

[50] In the usual course an appeal can be brought from an order of a High Court judge under section 35 of the Judicature Act. However, the order made by Huddleston J was (and this is not controversial) an order made by consent. An order made by consent is a particular species of order. It is not an order that is usually appealed and, if appealed, there are particular restraints to be applied given the principle of legal certainty which courts will strive to uphold.

[51] On this issue counsel has helpfully referred us to *Foskett on Compromise*, 8th edition, at paragraph 27-26 as follows:

> "It is suggested that there is no good reason why the court should not, in appropriate circumstances, allow an appeal against a consent order or judgment where there has been a change in circumstances such as the basis upon which the Order or judgment was made has been falsified. It is, however, likely that this jurisdiction will be used rarely and with caution…"

[52] Paragraph 27-27 of the same text states that an appeal would ordinarily be allowed only where;

> (i) A change of circumstance occurred which rendered the terms of the consent order manifestly and significantly unfair; provided
>
> (ii) That the change in circumstances relate to matters which were the subject of an assumption, on both parties;
>
> (iii) The change in circumstances were not foreseeable at the time the consent order was made and falsely the common assumption upon which both parties had acted
>
> (iv) the change in circumstances occurred within a short time of the Order;
>
> (v) The parties seeking to set aside the order acts properly on discovering the change in circumstances
>
> (vi) Third party rights will not be affected significantly by the setting aside of the Order.

[53] Under section 35(2)(f) of the Judicature Act an appeal only lies with leave of the High Court Judge from an order made by consent of the parties. Paragraph 20.09 of *Valentine Supreme Court Practice* refers to the fact that, where an appeal lies from the High Court only by leave of the High Court, the refusal of leave is un-appealable.

[54] By virtue of section 35(2)(f) leave must be sought from the court or judge that made the order. This is different from the wider provision found in section 35(2)(g) which allows the Court of Appeal to consider leave itself in certain circumstances. In this case leave has not been granted to appeal this consent order by the High Court judge. In those circumstances the Court of Appeal cannot itself consider the leave requirement.

[55] If this were not the case, we are bound to say that Mr Brennan has presented no evidence upon which we could grant such an application or extend time in this case. In particular we find no traction in the argument made by Mr Brennan that time should be extended in this appeal because of a breach of duty on the part of the lender's lawyers. This is put in a number of ways in the written argument but boils down to a claim that the "legal advisors on behalf of the respondents (plaintiffs) failed in their duty to the court and duty of candour by not disclosing to the court that the originating proceedings were unlawful." In our view this argument is totally misguided particularly as the appellant was represented by experienced lawyers during the High Court proceedings as was his wife. In these circumstances it is disingenuous to suggest that the opposing lawyers have acted improperly. We do not discern any misconduct or lack of candour on the part of the plaintiff's representatives.

[56] We repeat the point that failure to adhere to good practice does not render proceedings unlawful. Rather, it may have a bearing on the fairness and outcome of proceedings. In this case the lender provided numerous comprehensive affidavits at the appeal hearing before the High Court. We have seen for ourselves the detailed affidavits of Mr Lewis dated 15 October 2018, 24 April 2019 and 12 June 2019 and numerous replying affidavits from Mr Brennan and Mrs Brennan. Therefore, any procedural deficit was rectified.

[57] Mr Brennan was also perfectly entitled to have an appeal hearing before the judge, to cross examine the lenders and make his legal arguments in that forum. He did not avail of these options. Rather, he along with his wife, chose to settle the case with the benefit of legal advice. In our view there is no basis for Mr Brennan to complain about the choice that was freely made.

[58] We entirely reject the argument that Huddleston J was in some way at fault for not examining matters further himself and ordering a *de novo* hearing. We are surprised that this argument was made by a qualified barrister.

[59] We repeat the fact that the proceedings were not unlawful and that Huddleston J after numerous reviews and direction accepted a settlement. We also observe that the settlement included terms for a specific valuer and a sixteen week stay of enforcement. Mr Brennan himself says that "negotiations for settlement were to commence on that basis."

[60] It is also beyond comprehension for Mr Brennan to suggest that the judge would interfere in an agreement reached between represented parties.

[61] To our mind, Mr Brennan has simply repeated legal arguments of old in this latest stage of litigation. He has also cited numerous authorities which have no actual bearing upon the facts of this case; the facts of which may be simply stated in that a repossession order was made, appealed and a settlement reached on the basis of comprehensive and valid evidence from the lender. In truth this appeal has come across as a desperate shot in the dark and was bound to fail on the basis of the evidence and arguments put to us.

[62] Finally, and for the avoidance of doubt, we reiterate the core fact that frames this appeal as follows. Even if the appellant has a valid argument in relation to the lender's solicitor filing an affidavit before Master Hardstaff rather than the lender this was clearly corrected before Huddleston J. Fulsome affidavits from the lender were filed for the appeal in the High Court, no objection was taken to them at that time and they were the subject of replying affidavits. Therefore, no valid claim of illegality, perversity, unsafeness, bias or unlawfulness, can be established on the facts of this case applying the principles found in *Herron v Bank of Scotland*.

Overall conclusion

[63] We sincerely hope that this ruling will bring much needed finality to this case as we cannot identify anything further in this case that has not already been litigated upon. That is especially so as the property in issue is now repossessed by the lenders. Mr and Mrs Brennan are clearly desperate to cling on but in the absence of finding the funds to discharge the steadily mounting debt they have in relation to 2c Dorchester Park the prospects of ebbing the tide seem remote and will, we predict, simply cost them more money to no end.

[64] Accordingly, for all of the reasons we have given which span procedural and substantive matters our conclusion is that the appeal must be dismissed.