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

Ref: McB11338

ICOS No: 2020/26477

Delivered: 14/10/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

MARY PATRICIA ROBINSON AND JILL ANNE HENDRON AS EXECUTORS
AND PERSONAL REPRESENTATIVES OF THE ESTATE OF
ISAAC STEVENSON (DECEASED)

Plaintiffs

and

OLIVE BOYD

First named Respondent

and

THOSE PERSONS OCCUPYING 1 LARGYMORE DRIVE, LISBURN BT27 5BS

Second Named Respondent

Mr Keith Gibson (instructed by Elliott Duffy Garrett, solicitors) for the Plaintiffs

McBRIDE J

Ex Tempore

Introduction

[1] By summons issued on 10 March 2020 the plaintiffs, as the personal representatives of Isaac Stevenson (Deceased), sought an order pursuant to Order 113 of the Rules of the Supreme Court for possession of the premises situate and known as 1 Largymore Drive, Lisburn, BT27 5BS ("the premises").

[2] The plaintiffs were represented by Mr Keith Gibson of counsel. The respondents were not represented and did not appear at the hearing. The first respondent, Olive Boyd and her son David Boyd sent a "Notice of Abatement" to the

plaintiff's solicitors on 23 March 2020. Otherwise the respondents have taken no part in the proceedings. No Appearance has been entered on behalf of any of the respondents and no affidavits have been filed, despite court directions providing for this. Although the respondents were advised of the hearing today and their right to either participate by telephone, video conferencing or in person, no respondent attended either physically or by way of telephone or video conferencing.

[3] I am grateful to Mr Gibson for his very helpful written and oral submissions. I also wish to express my thanks to his instructing solicitors for an impeccable trial bundle.

The Evidence

[4] The Plaintiff's application was grounded on the affidavit of Mary Patricia Robinson sworn on 10th March 2020.

[5] As appears from the affidavit of Ms Robinson her father Isaac Stevenson ("the deceased") died on 5 June 2019. By his Will dated 12 September 1991 he appointed his children Mary Patricia Robinson and Jill Hendron as his executors. He left all his estate to his wife with the proviso that if she pre-deceased him all his estate was to be divided between his surviving children in equal shares. His wife died in 2010.

[6] In or around 2012 the first respondent Olive Boyd moved into the premises and she and the deceased lived together at these premises until his death. The first respondent however retained her own property at 88 Milltown Avenue, Lisburn which is held in her sole name mortgage free.

[7] During his relationship with the first respondent the deceased made no effort to change the provisions in his Will even though his Will which pre dated the date he met the first respondent made no provision for her.

[8] After their father's death the plaintiffs, in accordance with their duties as personal representatives made efforts to realise his estate. Attempts were made to enable the first respondent to vacate the premises on a voluntary basis. She refused and changed the locks. Thereafter, the plaintiffs sought through mediation to achieve resolution. The first respondent engaged a solicitor and it appears that an agreement was reached at mediation but the first respondent refused to sign up to the agreement and thereafter discharged her solicitors. The first respondent has never initiated any proceedings claiming an interest in the premises.

[9] The plaintiffs pay the rates on the property. The first respondent has never paid any rent in respect of her occupation of the premises.

[10] On 23 January 2020 the plaintiffs sent a letter by first class post to the first respondent terminating her licence to occupy the premises. A letter before action was sent on 30 January 2020 and proceedings were issued on 10 March 2020.

[11] The premises consist of a dwelling house and garden. They were valued recently at £160,000. The net value of the estate is £163,550 and therefore the premises are the only real asset in the estate.

Relevant Legal Provisions

[12] The relevant provisions are set out in Order 113 of the Rules of the Supreme Court. For the purposes of this application the most relevant rules are Rules 1, 3, 4 and 5.

Rule 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 after the termination of the tenancy) 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.”

Rule 3 provides that the affidavit in support should set out the plaintiff's interest in the land, the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises. It further provides that he should state that he does not know the name of any person occupying the land who is not named in the summons.

Rule 4 sets out the requirements for service of the originating summons and in particular provides that where any person in occupation of the land is named on the summons service of the summons and affidavit shall be by way of either personal service or by leaving the documents at the premises or sending them to him at the premises or by such other manner as the court directs. Where any person not named is in occupation of the land service shall be effected in the same manner unless the court otherwise directs by either affixing a copy of the summons and affidavit to the main door or other conspicuous part of the premises and if practicable by inserting a copy of the summons and affidavit in a sealed transparent envelope addressed to “the occupiers” through the letterbox or by placing stakes in the ground at conspicuous parts of the occupied land to each of which shall be affixed a sealed transparent envelope addressed to “the occupiers” and containing a copy of the summons and affidavit.

Rule 5 provides that any person not named as a defendant who is in occupation of the land and wishes to be heard on the question whether an order for possession should be made may apply at any stage of the proceedings to be joined as a defendant.

Consideration

[13] A number of questions arise for consideration. Firstly do the plaintiffs have locus standi to bring the proceedings? I am satisfied that the plaintiffs have locus standi to bring the case. They are the personal representatives of the deceased as they were appointed as executors under the last Will of Isaac Stevenson (deceased). A grant of probate with Will annexed issued on 2 September 2019. As personal representatives they are entitled and, indeed, required to realise the estate of the deceased.

[14] Secondly, are the conditions in Order 113 (1) met, that is, did the respondents enter into or remain in occupation of the premises without the licence or consent of the plaintiffs or the deceased? I am satisfied that the first respondent entered into occupation with the licence of the deceased. This licence was then terminated by letter dated 23 January 2020. In *Greater London Council v Jenkins* [1975] 1 WLR 155 the court held that Order 113 rule 1 applied to a person who holds over after his licence to occupy has been terminated. I find that the first respondent's licence to occupy the premises was terminated by letter dated 23 January 2020 and accordingly after that date she became a trespasser and therefore the Order 113 procedure is applicable.

[15] The procedure under Order 113 (1) however should not be used where there is a serious issue to be tried or there is otherwise an arguable case that a possession order should not be made.

[16] Therefore, the third question for consideration is whether there is any serious question to be tried or any arguable case has been made out. On the basis of the information available to the court it may be that the first respondent could bring a claim under the Inheritance (Provision for Family and Dependents) (NI) Order 1979 or a claim based on proprietary estoppel or constructive trust. Although the parties have been in correspondence and at one stage the parties entered into mediation and the first respondent engaged a solicitor, at no stage has she ever threatened or intimated that she intended to bring such a claim and to date no such claim has been brought. Consequently, it is the court's view that in the absence of such proceeding there is no serious question to be tried. The first respondent is a trespasser as her licence to occupy has been terminated and therefore it is my view that the Order 113 procedure is entirely appropriate and applicable in all the circumstances.

[17] Before determining whether to make a possession order the court has also carefully considered the Notice of Abatement to ascertain whether it contains any matters which would amount to an arguable defence or a serious dispute. The Notice of Abatement is written in strange and confusing language but it appears that it does raise a number of possible defences, namely:

- (i) The proceedings are irregular due to grammatical errors;
- (ii) The proceedings have not been served;

- (iii) The stamp on the court order has been altered;
- (iv) David Boyd resides in the premises; and
- (v) Olive Boyd could not attend court physically as it would pose a risk to her life due to Covid.

[18] Having considered the pleadings I do not accept that there are any grammatical errors in the proceedings. Even if there were errors of this nature I do not consider that such errors would invalidate the proceedings or otherwise amount to a defence. Secondly, for reasons which I will come to I am satisfied that the proceedings were served and in any event it is clear that they have come to the attention of the respondents because the service of the proceedings has elicited the response of the Notice of Abatement. Thirdly, I note the stamp on the application does appear to have been altered by pen. The court office has advised that this document was originally date stamped in error and it was then amended by pen to reflect the fact that the application was actually made on 10 March 2020. In any event I do not consider that a change in the date stamp in the present circumstances would in any way render the application void or irregular. Fourthly, there is no evidence that Mr David Boyd is resident in the property. If he is resident in the premises there is no evidence that he is anything other than a trespasser. I have considered, given his assertion that he is in occupation, whether he ought to be joined as a party. I do not however believe that this is appropriate as Order 113 Rule 5 places the onus on a person in occupation to apply to be joined as a defendant and no such application has been made by him. Further, I have considered whether in some way the respondents have been denied a fair hearing. In light of the fact the first respondent indicated that she was over 70 and considered it would be life threatening to attend court, the court ordered a hybrid hearing to enable the defendant to elect whether to attend physically or by telephone or video conferencing. The first respondent never contacted the court to indicate she had any difficulty with access to a phone or computer internet and in all the circumstances the court considers that the respondents were given the opportunity to fully participate in the present proceedings and they have chosen not to do so.

[19] In addition to the matters raised in the Notice of Abatement the court has also considered, and Mr Gibson helpfully provided an Addendum Skeleton Argument in respect of, the question whether because of Covid the court either lacked jurisdiction or otherwise should not make an order in the present circumstances. The court is cognisant of the fact that there is legislation restricting possession orders at this time because of Covid. That legislation restricts possession orders being made in respect of persons who have an interest in premises, for example, mortgagors or licensees. It does not extend to trespassers which is not surprising. Accordingly I do not consider that there is any statutory bar to the court making an order on foot of Order 113.

[20] The fourth question for consideration under Order 113 is whether all the technical proofs in respect of the pleadings and service have been met. The

application was grounded on the affidavit of Ms Robinson dated 10 March 2020. In that affidavit she set out that she and her sister were the personal representatives of her late father's estate. She provided proof of the Grant of Probate which was exhibited to her affidavit. She further set out that her father died on 5 June 2019 and at the time of his death he was living at the premises with the first respondent. She gives some background information about the first respondent. She states that she came to live with the deceased after he had made his Will and that he did not make any effort to change his Will to make any provision for the first respondent. She further avers by reference to a land certificate that the first respondent is owner of 88 Milltown Avenue, Lisburn, which is an unencumbered property and she further avers that the first defendant is in employment. She advises that mediation had been entered into; the fact that the first respondent did engage solicitors in respect of that; and the fact that mediation was unsuccessful and that since that time there has been no further engagement from the first respondent.

[21] I am satisfied that the affidavit fulfils the requirements set out in Order 113 (3) which requires the affidavit in support to set out information about the applicant's interest in the land and the circumstances in which the land has been occupied without licence or consent.

[22] The second matter which requires formal proof is service. Order 113 (4) sets out the requirements of service.

[23] In this case service was proved by the affidavit of a process server, Mr Andrew Weir, which was sworn on 15 May 2020. He avers on 18 March 2020 he served the proceedings by way of affixing a copy of the summons, affidavit and court order dated 28 April 2020 to the front door and in addition by posting them through the letter box. He attended the premises later that day and noticed that those documents had been removed from the place where he had affixed them. I am satisfied that the requirements of service set out in Order 113 (4) (1) (b) have been met. In any case I am satisfied that the respondents are aware of the proceedings as they responded to same by forwarding the Notice of Abatement to the plaintiffs' solicitors.

[24] When listing this matter for hearing I made a number of directions regarding service of the trial bundle upon the respondents together with the need to advise them of the trial date and the form of hearing. I am satisfied from reading the affidavit of Mr Weir dated 8 October 2020 that he provided details of the hearing, the Sightlink guidance and the trial bundle to the respondents by posting these documents through the letter box, after he had made several unsuccessful attempts to personally serve these documents on the respondents. I am therefore satisfied that the respondents were fully aware of the proceedings today and have chosen not to attend.

Conclusion

[25] I am satisfied that the requirements under Order 113 are met in this case and no arguable defence has been raised. I am however cognisant of the fact that it is open to the first respondent to bring proceedings claiming an interest in the premises. I do not consider that the potential of such proceedings is a bar to the court making a summary order and therefore I am satisfied that the court has jurisdiction to make a possession order. Nonetheless, in light of all the circumstances and the fact that we live with certain restrictions as a result of Covid, I am not minded to make an order which is immediately operative. I therefore make an order stayed for a period of 6 weeks to reflect the difficulties with Covid but also to reflect the fact that the first respondent is the sole owner of another unencumbered property and is presently in employment.

[26] I condemn the first respondent in costs. I make no order as to costs against the second respondent.