

Neutral Citation No: [2026] NICH 24	Ref: SCO13161
Judgment: approved by the court for handing down (subject to editorial corrections)*	ICOS No: 21/063283
	Delivered: 19/05/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

BANK OF SCOTLAND PLC

Plaintiff (Respondent)

and

JACINTA McALINDEN

First Defendant

and

HUGH McALINDEN

Second Defendant (Appellant)

Robert McCausland (instructed by TLT NI LLP) for the plaintiff (respondent)
 Anthony Brennan (instructed by Jim Rafferty & Co, Solicitors) for the first defendant
 The second defendant (appellant) appeared in person

SCOFFIELD J (*transcript of ex tempore ruling*)

[1] This is an appeal against an order of Master Hardstaff dismissing an application for discovery brought by the second defendant, Mr McAlinden, in the course of Order 88 possession proceedings. I was persuaded to hear the appeal on an expedited basis, by consent of the parties, as the full hearing of the Order 88 application is listed for hearing before the Master tomorrow.

[2] Mr McAlinden appeared in person to present the appeal. He was supported by the first defendant, who was represented by Mr Brennan, who I permitted to make brief submissions in support of the appeal. Mr McCausland appeared for the Bank of Scotland ("the Bank"), the plaintiff in the possession proceedings and the respondent to the appeal. I am grateful to all concerned for the submissions made, both orally and in writing.

[3] A complaint was made about the fairness of the hearing before the Master in two respects: first, an alleged failure to permit the second defendant to properly develop his application in oral submissions; and second, a failure to permit the first defendant to support the application when it was not made on her behalf (or to accept a speaking note in this regard provided by counsel). As the court has held on a number of occasions, complaints of this nature are almost invariably cured by the appeal proceeding de novo before the judge. In this case, I heard full submissions from the second defendant and have considered his written submissions. I also heard brief supporting submissions from Mr Brennan and have considered written submissions filed on his client's behalf also, which he confirmed replicated the substance of the speaking note on which reliance was hoped to have been placed below. His client's involvement in the discovery application is tangential at best. Her key point in the possession proceedings is an *Etridge* defence, which remains to be heard and determined.

[4] By his summons dated 2 March 2026 the applicant seeks three categories of documents: (i) Land Registry documents and other documents relevant to the identification of the charged lands; (ii) documents relevant to the plaintiff's standing to enforce the charge, including in respect of the legal and beneficial ownership of the charge; and (iii) documents relating to the mortgage account and various transactions, calculations and figures. The Master declined to order disclosure under any of these categories.

[5] Before turning to resolve the issues on this appeal it is appropriate to record a number of matters by way of context. First, a suspended possession order was granted in this case on 23 November 2022. The plaintiff is seeking leave to enforce an order which has already been granted; and which was granted on consent (although the first defendant in particular makes a number of points about that). Second, in Order 88 proceedings there is no requirement for standard discovery, that is, discovery by way of list such as arises in writ actions in the High Court under RCJ Order 24. Third, in respect of the second category of documents in particular, there is specific case law which has dealt with this in a number of previous applications, in a manner expressly designed to obviate disproportionate expenditure of time and resources. Fourth, it is for the Bank to prove its case in the application before the Master. Any failure to provide the documentation necessary for it to do so will redound to its disadvantage.

[6] Notwithstanding that discovery by way of list is not required in Order 88 actions, applications for specific discovery may still be made. I have reminded myself of the test for the ordering of discovery. The documentation sought must relate to a "matter in question in the cause or matter"; and discovery should only be ordered if disclosure is necessary either for disposing fairly of the cause or matter or for saving costs (see Order 24, rule 9).

[7] Mr McCausland's overarching submission was that the relevant information was contained in a small number of documents, principally the mortgage deed; the

Land Registry folio; and the earlier possession order. All of these documents are already in evidence before the court.

[8] Taking each of the categories in turn, my conclusions are as follows.

[9] The first category of documents was relatively easy to resolve. The mortgage deed refers to the relevant folio, namely Folio AR12119. It is the lands comprised in that folio which are identified as the property to be charged; and the Land Registry certificate of charge specifies that folio. It is the lands comprised in that folio over which security was granted and possession of which the plaintiff seeks in order to exercise its power of sale. Separately, the mortgage deed identifies the borrower's address as 74 Clonmore Road, Dungannon. A range of other documentation exhibited in the papers also refers to that address, including the notice to quit. The defendants' point arises from the fact that, in the folio map provided by Land Registry, the number '76' appears, rather than '74.' Mr McCausland described that as a simple error. Whether or not there is any legal significance to this is a matter which will have to be determined by the Master. The plaintiff's position is that it is of no legal significance given that the mortgage deed clearly identifies the correct folio. However, whatever point the defendants may have arising in relation to this issue does not, in my view, require the disclosure of further documents. It is clear that the plaintiff has always viewed their address, and the postal address of the property, as No 74 Clonmore Road. It is also clear that the folio map includes a different number. It seems to me that some of the documentation sought within this category has already been provided, including the Land Registry folio and confirmation of the registration of the charge relied upon. The Land Registry is, of course, also publicly searchable. I do not consider that further discovery – if any exists – is necessary on this issue to allow it to be aired before, and fairly determined by, the Master; nor for saving costs.

[10] The third category of documents is also straightforward in my view. I am satisfied that the defendants have been provided with a significant amount of information about their mortgage account from inception. This is clear from the fact that the second defendant instructed a company called Bank Check to undertake an audit of the mortgage account, which he has placed in evidence, which shows commentary on aspects of the account going back to 2007. It is true that that report raises some issues which, it is said, give rise to uncertainty. However, whether further discovery is necessary on this issue must take into account the nature of the matters in question at this stage of the proceedings. The key issue is whether the requirements of the suspended possession order have been complied with, namely whether the normal monthly instalments that become payable under the mortgage have been paid without default and whether the arrears of such instalments have been paid off by means of the arrears payments specified in that order. No such payments have been made on either account for quite some period of time. I also take into account the fact that the Bank has previously provided payment details within its evidence; and that the defendants are entitled at any time to request copies of mortgage account statements which will be provided in the usual way. It will be

a matter for the Master whether the requirements of Order 88, rule 5 as to the supporting evidence required (including the state of the account between the mortgagor and mortgagee) have been discharged.

[11] The second category of documents is the one upon which argument was most focused in the course of the appeal hearing. Mr McAlinden's core submission is that an appropriately authorised and knowledgeable officer of the Bank "must exhibit the primary documentation necessary" to establish the plaintiff's entitlement to enforce. Mr McCausland's primary submission in response was that the Bank has done so by exhibiting the mortgage deed and Land Registry confirmation that the Bank is the legal owner of the charge. Mr McAlinden has raised the possibility that the mortgage may have been securitised. He contends that he needs any documents relating to this to "properly test" the plaintiff's case.

[12] This issue has been addressed in a number of previous cases including, most notably, *Swift Advances plc v McCourt* [2012] NICH 33; and *Santander (UK) Plc v Carlin & Hughes* [2013] NICH 14. I considered similar issues myself recently, albeit in a slightly different context, in *Magee v Morag Finance Ltd* [2026] NICH 11.

[13] There seems to me to be clear force in the submission that a legal owner of a charge – as the plaintiff clearly is – can part with the equitable interest in it without losing their right to enforce the charge. That was described as "clear law" by Deeny J in the *Carlin* case, at para [2]. It appears to be the approach generally taken in this jurisdiction, although McBride J considered that might not be the end of the matter in at least some cases (see para [51] of her judgment in *Presbyterian Mutual Society Ltd v Dodds* [2021] NICH 2). However, even assuming there remains some doubt about the issue, in the present case the Bank's affidavit evidence states clearly, in two different affidavits, that there has been no securitisation of the defendants' mortgage and that the plaintiff is the legal and beneficial owner of the charge. That is set out in the affidavits of Ms George, a bank official, sworn on 3 June 2025 and 23 September 2025. These averments were made to directly meet the issue which had been raised by the second defendant. They assert that the Bank of Scotland is the correct plaintiff; that the mortgage account has not been securitised or transferred; that the registered owner of the charge is the plaintiff; and that the plaintiff is the legal and beneficial owner of the charge and has the right to enforce the mortgage.

[14] This affidavit evidence was clearly designed to comply with the guidance for future cases set out by Horner J in para [42] of the *Swift* case. I consider that it does so. Mr Brennan appeared to make some criticism of the fact that Ms George is identified as a "non-standard case consultant." However, she is an employee of the plaintiff and has confirmed on oath that she is a suitably senior and knowledgeable official to make the relevant statements. She has further confirmed her knowledge of the consequences that she and the plaintiff bear if she provides false information, having been advised of this by the plaintiff's solicitors. She has further averred that she has made the second affidavit on the basis of information provided to her by

reference to the plaintiff's records and from her direct knowledge of the mortgage account which is the subject of these proceedings.

[15] I do not consider that Ms George's job description undermines in any way the veracity of her averments. Indeed, the fact that she is a *non-standard* case consultant may be considered supportive of the fact that she is not the type of official about whom Mr McAlinden complained; namely, someone on the enquiries desk acquainted only with standard enquiries and without the wherewithal to understand the nature of the issue which had been raised. I also do not consider it necessary for Ms George to set out in detail – as Mr Brennan appeared to suggest – every record she consulted in order to be in a position to make the averment, much less to exhibit those documents (as the submissions of both defendants appeared to suggest). That would entirely undermine the approach set out by Horner J in the *Swift* case. It is designed to permit the matter to be dealt with (at least in the first instance) by way of a suitably formulated and reliable averment without the need for the provision of supporting documentation.

[16] The plaintiff having complied with the *Swift* guidance, Horner J made clear in that case that “unless there is prima facie cogent evidence that the Plaintiff does not have title, further discovery should not be considered necessary” under RCJ Order 24, rule 7 [underlined emphasis added]. That is specific guidance for dealing with an application of this type, set out expressly to apply in Order 88 proceedings and no doubt also with knowledge and understanding of the *Peruvian Guano* test on which the second defendant relies. In the *Carlin* case (see para [7]), Deeny J commended that approach. He said that “only if some uncertainty is left” after the relevant evidence from the bank should one go on to deal with applications for specific discovery. In that case, he found that the *Swift v McCourt* directions had been breached, particularly because the affidavit was not from a relevant bank official but merely an external solicitor. That does not arise in the present case. In the *PMS v Dodds* case McBride J also described the approach outlined by Horner J as “a sensible, robust and proportionate method of dealing with a challenge by a borrower to the lender's locus standi” which should be followed in all cases (see para [48] of her judgment). In that case, as in *Carlin* but as distinct from the present case, McBride J held that the averment relied upon was insufficient to comply with the *Swift* requirements.

[17] I do not consider that the second defendant in this case has raised cogent evidence that the Bank of Scotland does not have title to enforce the mortgage. In truth, his case on this was essentially speculation on the basis merely that securitisation was common within the mortgage market. He relied upon a deed of charge from December 2024 between Bank of Scotland and a range of other financial institutions which may be thought merely to demonstrate that fact; but which has no apparent connection to his own mortgage. The second defendant and Mr Brennan also relied upon the fact that the charge is registered in the name of Halifax plc, rather than Bank of Scotland. I accept the plaintiff's submission that the provisions of the HBOS Group Reorganisation Act 2006, particularly sections 10 and 12, provide

an answer to this issue. It certainly does not amount to “cogent evidence” that the plaintiff does not have title to enforce the charge.

[18] I have not therefore been persuaded that further discovery is necessary in this case. It is plainly not necessary for saving costs. Indeed, the type of exercise envisaged by the second defendant is likely to significantly increase the cost of the proceedings. For the reasons given above, I also do not consider it necessary for fairly disposing of the proceedings (even assuming in the defendants’ favour that the documents relate to matters in issue).

[19] Had the defendants issued a notice to cross-examine the Bank’s deponents, they could of course have explored some of these issues further by way of cross-examination if they saw fit. The Master may yet permit that to occur. He can also, of course, revisit the discovery issue if anything arises in the course of the hearing which causes him to take a different view. For the moment, however, I do not consider it to have been shown that the Master erred in law or in the exercise of any discretion available to him in refusing the discovery application.

[20] For the reasons given above, the appeal is dismissed.

[21] (The above ruling was prepared after the hearing and handed down later the same day. It has been typed up, corrected, and subject to modest amendment from the oral ruling delivered in open court earlier today. It is being issued to the parties for their information, and that of the Master should he wish to consider it, in advance of the hearing tomorrow.)