Neutral Citation No. [2013] NICh 14 | *Ref:* **DEE8994**

*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **19/09/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

SANTANDER (UK) plc

Plaintiff/Respondent

and

THOMAS ANTHONY CARLIN & MAXINE KARON HUGHES

Defendants/Appellants

DEENY J

Application

[1] The court here is dealing with a situation which happily is unusual. Thomas Anthony Carlin and Maxine Karen Hughes have appealed from an Order for possession granted by the Master relating to their home because they are in arrears of payments on an interest only mortgage on the property. As a number of personal litigants do in recent times they challenged the right of Santander UK plc to enforce the mortgage because they suspected that they may have transferred it away.

[2] It is clear law, as has been recently reaffirmed by the Court of Appeal in England in Paragon Finance v Pender and Another [2005] 1 W. L. R. 3412 that a legal owner of a charge can part with the equitable interest in it without losing their right to enforce the charge. Therefore, this point in many cases is likely to prove a short-term gain for any borrower because it is simply a matter of the right person establishing that they are entitled to assert what had been agreed between the parties under the mortgage would happen in default of the payments agreed. Nevertheless, it is essential that the court is making an order in favour of the correct party who has the right to enforce a legal charge, as much as any other contract between parties.

[3] A most unhappy situation has developed here. Santander UK plc sought the Order for possession. They put in an affidavit in support; they chose to do it in a particular way, that is through their solicitor. Now, Mr Carlin in one of several

documents which he submitted to the court has sought to rely on a judgment of Mr Justice Peart in the High Court in Dublin where he objected to hearsay evidence of debts. It seems clear that there is no equivalent of the Civil Evidence Order in the Republic of Ireland and explains the judge's remarks. We do have a Civil Evidence Order. Parties are entitled to put in an affidavit and to rely on hearsay evidence with the court assessing its weight. In any event even before the Civil Evidence Order an affidavit with the deponent saying that they had been informed of something by a named person and that they believed it was true, in appropriate cases for the smooth administration of justice was received. This is often done, particularly in originating summonses cases. But it is important that it is done carefully and conscientiously. The system only works if both the lawyer is scrupulous in what the lawyer says and the client is honest in what they inform the lawyer.

[4] Here we have the situation where, it is now admitted that paragraph 15 of the affidavit of Miss Valerie Gibson, solicitor, for the lender Santander plc of 6 December 2012 is simply wrong. Mr Carlin would say it is a lie and at the moment I do not see how that can be clearly gain said; it is not Ms Gibson's lie but when somebody told her that the mortgage had not been assigned they were either being careless or untruthful and at this precise moment in time I do not know which is the case. And what is more Mr Carlin asserts and Mr Gibson with his customary and proper candour does not dispute that the Master was told that there had been no assignment here and so that these issues did not arise. So the Order of the court below was obtained improperly by a misrepresentation to the court, misrepresentation put by the advocate for the lender to the Master and put in a sworn affidavit.

[5] That would be a serious enough state of affairs but at the review of this matter before me when listing this case for hearing today, 19 September, the plaintiff was given an opportunity and was directed on that occasion on 10 June to serve a rejoinder affidavit to Mr Carlin's affidavit and that of Miss Hughes within two weeks from that day, that is by 24 June. They did not do so. They did not serve affidavits, as far as the court was concerned, until 16 September, only three days before the hearing. Mr Carlin says he got an unsworn, undated draft two days before that. That is utterly unsatisfactory. It shows a disregard for the orders of the court which would be disreputable in a litigant in person and is equally disreputable on the part of a large commercial enterprise which should know better. No satisfactory excuse is offered for that.

[6] Furthermore, the matter is worsened by the disregard by Santander of the decision of Mr Justice Horner in Swift Advances plc v James and Maureen McCourt [2012] NI Ch. 33. He on that occasion, on behalf of Swift did have in court an official of Swift giving oral evidence before him because this or a similar point had been raised there. Of course it failed ultimately because Mr White, the Risk Manager of the plaintiff, gave sworn testimony that he had made the checks and the plaintiff had not sold the loan of the McCourt's to any third party and it had not legally nor,

apparently in that case, equitably assigned the charge, which the judge accepted and so Swift succeeded.

[7] The judge, and as I have already previously said in this court, wisely in my view, commended the course that the solicitor acting for the financial institution should expressly 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. Next, their solicitor should confirm to the court that the deponent has been so advised before the affidavit is sworn. Thirdly, 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. It is only if some uncertainty is left then that one should go on to deal with applications for specific discovery. So it can be seen here that Santander have further disregarded the decisions of this court because they have not deigned to swear the affidavit themselves but have required Miss Gibson to do it. Now the matter that is set out therein may or may not be right but it seems to me as it contradicts the earlier information on affidavit as it was given to the Master that Mr Carlin is entitled to cross-examine this lady as to whether it is true and perhaps is entitled to further discovery.

[8] His initial application today was to adjourn the matter because he had not got the skeleton argument in time and he had just been presented with this change of front at a very late stage and the court was sympathetic to that application. I heard from Mr Gibson. I gave the opportunity to Mr Carlin as to whether he had any further application and of course he might have made several applications at that time but he has chosen, as he put it, to ask me to strike out the order, and as he put it, I think not unreasonably in the circumstances, on the basis of untruth. Now the court of course recognises that everybody makes errors. They should not make them on affidavits, but at this point I do not know whether this was an honest error, I do not know whether somebody was playing fast and loose with the truth. No explanation of the earlier misstatement is given in the new affidavit. What is certainly the case is that Santander have been in breach of the directions of the court, they have been in breach of the judgment of Swift v McCourt and they obtained an order by at least, as I said earlier, misrepresenting the facts to the Master.

[9] In all those circumstances I conclude therefore that the appeal should succeed and I reverse the order of the Learned Master, making it clear that this is no reflection on him, and strike out the order for possession.