Neutral Citation No: [2020] NICh 11 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HUD11227** *Delivered:* **08/06/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

SANTANDER UK PLC

and

THOMAS ANTHONY CARLIN

First-named Defendant

and

MAXINE KARON HUGHES

Second-named Defendant

_____

HUDDLESTON J

Introduction

[1] The proceedings which have led to this case are of some vintage and have taken a somewhat circuitous route. For that reason I have set out in the appendix to this judgment a chronology of the events that have occurred. In essence, however, there was an initial set of proceedings issued by the Plaintiff (by its then name of Abbey National Plc) on 18 April 2012 seeking possession of a property secured to it on foot of a mortgage dated 23 September 2008 between the Defendants (1) and Abbey National Plc (2). The Master's possession order which resulted from those initial proceedings was set aside by Deeny J (as he then was) essentially because the Plaintiff in its grounding affidavit seeking possession of the Property, had failed to disclose that it had securitised the debt charged on the Property. Deeny J's judgment is reported at [2013] NICh 14.

[2] The present proceedings were issued following that decision and have taken the circuitous route which is outlined in the chronology. I do not propose to deal with the sequence of events which has occurred as they are not, in essence, relevant to the judgment of this court in the present action.

The Facts

[3] On or about 23 June 2008 the Defendants attended with a mortgage broker, The Mortgage Shop (NI) Ltd, at their offices at Mill Street, Ballymena, Co Antrim, with a view to applying for a mortgage. At the time of the application the Defendants were living together at an alternative address, with the first-named Defendant being employed as a civil servant and the second-named Defendant being employed as a care assistant. During the course of that interview the Defendants made an application to Abbey National Plc for a loan to purchase outright a property ("the Property") at [an address known to the court] (the title to which is registered in folio AN170712 Co Antrim). The value of the Property was estimated at £265,000 and the Defendants at that time indicated that they wished to borrow the sum of £185,000.

[4] The intention of the Defendants was to purchase the interest of Mr Doran, the former husband of the second Defendant, in the Property. Ms Hanna of Boal Anderson Solicitors had (it would seem) acted for the second Defendant in relation to her matrimonial proceedings and a separation agreement had been brokered between the parties which provided (inter alia) for the purchase of Mr Doran's interest for an agreed sum. The loan which the Defendants sought to achieve this objective was on an interest only basis with the repayment method of the principal being identified by the Defendants on their application as "*the sale of stocks and shares/other investments*". The Defendants now dispute the accuracy of that contention – a point I shall revert to below. In any event, on 9 July 2008 an offer issued from Abbey National Plc to the Defendants in the form of a letter addressed to them. This replaced an earlier loan offer of 4 July 2008. The loan which was ultimately offered was in the sum of £191,250 against a confirmed valuation of the Property at £255,000. The mortgage offered was on an interest only basis for a period of 20 years with the additional attraction that for the first two years interest would be charged at a variable rate of 1.14% above the Bank of England lending rate. Thereafter the rate would revert to the lender's standard variable rate.

[5] The Defendants nominated Boal Anderson and, more particularly, Ms Ann Hanna, Solicitor, to act on their behalf in connection with the purchase of the Property and the security to be given to Abbey National. The proposed completion date was identified as 19 September 2008.

[6] The exact circumstances leading to the loan, the mechanism and the transfer of monies as between the Plaintiff and Boal Anderson Solicitors is one which the first Defendant has taken considerable issue with during the course of these proceedings.

[7] In the affidavit of Ms Melissa Serin (a Project Analyst but formerly a Supplier Special Support Manager with the Plaintiff) dated 30 April 2019 the Plaintiff makes the following case in relation to those events:

(i) That on 18 September 2008 (being the day before anticipated completion of the transaction) the sum of £191,465 was debited from the Plaintiff's "Advances Pending Ledger" and transferred to the Plaintiff's "CHAPS ledger". The sum advanced was calculated as being the loan of £191,250 plus a £250 cashback incentive less the sum of £35 representing the telegraphic transfer fee. It was advanced on the back of Ms Hanna's Certificate of Title and Funds Request;

(ii) On 18 September 2008, the full mortgage loan of £191,465 was transmitted from the Plaintiff's CHAPS ledger account to Boal Anderson's Solicitors via telegraphic transfer. I shall revert to it below, but the court heard from Ms Ann Hanna and was furnished with an extract of the client account records demonstrating receipt of those funds at Boal Anderson's account with Ulster Bank;

(iii) On 19 September 2008 the Defendants' mortgage account was debited in the sum of £192,099 representing the loan plus Abbey National's product booking fee of £849 and allied costs (as detailed in the mortgage offer letter).

[8] Legal completion of the transaction ("the Transaction") did not occur until 23 September 2008.

[9] As to the formalities leading to completion of the Transaction, from the evidence, it would appear that the Defendants signed a mortgage deed in respect of the Property when they attended with Ms Hanna but which at that meeting was left undated. Ms Hanna gave evidence that this was subsequently dated in her hand when she completed the acquisition of the Property on behalf of the Defendants and paid Mr Doran the amount which had been agreed between the second Defendant and Mr Doran on foot of the matrimonial agreement and representing the purchase of his interest in the Property.

Abbey National Plc/Santander UK Plc

[10] It is convenient at this point to deal with a preliminary point raised by the Defendants. The proceedings in this action were originally brought in the name of Santander (UK) Plc (i.e. with brackets) rather than Santander UK Plc (i.e. without brackets). The first Defendant sought to have the proceedings struck out on that basis. Having heard the parties I was satisfied that this was a genuine mistake and that no injustice would be done to either party by making the requisite amendment to the proceedings pursuant to Order 20 Rule 5 RSC. I took that approach on the following basis:

- I am satisfied that there is no company called Santander (UK) Plc (and never has been) and that the only entity recorded in Companies Registry is Santander UK Plc;

- I am entirely satisfied that the Plaintiff is the successor in title of Abbey National Plc - this is confirmed in Practice Direction 3/2010 as issued by the Lord Chief Justice on 4 February 2010 which records the change of name from Abbey National Plc to Santander UK Plc; and

- Finally, I am satisfied, that the error was a simple mistake, that no prejudice results to the Defendants whatsoever by reason of such a name change and the exercise of the court's powers to amend the title to the proceedings.

[11] I should say that similar points have been raised by other litigants in person – with similar result – see *Santander UK Plc v Scullion* [2020] NICh 1 and *Santander UK Plc v Ward* [2020] NICh 2.

Evidence

[12] The court had affidavit evidence from Ian Williams (Head of Secured Debt at the Plaintiff) who dealt extensively with the issues of securitisation (see below). The Court also had both affidavit evidence and oral testimony from Mr Thomas Ranger, the Treasurer of Santander UK Plc, on the question of "no money" or the "money supply argument" (see below) and Ms Melissa Serin (as mentioned above), again of the Plaintiff, who dealt both with the replies to the detailed discovery applications made by the first Defendant and the mechanism and transfer of the alleged mortgage advance. Mr Carlin, the first Defendant, as a personal litigant, was assisted by a McKenzie Friend throughout (with the court's permission) and, with consent, gave his evidence from the body of the court. The court facilitated him with an extensive number of breaks to allow him to collate and present his case.

[13] Mr Ranger and Ms Serin were called because of the nature of the interlocutory proceedings leading up to the hearing. The first Defendant had lodged a very detailed specific discovery application. That had been dealt with before the Master and in the replying affidavits provided by both Mr Ranger and Ms Serin. To deal with those issues upon which the first Defendant was not satisfied it was proffered by the Plaintiff (and the court agreed) that the best way to deal with any continuing issues was to allow the Defendant the opportunity of cross-examining the witnesses in person. This opportunity he availed of during the proceedings.

[14] Ms Ann Hanna of Boal Anderson Solicitors, and the solicitor who had carriage of the Transaction to which this action ultimately relates, also gave evidence to the court and produced the relevant records which documented the financial transactions which occurred.

The Defendants' Arguments

[15] The Defendants' arguments are various and wide ranging. I did not find them necessarily cogent or logical but I have dealt with them in the following sections:

A. The securitisation issue

[16] As I have said Ian Williams gave extensive affidavit evidence. In large part this was to address the first Defendant's contention around the issue of securitisation of his loan which the first Defendant says (in essence) "*vitiates*" the mortgage contract and "*renders void*" the mortgage deed [per the Defendant's Closing Submissions at Paragraph 41] and/or the argument that the Plaintiff "created" money to fund the mortgage advance and, therefore, suffered no actual loss.

[17] On the question of securitisation Mr Williams avers that:

(i) The assignment of equitable rights in mortgage portfolios is, was and remains a widespread practice amongst UK mortgage lenders;

(ii) Fundamentally, it is a practice that is regulated by the Financial Conduct Authority (the "FCA");

(iii) In essence lenders use it as a method to raise funds which can then subsequently be lent to individuals or other borrowers;

(iv) In the course of securitisation, the security which is allied to a portfolio of existing loans is assigned to the company who provides security for the bonds - in this case Abbey Covered Bonds LLP – thus acting as security for the additional borrowing by the lender. The additional borrowing is used to make further loans;

(v) Importantly, in those cases although there is an assignment of the loans the legal title in the original security generally remains with the original mortgage lender - in this case the Plaintiff;

[18] Mr Williams also avers that within Abbey National (at that time) in order to identify those mortgages that are "allocated" to the arrangement the following occurred:

- The mortgages which were allocated to the securitisation were indicated by a prefix ANMF Number;

- That when the assignment occurred the Plaintiff showed this in its internal books of account by a "transfer in" and "transfer out" of the account maintained by the Plaintiff to record the details of each individual loan – in this case the entries which are in point in relation to the Defendant's account were made on 28 September 2010 and 30 December 2011.

[19] The first Defendant has raised the issue of securitisation as a defence to the present proceedings. He has done so, no doubt, in part because of the course (and

outcome) of the initial proceedings and the fact that the original possession order was set aside (see supra). The first Defendant has provided extensive affidavit evidence and written submissions and (obviously) addressed the Court as to his arguments but even with all of that it is difficult to assess exactly how he asserts that the act of securitisation is a defence to the present possession proceedings. What he appears to assert is that the Plaintiff had no authority to deal with his account in the way which Mr Williams describes and/or that the credit/debit entries discharged his liabilities and/or rendered the mortgage void.

[20] I can deal with the "authority" point in short order:

(i) It is a long established legal principle that a lender may transfer the interest it holds in a mortgage to a third party at any time during the currency of the mortgage itself [*see Fisher and Lightwood on Mortgages at paragraph 29.4 and Re Quinlan's Trust [1859] 9 IR 1HR*];

(ii) It is also a reality that in doing so the lender may transfer either the debt, its security interest in the mortgaged property, (i.e. the mortgage), or both;

(iii) Equally, the interest transferred can be either a legal or an equitable one.

[21] Accordingly, the legal framework on the facts of this case not only facilitated and allowed the Plaintiff's actions in terms of the securitisation that occurred but, with specific reference to the mortgage contract itself, under Condition 35 of the Mortgage Conditions, the Defendants (as borrowers) had expressly agreed to the Plaintiff undertaking such action if it so desired. Condition 35.1 provides as follows:

> *"You [i.e. the borrower] agree that we may transfer, or agree to transfer, the following to any person at any time:*
>
> *a) some or all of our rights or obligations under the mortgage documents; and*
>
> *b) some or all of the rights or obligations we have under our charge over the additional security."*

[22] On the facts, what occurred was that the equitable (rather than the legal) interest that Abbey National held was assigned for a period of just over one year as part of Abbey National's securitisation programme. Both the legal and beneficial interest in the loan were held by the Plaintiff at the time that the repossession proceedings were originally commenced. The "fault" lay not in the securitisation itself but that it was not fully disclosed in the initial proceedings – as Deeny J's judgment makes clear.

[23] Securitisation has no impact on the rights of a lender - see *Paragon Finance v Pender and another* [2005] 1 WLR 3412. At paragraph 109 Parker LJ puts it thus:

> "*One incident of its legal ownership - and an essential one at that – is the right to possession of the mortgaged property … In my judgment as a matter of principle the right to possession conferred by the Legal Charge remains exercisable by Paragon as the legal owner of the Legal Charge notwithstanding that Paragon may have transferred the beneficial ownership of the Legal Charge to the SPV.*"

[24] That position applies to the facts in this case but actually with greater force given the fact that both legal and beneficial title were vested in the Plaintiff at the date that the possession proceedings were instigated. In any event contrary to what the Defendants suggest, the act of securitisation has no impact on the underlying debt or on the mortgage deed that secures it.

[25] As to the designation of securitised accounts in the internal ledgers of the Plaintiff with prefixes to denominate them and as for the debit and credit entries in a borrower's mortgage account to reflect the act of securitisation I find that these are internal administrative records for the accounting purposes of the Plaintiff. They did not need the specific authority of the Defendants and they do not, as the Defendants suggested, impact on the indebtedness of the Defendant as a borrower or the currency of the loan. Their indebtedness remained throughout any period of securitisation and cannot be avoided because of it.

[26] In light, therefore, of the objections raised by the first Defendant to the issue of (a) the securitisation itself or (b) how Abbey National (and later Santander) chose to reflect the consequences of the securitisation in its own internal records, I find that they have no merit and are rejected by this court in their entirety.

B. The money/no money argument

[27] I deal next with the Defendants' alternative argument (as it is put). In context it is a wider and more esoteric argument to deny "*indebtedness*" or indeed loss on the part of the Plaintiff. The first Defendant asserts (variously and in no particular order) that:

(i) The Plaintiff's actions were limited to facilitating credit and that what it did was to create a "bank deposit" or "cash" on the back of the Defendants' promise to pay which the Defendants categorise as a promissory note – the "money creation argument". The Defendants allege that the money which was advanced was not Abbey National's funds but "*created out of thin air*" (to use the first Defendant's language).

(ii) That the Plaintiff did not lend money but misrepresented the "*entire nature of the alleged loan in order to induce the Defendants into signing a deed and implied contract*" rendering it "*void*";

(iii) That the money which was advanced to the Defendants did not "*belong*" to the Plaintiff but rather to its savers; that one of the savers, in this case, was the first Defendant and that the Plaintiff was, therefore, in reality lending the first Defendant his own funds [Para 13 et seq of first Defendant's affidavit, 18th June 2015]; or

(iv) That the promissory note given by the Defendants underpinned the entire transaction and constituted the originating source of funds and that the Defendants "*were wilfully misled and induced by the Plaintiff into believing they were actually borrowing money that pre-existed [the mortgage application*]". [Defendants' final Closing Submissions at Para 47.]

[28] In support of these various strands of argument the court was invited to have regard to the academic writings and an affidavit of Professor Richard Werner, a commentator on the issue of quantitative easing within the banking sector. This, the Defendants assert (and I quote), is empirical evidence to show:

> *"how all money circulating in the United Kingdom, including mortgage monies, is created when a bank deposits a loan agreement [also known as a promissory note] in its own account. The credit created is then transferred to the borrower's account, as if it had been loaned by the bank, when in fact it has been created by the alleged debtor's signed promise to pay."*

[The Defendants' Closing Submissions at Para 29.]

[29] The court was also referred to the Bank of England Quarterly Bulletin (2014) which also refers to the deposit of loan agreements as a form of Promissory Note and the "creation" of money on the back of them. The suggestion is that in this instance the Plaintiff did not lend existing money but "created" new money and has sustained no loss and/or were misrepresenting the source of funds and therefore the nature of the transaction.

[30] It is not the first time that such arguments have been advanced to these courts but they remain singularly unattractive. This is so not least because the question of "loss" upon which the argument is ultimately based is not actually the point at issue in Order 88 proceedings seeking possession of the Property. [See *Herron v Bank of Scotland Plc* [2018] NICA 11 and, in particular, McCloskey J (as he then was) at Paragraph [57]].

[31] Let me address the point, however, on the evidential basis which was put before the court. Both Mr Ranger's and Ms Serin's evidence (both in affidavit and in oral testimony) provides a clear explanation of the flow of funds from Abbey National's reserves (the quantum of which was estimated by Mr Ranger to be in the sum of £30 billion) to the Plaintiff's "Advances Pending Ledger Account" thence to a

"CHAPS Ledger" (albeit administered through its Treasury function) with a subsequent transfer of funds to Boal Anderson's Client Account. The first Defendant does not accept that evidence nor indeed the extracts which were provided from the Plaintiff's own internal accounting records as part of the discovery process which corroborate that flow of funds. Those were also adduced to the court and formally proven by Ms Serin as evidence of the various transactions and flow of funds which were specific to this Transaction. By reason of confidentiality the records which were produced to the court were, understandably, redacted to exclude the details of other borrowers and their individual transactions. The records we saw, therefore, focused solely on the accounting transactions that were relevant to the Defendants' mortgage account. Notwithstanding that, the first Defendant sought to bring forth a Banker's Book of Evidence Act Application under sections 4, 7 and 9(2) of the Banker's Book of Evidence Act 1879. This was raised both before and after the Trial but the court rejected the application at both stages on the grounds that it was entirely satisfied that the accounting entries which were supplied by the Plaintiff (as bolstered by the evidence of Ms Serin and Mr Thomas Ranger) more than adequately satisfied the court that the funds in question were drawn by Abbey National from its reserves and were transmitted to the client account of Boal Anderson in the manner suggested above. Contrary to the submissions made by the Defendants the court did not see the need to have discovery of Abbey National's "*entire mortgage book*" to establish the operation of this individual account.

[32] Ms Hanna of Boal Anderson gave evidence – corroborated by an extract from her firm's accounting system – which confirmed receipt of sum of £191,465 [i.e. the loan amount averred to by Ms Serin less telegraphic transfer fees]. It was these funds which Ms Hanna said she used to complete the purchase of the part interest in the Property from the second Defendant's former husband, allowing her to then complete the dating of the transfer document (into the names of the Defendants) and the dating of the subsequent mortgage (in favour of Abbey National Plc). Specifically, she explained that she used the funds to:

(a) repay an existing charge registered against the Property by the second Defendant and her former partner Mr Doran (in relation to earlier borrowings) (in the sum of £75,139.08); and then

(b) remitted funds to Mr Doran's solicitor in the amount of £56,787.17 - in accordance with the Separation Agreement which had been entered into between he and the second Defendant; and then

(c) discharged certain other liabilities; and then

(d) paid the balance to the Defendants (less costs and outlay).

[33] Mr Carlin accepted in court both that those transactions occurred, and, that they occurred in that sequence i.e. that there was a transfer to Boal Anderson's account at the Ulster Bank; that Ms Hanna dealt with the funds as she suggested to

the court and that those monies were applied primarily in the purchase of the Property, making the payment to Mr Doran and that there was a distribution of a balance to the Defendants.

[34] The court put the accounting entries to Mr Carlin on at least 5 occasions in an effort to better understand his position. It also put to him the simple principle of double entry bookkeeping and the concept of credits being matched by debits – in this case the debit entry in the Borrowers' accounts with Abbey National being ultimately matched with the credit entry in the accounts of Boal Anderson and, following that, the debit entries to fulfil the sequence of events outlined above. It was clear to the court that Mr Carlin did not understand even the basic concept behind what constitutes even the simplest form of book-keeping. So whilst accepting that he had the benefit of the actual money transferred he denies the logical consequence of the Defendants' indebtedness to the Plaintiff that subsequently ensued or the manner in which the funds flowed and upon which these proceedings are based. As a result of those interactions and in the face of very clear evidence from the Plaintiff, as corroborated by Ms Hanna, the court finds that the Defendant's position lacks any credibility or indeed even basic logic. Accordingly, it specifically finds:

(a) That Abbey National did advance funds from its general funds through the route which is outlined in some detail above;

(b) That those funds were credited to the Boal Anderson account on 18 September 2008 following the Certificate of Title and Funds Request which Ms Hanna made;

(c) That the funds were held in the Boal Anderson account pending completion of the Transaction;

(d) That the Transaction (and here specifically I mean the transfer of legal title of the Property to the Defendants and the creation of the Mortgage by them in favour of Abbey National) was completed on 23 September 2008;

(e) That Ms Hanna dated all of the documents on that date in order to effect legal completion of the Transaction;

(f) That upon receipt of confirmation from Ms Hanna that the Transaction had completed, Abbey National then formally debited the Defendant's mortgage account to reflect (a) completion of the Transaction and (b) the level of indebtedness which then existed from the Defendant to the Plaintiff i.e. the sum of £192,099 – representing the total loan advanced and the final booking fee.

[35] As to the argument regarding whether this arrangement constituted a Promissory Note as advanced by the first Defendant I accept that he did adduce a

standard Abbey National document which makes reference to mortgages as "Promissory Notes" in the context of mortgage lending. These, however, it transpired had been taken from the Plaintiff's standard documentation for use in the United States of America. Notwithstanding that, I accept that on one analysis it is possible to categorise a mortgage contract between a borrower and a lender as a promise to pay i.e. one where the lender lends on the strength of the borrower's promise to pay that loan back by monthly or other instalments. In the context of mortgage lending those promises are perennially subject to the provision of collateral security (i.e. in normal course the mortgage security that is provided is over the property which is being acquired) which will be called in if there is default on foot of that contract. That lending transaction could broadly be categorised as a Promissory Note backed by the provision of a security but let us then apply that to the specific facts of this case.

[36] In the first case the Plaintiff expressly acknowledges that there was no offer which is signed by the Defendants. That works against the Defendants' argument that they were "*induced*" into creating a Promissory Note on which the funds advanced were then based. The Plaintiff rests on the dated and signed mortgage as evidence of the terms that apply to the lending contract. At the point when funds were released by Abbey National there is no "*note*" such as the one the Defendants assert.

[37] As to the "promissory" aspect (i.e. a promise to pay) of the contract between the parties that was incorporated into the mortgage deed (as dated) and was first breached in or around October 2011 when the first shortfall of payments on foot of the mortgage began to occur and arrears started to accrue. From September 2013 onwards no payments at all were made. The court's conclusion, therefore, is that even if it were to indulge in the Defendants' analysis the Promissory Note which they allege to exist has been breached. The consequences of that breach render the "Promissory Note" worthless and entitle the Plaintiff to enforce its security in order to remedy the breach that has occurred. Mr Carlin's suggested argument – and it is a fallacious one – is defeated by the very fact that the Defendants have breached their own promise to pay. If it be his case that a Promissory Note continues to exist and that there is no resultant continuing loss to the Plaintiff then that simply cannot be the case in those circumstances. A Promissory Note which has been breached and upon which no payments are made can have no continuing value and, as I have said, entitles the lender to exercise its security as a result of that default. Mr Carlin's argument, therefore, fails. It also remains the case that fundamentally this action is not about "loss" in the strict sense but is about the Plaintiff's right to possession of the Property on foot of the Order 88 Summons process.

[38] For completeness and to counter the other argument advanced by the Defendants on this point (i.e. that there was no consideration for their promise to pay) that is easily met by the fact that the mortgage advance is evidenced by a Deed which, of course, because of its status as a Deed does not require to be supported by

consideration. I shall return to Mr Carlin's other challenges to the Mortgage Deed below.

C. The Conveyancing Transaction

[39] Mr Carlin makes a number of challenges in relation to the conveyancing transaction itself. I deal with each in the following sequence:

(i) The mortgage offer of advance

Notwithstanding the fact that the Defendants assert that their acceptance of the mortgage offer constitutes a Promissory Note (with the consequences which are rehearsed above) the first Defendant simultaneously seeks to advance an entirely contradictory argument - namely that the Defendants did not at any time sign any document to accept the mortgage offer. That point is accepted by the Plaintiff who relies upon the mortgage deed and the mortgage conditions themselves as evidence of the contract terms. As I say that is the converse of the "*money creation*" argument which the Defendants simultaneously have tried to advance.

To deal with this point I find that there is no doubt that an offer of a loan was made by the Plaintiff (then Abbey National Plc) based on the letter of 9 July 2008 which it wrote to the Defendants. I also find that that mortgage advance was drawn down and applied for the purposes outlined in the original offer letter. There was, in law, therefore an acceptance of the mortgage terms as the funds were drawn down and (as I have indicated) used for the Defendants' purposes. The contract was consummated at that point in time. If that were not enough, there is also execution of the mortgage deed which was executed by the Defendants in the presence of Ms Hanna and which expressly incorporates the 2007 Mortgage Conditions. The Defendants assert that all of this is "*ambiguous and vague.*" I find no such ambiguity or vagueness. The bottom line is that an offer was made, it was accepted by the Defendants through their actions - as is evidenced by their use of the money and by their execution of the mortgage deed which in turn, by incorporating the 2007 Mortgage Conditions, records the terms which apply to their indebtedness and by which they also charged the Property as a continuing security for the loan that had been made.

(ii) The Mortgage Deed

To that, the Defendants assert that the mortgage deed is insufficient as it does not mention a specific amount of monies owed nor specifies the payments to be made per month. They assert that neither is this detail incorporated into the Standard Mortgage Terms or the 2007 Conditions which are incorporated (by reference) into the mortgage deed. They say that the mortgage deed is a "*paltry double-sided page*" and so is insufficient and should be regarded as a

nullity. They cite in support of that argument variously the Statutory of Frauds Act 1828 (as cited by the Defendant but I assume is meant to be the Statute of Frauds (Amendment) Act 1828 which the Defendants suggest requires that a creditor cannot issue legal proceedings without a written agreement signed by the debtor), sections 43 and 44 of the Companies Act 2006 (which they say obliges every company to sign a document in order to render it legally enforceable); section 1(3) (of the Law of Property) (Miscellaneous Provisions) Act 1989 and finally the Law of Property Act 1925. Whilst the Defendants do acknowledge that not all of these provisions apply in Northern Ireland they make no attempt at distilling which do apply in this jurisdiction or directing their minds to what (I think) they ultimately are attempting to assert which is that the Mortgage Deed is invalid as a deed under the law of Northern Ireland. The relevant provisions in that regard are the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 and in particular Article 3 which provides as follows:

> "3.—(1) An instrument executed by an individual after the coming into operation of this Article is a deed, notwithstanding that it has not been sealed, if, and only if, it satisfies the requirements of paragraph (2).
>
> (2) The requirements referred to in paragraph (1) are that the instrument is—
>
> (a) expressed to be a deed, or to be a conveyance, assurance, mortgage, settlement … required by law to be a deed;
>
> (b) signed—
>
> (i) by the individual executing it in the presence of a witness who attests the signature; or …
>
> (c) delivered as a deed by the individual executing it or by a person authorised to do so on his behalf."

The Defendants do not dispute their signatures on the Mortgage Deed. Taking the requirements of the provisions cited into consideration and given even a cursory examination of the Deed itself and the evidence of Ms Hanna as to the manner of its execution and subsequent delivery I am entirely satisfied, however, that the mortgage deed is a "deed" and that under its terms it incorporates the 2007 Mortgage Conditions. It does not need to do more.

(iii) Whether the deed was executed?

The First Defendant develops his argument specifically to suggest that as the mortgage deed was executed by himself and the second Defendant before he "*owned or had any legal or proprietary interest in the property concerned*" it is a nullity. I revert again to the testimony of Ms Hanna. She gave evidence to the court that the documents which she required to complete the Transaction were executed by the Defendants in her presence *in advance* of the Transaction. For that reason they were left undated but they were witnessed by Ms Hanna at the time of execution. Ms Hanna gave cogent and helpful evidence as to the normal practice of solicitors in relation to conveyancing transactions of this type. She stated that it was common practice to have clients execute documents in advance of completion of the transaction. Indeed, she said, that lenders often require that to be done as a pre-condition for the release of funds.

[40] In the present case when the documents were executed Ms Hanna completed her Certificate on Title/Request for Funds which triggered the telegraphic transfer from Abbey National Plc. As I have said above the funds were received into her firm's client account on 18 September 2008. In compliance both with the requirements of the Defendants (and the lender) she then completed the Transaction on 23 September 2008 – at that point ensuring that Mr Doran (the Second Defendant's former husband) had executed the relevant legal transfer of the Property into the names of the Defendants. Thereafter, she completed the mortgage on behalf of the Defendants paying to Mr Doran the amount due to him in accordance with the separation agreement which he and the second Defendant had entered into, discharging the other requisite liabilities and then remitting the balance to the Defendants. Each of those steps were in accordance with her instructions – instructions she had received from the Defendants (in terms of the acquisition of the Property) and from Abbey National Plc (in terms of the completion of their security interest). After completion of the Transaction Ms Hanna undertook registration of the various conveyancing documents in the Land Registry to conclude matters.

[41] In relation to that sequence of events the First Defendant appears to take issue with the following:

- **He had no legal proprietary interest**

  Whilst Mr Carlin asserts this as a point in his defence it is clear that at the point that the mortgage was dated he and the Second Defendant did have a legal interest in the property – they having by then completed the acquisition of Mr Doran's interest in the property. The second Defendant, for her part, of course held a legal interest in the Property throughout.

- **That the documents were amended without the Defendants' authority**

  Both in his written submissions and in court Mr Carlin asserted that the documents had been "*illegally*" altered by Ms Hanna and/or that she "*defaced*" them by the insertion of the date of completion. Mr Carlin asserts that she had no authority to do so and that specifically she had no power of attorney which allowed her to perform those actions. In specifics what Mr Carlin complains of is the dating of the document with the insertion of the "23 September 2008" date which he calls a "*material alteration*". This argument has no credibility whatsoever. The practice and procedure of conveyancing has long relied upon the implied authority of solicitors, acting as their clients' agents to date and complete transactions on their behalf. The court accepts that Ms Hanna did nothing more or less than that in relation to the present transaction.

  The reality is that the Defendants wanted to acquire the Property. To do so they needed to borrow money from the Plaintiff (which they did) and in order to secure the Plaintiff's interest Ms Hanna completed the date on the Transfer and then on the Mortgage Deed and registered the latter as a burden against the title for the Property. That sequence does not affect the validity of what they signed. The Defendants cannot, having had the benefit of the Transaction (i.e. the transfer of the Property), now assert that they should not be bound by the burden of it (i.e. the Mortgage).

- **Conflict of Interest**

  Mr Carlin also asserts that Ms Hanna acted inappropriately because she was not "*impartial or independent*" on the grounds that (a) she was employed by both the Defendants and the Plaintiff; (b) she received a fee from the Plaintiff; and (c) she did not offer the First or Second Named Defendant separate representation or advice regarding the mortgage process or its implications.

  Again, Ms Hanna gave extensive evidence in relation to the practice and procedure of conveyancing transactions in this jurisdiction. It is the reality (and largely as a driver to save costs) that a party embarking upon a conveyancing transaction such as this nominates a single solicitor to act on his/her behalf in the acquisition of a property and at the same time nominates that same solicitor to the lender (if there be one) who is providing the financial assistance to facilitate the transaction. Invariably, the purchaser of the Property pays all of the solicitor's costs although the solicitor is, indeed, performing a dual function for both the purchaser/borrower and the lender. Ms Hanna confirmed that she did not receive a separate fee from the Plaintiff on the facts of this case. Again, the court accepts her evidence that what happened accords with common conveyancing practice in this jurisdiction in

that context. In almost every residential conveyancing transaction where borrowing is required, the solicitor engaged has (a) responsibility to both the purchasers of the property and the lender who is helping to fund it in (b) ensuring that there is good and marketable title to the property; (c) requesting the drawdown of funds in sufficient time to allow completion of the transaction; (d) applying those funds to the purchase; and (e) after its completion ensuring that all registration formalities are completed. In each of those steps there is no conflict per se between the interests of the purchaser and a lender. It is only where a solicitor becomes aware of a specific issue that a conflict arises in his or her role as a solicitor. That is only likely to happen where there is a divergence from the instructions he/she receives from the purchaser/borrower as against those received from the lender. If that happens best practice suggests that the solicitor should cease to act for both parties. That much is enshrined in the guidance provided by the Law Society for Northern Ireland on such matters. On the evidence before the court no such conflict existed on the facts of this case. Ms Hanna, at the time she completed the Transaction, was performing a very ordinary conveyancing transaction. It ill behoves the Defendants at this stage, having had the benefit of that Transaction (i.e. the acquisition of the Property) to attempt to construct an argument to vitiate one aspect of it (i.e. the Mortgage) on the basis of a spurious conflict. As I say, having heard Ms Hanna and having considered the papers in some detail I see no conflict on the facts.

- **Insufficiently clear language**

  Mr Carlin argues that the Plaintiff was not sufficiently clear, in terms of the language of the documentation (or at all) that, by signing the mortgage documents, they were formally accepting the loan along with any ancillary contractual obligations which arose. I simply do not accept that assertion. Both Defendants clearly knew that they were acquiring a property. It was one that the second Defendant had already partly owned. They knew that they did not have the financial resources themselves to purchase it outright and that for that transaction to complete Mr Doran (the original co-owner) had to be "*bought out*". To do that they approached Abbey National for a loan. The court has reviewed the Letter of Loan; the Mortgage Conditions and the Mortgage Deed. They were Abbey National's standard documents – similar to those used in thousands of transactions across the UK although adapted for use in this jurisdiction. To suggest that in terms of the language adopted that they did not understand the language or understand what was happening is simply disingenuous and not a contention that this court can believe.

- **Mis-selling of the mortgage**

  This is not an argument which was developed to any great extent before the court but I deal with it nonetheless. The Defendants assert that they "*do not and never have had any stocks or shares*". The provenance of this is the reference

within the mortgage application (which was completed by their broker) that they wanted an interest only mortgage and that they proposed paying the principal back from their investments. Whilst this issue was raised by Mr Carlin in his closing submissions, as I say, it did not form a material part of the case advanced at trial nor was it substantively developed. I do not accept its veracity. I find that the Defendants knew that they were applying for an interest only mortgage which had a preferential discounted rate for an initial period. I find that they simply did not consider the implications of the arrangement which they were entering into or, if they did, that they chose to ignore the fact either that the initial discount period was limited to 2 years and/or that at the end of the mortgage term the loan would have to be repaid. That is very far removed from making a case of mis-selling.

[42] In relation to each of the conveyancing related arguments which Mr Carlin has advanced on behalf of the Defendants I conclude that I find no basis for them either in law, in substance or indeed in logic. I find that this was a very normal mortgage transaction. The Defendants applied for and borrowed money from Abbey National Plc (as it then was) which, at the Defendants' direction, was applied by their conveyancing solicitor to the completion of the acquisition of the Property. A necessary consequence of that was the execution of the Mortgage Deed (incorporating the then standard mortgage conditions) as security for the loan which had been advanced. I find there is absolutely nothing exceptional in what occurred and, more particularly, I find against the Defendants that there were any vitiating circumstances which would support any of the arguments which they have advanced. It is rather a case of them attempting to raise sufficient smoke to obscure the bald fact that they have not met their obligations or made any repayment of the monies advanced to them since September 2013.

D. Capitalisation

[43] The Defendants' case is that Abbey National lent the principal of £192,099 in September 2008 and that arrears and other costs are and should be a separate amount. They assert that Santander now claim a principal amount of approximately £240,000 which means that the Defendants are being charged monthly interest on an additional circa £48,000 that was not part of the alleged loan. They cite, in support of that argument, *The Bank of Scotland v Rea and others* [2014] NIMaster 11.

[44] The issue of capitalisation is dealt with in Mr Williams' second affidavit. The starting point, as Mr Williams points out, is that the operation of this particular mortgage account differs from that which prevailed within the Bank of Scotland or HBOS Group as was the substance of the matter before the Master in the *Rea* case. Mr Williams in his affidavit refers to the FCA guidance which "*expressly approves capitalisation of arrears where there is no resulting impact on interest payable, repayment of the amount or terms of the mortgage*". The guidance acknowledges that a de minimis capitalisation is acceptable and can be effected unilaterally without the consent of the borrower or without any assessment of affordability. In *Rea* the objection which

the Master took to the process of capitalisation was in respect of significant amounts being added to the principal which had the effect of substantially increasing the monthly payments and thus negatively affecting the ability to repay.

[45] In the present case the Plaintiff's case is quite simply based on the fact that, on the facts of this case, the Defendants did not at any stage receive a demand for payment or an increased monthly demand which included a capitalisation amount. Accordingly, the Plaintiffs say that the Defendants cannot therefore now assert that they would have been prepared to pay the monthly sum had it not been for the Plaintiff's capitalisation of their arrears. By extension the Plaintiff's argue that the Defendants cannot now argue that they are prejudiced. Having considered the evidence and more importantly the detailed operation of the account in terms of the additions of interest, costs and arrears the court is satisfied that no capitalisation did take place before the proceedings were commenced. The amounts that have been added to the account are generally in respect of legal costs. All arrears have been separately accounted for. The court finds no prejudice to the Defendants on the question of capitalisation and so no question of a suspension or stay of enforcement of the possession order arises.

Conclusion

[46] The Plaintiff's right to recover possession of the Property is a common law one as regulated by contract. In this case the court has found a contract to exist between the parties – one evidenced by the Mortgage Deed incorporating the 2007 Mortgage Conditions. The statutory right of enforcement in respect of registered land (such as the Property) is enshrined in the Land Registration (NI) Act 1970 – Schedule 7 Part I paragraph 5(2) and following. It is trite law to say that the general rule is that, subject to any contractual or statutory limitation, a mortgagee under a legal charge is entitled to seek possession of the mortgage property **at any time** after the mortgage has been executed, by virtue of the estate vested in it on foot of the mortgage. On the facts of this case the court is satisfied that the Defendants granted the Plaintiff security over the Property in the form of a first legal charge. For the reasons which I have set out above the court finds that there were no vitiating circumstances which bring that charge into question. The security was granted by the Defendants in return for the monies which were advanced to them in order to purchase the Property and to pay Mr Doran the sum due to him on foot of the Separation Agreement.

[47] Under the terms of that mortgage the Defendants expressly acknowledged the ability of the Plaintiff to:

(a) Transfer the mortgage to a third party (if the Plaintiff wished to do so) - Clause 3.51 of the Mortgage Conditions; and

(b) That if they defaulted in their obligations that the Plaintiff would be entitled to recover possession - Clause 24.2 of the Mortgage Conditions in that regard

provides that borrowers are in default if they are more than two (2) months late in making a payment that is due under the mortgage.

[48] I find as a fact that the Defendants have breached their loan obligations in that the money became due and owing and the Defendants have not made a mortgage payment since in or about 1 September 2013 and that mortgage arrears had arisen prior to that date and since. Based on that position the Plaintiff is entitled to an Order for Possession on the foot of the Order 88 summons.

[49] This is a standard repossession case. The reality which the Defendants have never been prepared to accept is that they borrowed money from the Plaintiff which was secured on their property. They failed to keep up the payments which became due as a consequence. They have been in possession of the property for a number of years without making any repayments whatsoever. The court was told that the balance on the mortgage account in November 2019 was £239,976 and that the arrears stood at £76,000.69. I am entirely satisfied that the Plaintiff is entitled to the Order for Possession sought and accordingly I make an Order for Possession of the Property.

[50] Costs I award to the Plaintiff.

APPENDIX

CHRONOLOGY

9 July 2008	Mortgage offer to the Defendant offering a new loan in the sum of £192,099 for a period of 20 years on an interest only basis. The mortgage was being advanced to allow the Defendants to purchase the Property.
23 September 2008	Defendants grant to Abbey National Plc (part of the Santander Group) a mortgage over their property.
29 October 2008	Defendants registered as owners of the subject property.
29 October 2008(2)	Abbey National Plc registered as charge holder on the basis of an all-monies charge.
22 January 2010	Abbey National Plc changes its name to Santander UK Plc.
28 September 2010	Assignment of the equitable title to the Defendants' mortgage into the Covered Bond Programme.
21 October 2011	First missed mortgage payment by the Defendants.
18 April 2012	First set of Order 88 proceedings issued against the Defendants.
19 September 2013	First set of proceedings dismissed.
28 August 2014	Order 88 proceedings issued (for the second time) against the Defendants.
18 December 2014	Order 88 Summons transferred to the Chancery Judge.
29 April 2015	Affidavit sworn by Ian Williams of the Plaintiff dealing with the Plaintiff's computer systems and issues about whether the mortgage loan had ever been sold or transferred to a third party.
18 June 2015	Substantive Affidavit (of 111 paragraphs) in which the Defendants, and more especially the First Named Defendant, outlines and identifies his Defence to the Plaintiff's claim for possession.

17 July 2015	Defendants apply to strike out the Plaintiff's claim pursuant to Order 18 Rule 19.
15 September 2015	Replying Affidavit by Ian Williams (his second Affidavit) responding.
12 January 2016	Decision delivered by Lord Justice Gillen dealing with Mr Carlin's strike out application. The Learned Trial Judge refuses the Defendants' application to strike out.
12 January 2016 - 10 April 2017	There is a hiatus of a period of approximately fourteen months during which period the First Named Defendant is imprisoned by virtue of his contempt of court. The matter is relisted before the Chancery Judge on 27 April 2017.
9 June 2017	Lord Justice Gillen gives his decision on costs.
14 June 2017	Plaintiff's List of Documents issued.
19 October 2017	First Named Defendant's Application for Specific Discovery in which he seeks 56 separate classes of documents.
23 March 2018	The first Affidavit from Thomas Ranger dealing with the Defendant's discovery request.
23 March 2018	First Affidavit of Melissa Serin dealing with the issue of corresponding to the First Named Defendant's discovery request.
16 July 2018	Further Affidavit from Melissa Serin, in the context of the decision of **Bank of Scotland v Herron**.
1 February 2019	Specific Discovery Order issues from Master Hardstaff.
12 April 2019	Affidavit in response to the Master's Order filed by Thomas Ranger.
30 April 2019	Affidavit filed by Melissa Serin in answer to the Order of Master Hardstaff.
18 June 2019	Summons issued by the First Named Defendant to strike out the Plaintiff's claim for "failure to comply with the discovery process as required by Order 24 rule19(1) of the Rules of the Court of Judicature (Northern Ireland) Act 1980.