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Judgment: approved by the Court for handing down | *Delivered:* **19/10/2012**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

SWIFT 1ST LIMITEDPlaintiff

v

JAMES McCOURT & MAUREEN McCOURT

Defendants

HORNER J

A. INTRODUCTION

[1] Swift 1st Limited ("the Plaintiff") seeks an order for possession of premises at 70A Sessiagh Scott Road, Dungannon, comprising folio TY20918 County Tyrone ("the Premises") against Mr James McCourt ("the husband") and Maureen McCourt ("the Defendant").

[2] The Plaintiff seeks possession on foot of a charge dated 12 September 2007 ("the Charge"). The Charge provides for repayment of interest only during its term.

[3] It is common case that £177,090 was lent by the Plaintiff to the Defendant and her husband. The term of the loan was 25 years. The Defendant and her husband are in arrears and have no prospect of paying any interest that falls due. They are the victims of the economic downturn in Northern Ireland – they have no employment and the value of the Premises which were once worth £300,000 when the Charge was taken out, is now insufficient even, if the Premises are sold, to discharge their indebtedness. They are well and truly in a negative equity situation. Despite the hopelessness of their position, the Defendant has with dogged determination sought to raise arguments that she says prevent the court from granting the Plaintiff the relief it seeks. In the course of her attempts to escape an order for possession she has written and/or spoken to a number of different persons employed not only by the Plaintiff but by other companies which did business with the Plaintiff. For example, she has been in direct correspondence with the then Chief Executive of Barclays Bank. The Defendant has even on occasions resorted to taping

conversations of the Plaintiff's Risk Manager, Mr White, without his knowledge or permission. There is a dispute about the accuracy of the transcriptions of these taped meetings. Significantly, Mr White was not challenged in any meaningful way by the Defendant when he gave his sworn testimony about what happened at these meetings. I considered him to be doing his best to assist the court and I found him to be an essentially honest witness. The Defendant chose not to give evidence under oath. I did have the benefit of her evidence on affidavit.

[4] Confidential documents were provided to the Defendant on the first day of the hearing on her undertaking (and that of her McKenzie friend) to return them to the Court Office that afternoon. However, all the documents were not returned. A file was missing and some of the documents had been removed from another folder. The explanation provided by the Defendant and her McKenzie Friend, Ms George, was less than convincing. Both the Defendant and Ms George were warned that the matter would be referred to the PSNI should the missing documents not turn up. The circumstances in which they were then discovered in the café in the Royal Courts of Justice gave rise to further concerns. It is sufficient to record here that the Defendant's single-minded determination to defeat the Plaintiff's claim may have led the Defendant to believe that the ends justify the means. This is a risk that can arise when personal litigants are involved in cases. While, in the vast majority of cases, legal representatives appreciate that they owe a duty to the court to conduct themselves in accordance with long established rules of conduct it can be difficult to persuade personal litigants who have a personal interest in the outcome of the litigation, that they have obligations to the court that must outweigh what they perceive to be their own personal advantage.

B. BACKGROUND

[5] The Plaintiff is a company which operates in what has variously been described as the "secondary lending market" or the "non-conforming market". Essentially the Plaintiff offers subprime mortgages to customers who are unable to obtain finance from traditional High Street lenders. These are people, for example, with adverse credit records. In this case Mr McCourt stated he was a self-employed paint sprayer with an income of a gross value in excess of £45,000. However, he had no accounts to prove such earnings. Mr McCourt and the Defendant also claimed that they had outgoings of only £150 per month. The Plaintiff charges higher interest rates than a building society or High Street bank because these rates reflect the greater risks of lending to such borrowers. The Plaintiff borrows its funds from a syndicate of lenders often using Barclays Bank as a facility agent. Sometimes the Plaintiff bundles up its mortgages and charges and uses them as security for its indebtedness. This is, I understand, normal practice in the world of high finance.

[6] The Defendant and her husband had had a mortgage with Preferred Mortgages Ltd which had gone into arrears. They used the loan from the Plaintiff to pay off Preferred Mortgages and the fees which had been generated by the

redemption of the first mortgage. This put the Plaintiff into the same position as Preferred Mortgages had been, namely as holder of a first legal charge on the premises.

[7] The salient facts can be set out as follows:

(i) A mortgage application was submitted on 26 June 2007 accompanied by an Income Affordability letter and a borrower's declaration.

(ii) After a false start, a mortgage offer was sent to the Defendant and her husband on 23 August 2007. This provided for interest to be paid at 7.88% for 12 months and thereafter at a variable rate which at that stage was 9.63%. The total amount of the loan was £177,090.

(iii) A document setting out the key facts was also sent out to the Defendant and her husband in respect of this mortgage offer.

(iv) The mortgage offer stated that the Charge was not to be dated. This was to be done by the Plaintiff and at the time when the loan was drawn down.

(v) In error the Charge was dated by the Defendant and her husband. The date on it was subsequently altered to 12th of September 2007 to reflect the date when the funds were released to the Defendant and her husband and the Charge to Preferred Mortgages was redeemed.

(vi) The Charge was registered in the Land Registry on 24 September 2007.

(vii) The Defendant and her husband were subsequently in receipt of statutory benefits and the interest on another loan was, in part, discharged by the DSS for a period of time.

(viii) The McCourts quickly fell into arrears. The Defendant complained to the Plaintiff about their treatment. This complaint was investigated and was rejected by the Plaintiff on 10 April 2010.

(ix) A letter before action was sent on 18 May 2010 because of the failure of the Defendant and her husband to make the repayments required under the Charge. This failed to have the desired effect and proceedings followed on 24 January 2011. At that time the Defendant and her husband were substantially in arrears and with no realistic prospect of paying the outstanding arrears or of meeting future repayments as they fell due.

(x) The case has progressed slowly, in part, due to the Defendant's search for documents that she hoped would defeat the Plaintiff's claim.

(xi) It is claimed by the Plaintiff that the current arrears of the Defendant and her husband amount to £39,875.56. No payment has been made by the Defendant and her husband after August 2010.

C. THE ISSUES

[8] In the Defendant's Points of Defence, the Defendant raises a number of different and disparate issues. Those that I consider might conceivably be effective, either legally or factually, have been grouped together as follows:

(a) The Plaintiff has no locus standi to bring these proceedings for possession of the Premises owned by the Defendant and her husband because of a lack of title. ("Locus Standi")

(b) The Charge is invalid and should not be enforced. ("Charge Validity")

(c) Payments were made but not credited to the account of the Defendant and her husband. ("Lost Payments")

(d) There had been breaches by the Plaintiff of Statutes and/or Regulations and Codes of Conduct. ("Regulatory Issues")

(e) The terms of the Charge and/or the loan are unfair and should be struck down. ("Unfair Terms")

I intend to deal with these issues sequentially. In doing so I have ignored some of the issues raised by the Defendant but not developed at all in argument. For the record I considered them to be devoid of merit.

(a) Locus Standi

[9] The Defendant claims that the Plaintiff cannot succeed in its claim because it does not have the title necessary to obtain an order for possession. In effect the Defendant claims that the Plaintiff is not the legal (or equitable) owner of the Charge. The history of mortgages in Ireland is clearly set out in Professor Wylie's Irish Land Law (Third Edition) at 12.02-12.05. Unregistered land and registered land have different systems for securing the repayment of loans. In registered land the property is made the subject of a charge. This can be regarded as a form of mortgage (see Professor Wyle at 12.19). The difference is that in a mortgage of unregistered land, the mortgagee acquires some rights of ownership over the property whereas with a charge, there is no transfer of ownership. Instead the chargee is given rights over the property. As Campbell J said in Northern Bank Ltd v Haggarty and Another (NI) Trial 211-217:

> "Unlike a mortgage, which confers an interest of property, a Charge may give a chargee certain rights over the property as security for the loan."

A legal Charge of registered land is created under Section 41(1) of the Land Registration Act (NI) 1970 ("the Act") which states:

> "A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, either by way of annuity or otherwise."

[10] Once a charge is registered then Section 11 of the Act applies. This states:

> "Save as is otherwise provided by or under this Act, each register shall be conclusive evidence of the title shown on that register and of any right, privilege, appurtenance or burden as shown thereon, and the title of any person shown thereon shall not, in the absence of actual fraud, be in any way affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown."

[11] Most countries have a "positive system" of land registration as is the position in Northern Ireland. This is an authoritive system which allows purchasers to transact safely in reliance on registered title even if it turns out to have been procured by defective means. Some countries in certain circumstances do not even have the fraud exception. For example in Australia and New Zealand mortgagees receive indefeasible title on registration of a forged instrument. Of course, in Northern Ireland, actual fraud unravels everything.

[12] The usual remedy of a chargee when a chargor has breached the term of a charge, is to apply to the court for an order of possession of the charged property, followed by a sale of that property by the chargee out of court. In Northern Ireland the power to award possession to the owner of a registered charge is given by para 5(2) of Part I of Schedule 7 of the Act. This states:

> "The registered owner of a charge may apply to the Court for the possession of the registered land …"

[13] In the present case there is undisputed evidence that:

(i) the Plaintiff is the registered owner of a first Charge secured on the Premises; and

(ii) the Defendant and her husband are in breach of their obligations under the Charge by failing to make the interest payments on their loan and they fall due.

[14] It is important to stress that at this stage the court is only concerned with whether it should make an order for possession. At a later stage the Master may have to consider other matters such as the amount due to the Plaintiff at the time of the sale. I propose to come back to this later on in the judgment.

[15] The central issue raised in this case by the Defendant is to challenge the Plaintiff's right to sue. The Plaintiff is registered legal owner of the first Charge and thus has a right to seek an order for possession. There has been no suggestion of fraud on the part of the Plaintiff and therefore the Plaintiff is entitled to rely on its registration as the owner of the first legal charge over the Premises.

[16] The issue of what title is required to seek an order for possession was considered by the Court of Appeal in England in Paragon Finance v Pender and another (2005) 1 WLR 3412. One of the issues in that case was whether the claimant as the registered proprietor of the legal charge had a right to an order for possession of the mortgaged property.

[17] Johnathan Parker LJ said at Paragraph 109 as follows:

> "In my judgement Mr and Mrs Pender's case on this issue is misconceived. It is common ground that Paragon, as registered proprietor of the legal charge, retains legal ownership of it. One incident of its legal ownership – and an essential one at that - is the right to possession of the mortgaged property. I can see no basis upon which it can be contended that an uncompleted agreement to transfer the legal charge to the SPV (that is to say an agreement under which, pending completion, the SPV has no more than an equitable interest in the mortgage) can operate to divest Paragon of an essential incident of its legal ownership. In my judgement 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 (ie as a Registered proprietor of it) notwithstanding that Paragon may have transferred the beneficial ownership of the legal charge to the SPV."

[18] Regardless of the Plaintiff being entitled to rely on its registration as the owner of the first legal Charge the evidence before me was unequivocally:

(i) The McCourts' loan had not been sold by the Plaintiff.

(ii) The Charge has not been legally or equitably assigned by the Plaintiff.

(iii) The Plaintiff at all times has been the legal (and equitable) owner of the loan and the Charge.

[19] I reminded Mr White, the Risk Manager of the Plaintiff, when he gave sworn testimony of the importance of being accurate and truthful in his answers. He swore that he had carried out all necessary checks and that he was as certain as he could reasonably be that:

(a) The Plaintiff had not sold the loan of the McCourts' to any third party.

(b) The Plaintiff had not legally or equitably assigned the Charge.

[20] He said that full searches had been carried out. He was supported in his evidence by Mr Wendholt, a business/MIS analyst employed by the Plaintiff who swore that he had carried out a comprehensive search of the Plaintiff's computer records and that there was no evidence that there had been any legal transfer of the charge or of the loan.

[21] In this case the Plaintiff remained not only the registered legal proprietor of the Charge but also retained the beneficial ownership of it. So for the reasons I have set out the challenge by the Defendant to the Plaintiff's right to seek possession of the Premises on the basis that the Plaintiff does not have a legal title is misconceived and bound to fail. I should also point out that enormous effort has been expended on this issue which has taken up a considerable amount of court time and resulted in substantial costs being incurred. The primary cause for this has been due to the Defendant's inability to understand (and this is not a criticism) how various legal documents such as debentures work. This has allowed her to reach conclusions not justified or supported by the documentary evidence.

(b) **Charge Validity**

[22] The Defendant's initial complaint is that the Charge is incomplete. That argument was not developed by the Defendant. In any event I find it to be without any merit, whether legal or factual.

[23] The Defendant did object to the alteration of the date on the Charge to 12th of September 2007 by the Plaintiff to reflect the date when the funds were released. This allowed the Defendant and her husband to redeem the mortgage they had with Preferred Mortgages. It is not suggested that this alteration materially affected the way in which the Charge should operate. For example, there is no suggestion that a release should be given to the Defendant on the grounds of an actual

misrepresentation or mistake or indeed on any other ground. The case made by the Defendant is that the alteration by itself renders the Charge a nullity.

[24] There is no doubt that before the coming into effect of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 on 1st of Feburary 2006, the point made by the Defendant may have been difficult for the Plaintiff to defeat. The Rule in Pigot's case (1614) 11 Co Rep 26(b) provided that if a promisee, without the consent of the promisor, deliberately made a material alteration to an instrument, such as a deed, this would discharge the promisor from all liability thereon, even though the original words of the instrument were still legible. The principle, which lay behind this Rule has been said to be that "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected". The promisor is therefore, under this Rule, not discharged by alterations made by accident or by mistake. Here the alteration was made deliberately and therefore under the Rule the Defendant and her husband would have good grounds for claiming that they should have been discharged from all liability under the Charge. However, the Rule was abolished by Article 8 of the 2005 Order which states:

> "(i) The Rule of Law known as the Rule in Pigot's Case (which deals with the consequences of alterations in certain documents) is abolished.
>
> (ii) A material alteration to any document to which this paragraph applies does not, by itself, invalidate the document or render it voidable or otherwise affect any obligation under the document.
>
> (iii) Paragraph (2) applies to the following documents:
>
> (a) Deeds …
>
> (iv) This Article applies to alterations made before or after the coming into operation of this Article, but does not apply to proceedings instituted before the Article comes into operation."

[25] Given the circumstances in which the date was changed on the Charge by the Plaintiff, there can be no entitlement on behalf of the Defendant (or her husband) to challenge the validity of the Charge, an instrument which enabled her and her husband to receive the sum of £177,090 from the Plaintiff.

C. LOST PAYMENTS

[26] The Defendant complains that five DSS payments were made to Preferred Mortgages Ltd by DSS rather than to the loan account which the Defendant and her husband had with the Plaintiff. The undisputed evidence is that this did happen although the amount of the payments is such that they only amount to a small portion of the overall amount of arrears. It is not suggested that the Plaintiff was in any way responsible for the mistake of the DSS. If money was paid by mistake to Preferred Mortgages Ltd, then that is a matter between the DSS and Preferred Mortgages. However, the amount of all five payments is such that even if they had all been credited against the indebtedness of the McCourts they would only amount to a very small fraction of the total indebtedness and would make no difference at all to the outcome of the Plaintiff's claim for possession.

[27] I am also satisfied on the evidence that has been filed that any payments intended to discharge the indebtedness of the Defendant and her husband in respect of their loan account with the Plaintiff were not paid by mistake to Swift Advances plc permanently to reduce the indebtedness of another loan taken out by the McCourts with Swift Advances plc. It is clear that the account number named in the proceedings is in the name of and controlled by the Plaintiff. The payments which were made by the Defendant and Mrs McCourt or made on their behalf by the DSS were credited against the McCourts' charge account.

D. REGULATORY ISSUES

[28] Firstly the Defendant complains that Swift Advances plc does not hold a Consumer Credit Act Licence for debt collection purposes in order to collect payments for the Plaintiff or indeed any other company when acting as agent or servicer. But Swift Advances plc does not collect instalments for the Plaintiff from the Defendant and her husband. Furthermore, if there is a problem with the administrative machinery, that is a regulatory matter to be dealt with by the FSA. The absence of a licence, if a licence is required, is not an issue which gives the Defendant or her husband any relief against the claim for the order for possession of the Premises presently being made by the Plaintiff.

[29] The Defendant also complains about breaches of the Mortgages and Home Finance: Conduct of Business ("MCOB"). But even if the Defendant and her husband were able to establish that there were any MCOB breaches, and on the evidence, I am not satisfied that there have been breaches of MCOB by the Plaintiff, this is a matter for the FSA which was and is responsible for the regulation of the Plaintiff and ensuring that it acts in accordance with industry standards. The same argument applies to the other generalised complaints made by the Defendant that the Plaintiff is in breach of the Financial Services Act and the Financial Services and Markets Act. These are matters that the Defendant and her husband can take up with the FSA. Indeed, it is not clear whether or not a complaint has already been

made by the McCourts to the Ombudsman. In any event, the complaints made by the Defendant even if proven to be true, do not in any way invalidate the loan to the Defendant and her husband or the Charge that they executed.

(e) **UNFAIR TERMS**

[30] The Defendant relies on the Unfair Terms and Consumer Contracts Regulations 1999 to claim that terms J and L of the general conditions are unfair and thus under Regulation 8(1) should not be binding on the consumer, that is the Defendant and her husband, and should be struck down.

[31] Clause J provides:

> "After the expiry of the fixed rate period specified to in Section 4 of this offer, we have the power to change the rate of interest we charge under this agreement to reflect the change in the cost of our funds. We may use this power by giving you 14 days' notice by first class post. Changes will apply from the date shown in the notice which will also tell you why the cost of our funds has changed."

[32] The Defendant claims that the term is "unfair and open ended". In Paragon Finance plc v Nash & Others [2002] 1 WLR 685 the Defendants sought to defeat a claim for possession even though they were in arrears with their mortgage repayments. The Defendants admitted the arrears but claimed that the loan agreements were extortionate credit bargains within Section 138 of the Consumer Credit Act 1974. On appeal the Court of Appeal held that:

> "The power of the mortgagee to set the interest rates from time to time was not completely unfettered; that in order to give effect to the reasonable expectations of the parties it was an implied term of each mortgage that the discretion to vary interest rates should not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or in a way in which no reasonable mortgagee, acting reasonably, would do; that it was not a breach by the claimant of that implied term if, as a commercial organisation, it raised interest rates paid by mortgagors in order to overcome financial difficulties it had encountered; and that, since there was no evidence that the decision to widen the gap between the rates charged by the claimant and standard market rates was motivated by other than purely commercial considerations, there

> was no real prospect of the Defendants proving a breach of the implied term at trial."

[33] In his judgment Dyson LJ said (at paragraph 33) that:

> "Of course I accept as a general proposition that a lender must have an eye to the market when it sets its rates of interest."

He also went on to say at paragraph 46:

> "I would hold that there were terms to be implied in both agreements that the rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily. I have no doubt that such an implied term is necessary to give effect to the reasonable expectations of the parties."

[34] I have no doubt that a similar term should be implied into Clause J in order to give effect to the reasonable expectations of both parties. The rates of interest should not be set dishonestly, for an improper purpose, capriciously or arbitrarily when varied by the Plaintiff. Mr White says in his further affidavit that the interest rate was set in accordance with the cost of funds: see paragraph 12 of his affidavit sworn on 2nd October 2012. This accords with Mr Dunlop's submissions on behalf of the plaintiff when he said that the interest rate when it became variable did reflect the cost of funds to the Plaintiff. I note that the interest rate in respect of the McCourts' loan has not been altered "as a result of the cost of funding this specific loan" (for the record I have taken into account the Defendant's objection to the further affidavit evidence offered by Mr White and I have only considered paragraphs 11 and 12 of his affidavit). In all the circumstances it seems to me that Clause J is reasonable and should not be struck down. I find further support for my conclusion in the Clause which Cheshire Mortgage Corporations Ltd proposed to use in its charge. This was expressly approved by the FSA and is in similar terms to that of Clause J in the present Charge. The proposed term approved by the FSA was as follows:

> "While the interest rate on your mortgage is variable, we may vary the interest rate at any time. However, we will only vary the interest rate to respond proportionately to changes in our funding costs. You will be given at least 14 days' notice in writing of any change in the interest rate. The notification will include details of what the interest rate is varied to and the resulting increase or decrease in your monthly payments."

[35] I am satisfied that if "proportionately" and "reflect" are not synonymous, they are intended to achieve a strikingly similar result.

[36] Clause L of the general Terms and Conditions provides:

> "As well as the charges we have specifically mentioned in clauses D, F, K, N(3), P and T, you must pay the following:
>
> (i) All reasonable costs and expenses we have to pay or decide to charge as a result of any term of this agreement or of the legal charge being broken.
>
> (ii) All other reasonable costs or expenses we have to pay or decide to charge in connection with this agreement or the legal charge."

[37] The key point here is that the costs and expenses have to be "reasonable". This is a matter which the Master will review when the Premises are sold. He will do so with his customary care and ensure that the Defendant and her husband are only liable for the costs and expenses that are proved to be reasonable. It has been brought to the Court's attention, and no doubt the Master has been made aware, that the Plaintiff has been found guilty by the FSA and fined £600,000 for, inter alia, levying excessive charges in respect of customers who were in arrears. If the plaintiff does charge excessive costs or expenses, then it will be in breach of Clause L but this will not make Clause L unfair, instead it will make the Plaintiff's in breach of the terms of its Charge.

[38] The Defendant also claims that the Plaintiff is in breach of the Unfair Contract Terms Act 1977. No case has been articulated by the Defendant as to how the Plaintiff is in breach of the Act. I note that the Court of Appeal in England rejected an argument that Paragon Finance was in breach of Section 3(2)(b)(i) when it considered this issue in the case of Paragon Finance plc v Nash (2002) 1WLR 685 at paragraphs 76 and 77.

[39] On the evidence before me I conclude that that there was no breach by the Plaintiff of the Unfair Contract Terms Act.

The Broker

[41] During the course of argument the Defendant expressed her dissatisfaction with the performance of her broker, Ms Steenson, who arranged this Charge with the Plaintiff. It was suggested that Ms Steenson may have led the McCourts to believe that the rate of interest under the charge was linked in some way to the base rate or to LIBOR. It is impossible for me to form a view as to whether there is any

substance in this complaint made by the Defendant. If the Defendant is right then the charge was mis-sold to her and her husband. Looking at the papers it does seem there may have been two brokers involved, the Mortgage Advisory Group and Enterprise Northern Ireland. It is not altogether clear for whom Ms Steenson acted and what was the relationship between the two brokers, the McCourts and the Plaintiff. I had no evidence whether Ms Steenson was an agent of the Defendant and her husband, or an agent of the Plaintiff or in fact an agent of both the Plaintiff and the McCourts. However, no case has been made out that the Plaintiff was in any way liable for Ms Steenson's actions or omissions and did not form any part of the present proceedings. Nor have I reached any concluded view about the liability or otherwise of Ms Steenson and/or her employer.

F. CONCLUSION

[42] It therefore follows from my rejection of the Defendant's points of defence as having no substance that the Plaintiff is entitled to an Order for Possession of the Premises. It is clear that the Defendant and her husband are in breach of the terms of the Charge by reason of their failure to make the payments of interest required under that Charge. The unchallenged evidence is that the last payment made under the Charge was done so more than 2 years ago in August 2010 and that the Defendant and her husband are in very substantial arrears.

G. FURTHER THOUGHTS

[42] The Defendant's central complaint has been that the Plaintiff did not have legal ownership (or any ownership) of the Charge and/or of the loan. This is a claim which is being increasingly made primarily by personal litigants where a mortgage or charge, particularly a sub-prime mortgage or charge, is in arrears. Investigation of this issue can result in a disproportionate expenditure of both time and money. Accordingly, when considering the conduct of any further claims where the central issue is whether or not the financial institution has the locus standi to obtain an Order for Possession, it is suggested the following course should be adopted after lists of documents have been exchanged by both sides. Firstly, there should be an inspection of those documents in the list of each party. Secondly, the solicitor acting for the financial institution should warn the proposed deponent on behalf of the financial institution of the serious consequences he or she bears personally, and the consequences for his or her employer, if he or she swears an affidavit that is false in any respect. Thirdly, the solicitor should confirm to the court that the deponent has been so advised before the affidavit is sworn. Fourthly, the deponent on behalf of the financial institution should then swear the affidavit dealing with the plaintiff's title to seek an Order for Possession. If that course is taken, unless there is prima facie cogent evidence that the Plaintiff does not have title, further discovery should not be considered necessary under Article 24 Rule 7. Nor, in those circumstances,

should it be considered necessary to give leave to serve a Khanna subpoena on any person who is not a party to those proceedings.