**Neutral Citation No. [2009] NICh 6**

| *Ref:* | **DEE7543** |
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*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)**

| *Delivered:* | **23/6/09** |
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

**2007 No. 10510**

**BETWEEN:**

**NORTHERN BANK LIMITED**

**Plaintiff;**

**-and-**

**JOHN JOSEPH RUSH**

**First Defendant;**

**-and-**

**NICOLE DAVIDSON**

**Second Defendant.**

**DEENY J**

[1] The plaintiff in this action sues on foot of a mortgage document of 1 February 2006. On foot of this document the first defendant secured an advance from the plaintiff on the mortgage security of his dwelling at Laurel Court, Greenisland, County Antrim ("the property"). The plaintiff has entered judgment against the first defendant, which is unlikely to be enforceable, but in the proceedings before me seeks to obtain possession of the property currently occupied by the second defendant who purchased from the first defendant. Mr William Gowdy appeared for the plaintiff and Miss Jacqueline Simpson for the second defendant. I am grateful to them for their helpful submissions. The second defendant joined her then solicitors as a third party to the action and they in turn joined the solicitors to the first defendant as a fourth party, but I am not concerned in this judgment on foot

of the plaintiff's originating summons with those proceedings but only with the legal position between the plaintiff and second defendant.

[2] The situation which the parties face and the court has to deal with is a situation where one or other party who has not enjoyed the benefit of monies must nevertheless sustain a detriment. The matter arises in this way. The plaintiff, through its own corporate legal department, registered the mortgage of 1 February in the Registry of Deeds on 16 February 2006. Unfortunately, on the memorial the first defendant's surname was misspelt as "Rusk". On foot of the Registration of Deeds Regulations (N.I.) 1997 and the decision of this court in Pen Finance Limited v Leona Laird and Others [2008] NICh 15, the plaintiff accepts that that was not a valid registration of the mortgage. It will be necessary to say something more about the mortgage itself in due course but for now I note that the next chronological event was the discovery by the bank that a search for this mortgage did not disclose it in the Registry of Deeds. On 22 March 2006, it emerges from the bank's file, which was only received at a very late stage on foot of an order of the court for discovery, the bank wrote to it's legal searchers asking them to carry out a fresh search to show their title. Of course, no such search would show their title under the name Rush as the name had been misspelt. The file does not disclose any reply to that letter nor any further step taken by the bank or it's legal department. Miss Simpson relies subsequently on the fact therefore that from some time shortly after that date the bank knew, or it was reasonably foreseeable, that a person in the position of the second defendant could purchase the property ignorant of this mortgage in favour of the Northern Bank. There was a prior mortgage in favour of the Nationwide Plc which was properly registered.

[3] By late 2006 the first defendant decided that he would have to sell the property to pay his debts. The property was made available for sale and on or about 31 January 2007 was sold to the second defendant.

[4] Although the plaintiff had informed the Nationwide of their second mortgage, having received the title deeds from the Nationwide for inspection, the Nationwide did not inform the solicitors for either the purchaser or vendor of the property of the existence of that second charge. A search carried out on behalf of the solicitors again did not reveal the mortgage because it was registered under the name of Rusk. The second defendant as purchaser then handed over the purchase price and the mortgage to the Nationwide was discharged. The mortgage to the plaintiff was not discharged as the first defendant does not appear to have told his own solicitor about it and it had not shown up on the search. At some stage towards the end of June the first defendant's solicitor became aware of the charge. She very promptly informed both the bank's solicitor and the solicitor for the second defendant. It is a significant fact to which I shall return that the second defendant's solicitor had not registered the assignment of the interest

to his client although the purchase monies had been paid over some five months previously. Indeed he did not do so even when told of this situation. Following an application by counsel for the second defendant the court did read and consider the legal reports, verified on affidavit, from Mr John G Neill and Mr Neil Faris as solicitor experts. The plaintiff then submitted a report in reply from Mr Maurice McIvor. These documents were all of assistance to the court but I discouraged the giving of oral evidence, which was not then heard. All three solicitors were of the opinion that it was not good practice on the part of the second defendant's solicitors not to register the assignment.

[5] Indeed one can put the matter more strongly than that. Section 24 of the Land Registration Act (NI) 1970 requires the compulsory first registration of the ownership of any land specified in column 1 of Part I of Schedule 2. In this case the assignment on sale, by virtue of Schedule 2 "shall become void on the expiration of three months from the date of execution thereof unless, within that period, application is made in such manner as may be prescribed for registration in the appropriate register of the person entitled to be registered as owner by virtue of the conveyance, grant or assignment or of his successor in title." This was not done. Subsequently the third party applied on the 26 July to register the assignment. Although the attached letter sought an extension of time it does not appear that the Order from the Land Registry in fact extends time as required under Part II of Schedule 2 of the Act. Although it is not a matter for my decision at the moment there must be a question mark over the validity of the registration of that assignment. I observe that the second defendant's solicitors appear to have wrongly certified to the Land Registry that they were not aware of any other relevant document affecting the title of the land when in fact they were aware of this plaintiff's mortgage, whatever its precise status.

[6] I set out Section 4 of the Registration of Deeds Act (N.I.) 1970 in full:

> "4. - (1) Subject to subsection (3) and sections 3A(5), 3B(5) and 5, every document which is registered shall be deemed and taken as good and effectual both in law and equity according to the priority of time of registering it and the priority of time of registering a document registered after the 30th April 1968 shall be determined by the serial number allocated thereto pursuant to section 8 and not by the actual time of registering the document.
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> (2) Subject to subsection (3) and section 5, a deed or conveyance affecting any land in Northern Ireland which is not registered shall be void against a registered document affecting those lands and against

> a registered order charging those lands made under the Judgments Enforcement (Northern Ireland) Order 1981 .
> (3) Where a person or the agent of that person has actual knowledge of a prior document, which has not been registered, affecting any unregistered land, registration of a subsequent document which transfers, or confers an estate in, the land to or on that person shall not operate so as to confer priority on, or make the prior document void in relation to, that subsequent document.
>
> (4) In subsection (3), "agent" means a person who is generally authorised to act for his principal in respect of dealings in land or who is specially authorised by his principal to deal in the land the subject matter of the prior document and who in either case obtains knowledge of the prior document in the course of the same transaction with respect to which the question of knowledge arises.
>
> (4A) Subsections (3) and (4) shall not apply to any document relating to a matrimonial or civil partnership charge (within the meaning of the Family Homes and Domestic Violence (Northern Ireland) Order 1997)."

It can been seen that Section 4(1) gives priority to this mortgage over any later assignment provided that the mortgage is validly registered first, and even allowing for the subsequent assignment to be validly registered. The plaintiff's position is that really ends the matter but Mr Gowdy went on to helpfully deal with the arguments being advanced on behalf of the second defendant.

[7] Before the registration of that assignment took place, whether validly or not, Messrs King and Gowdy for the plaintiff bank registered the bank's mortgage in the correct name of the first defendant. This was on 11 July 2007. This is an important part of the case for the plaintiff. They say their charge is validly registered and has priority over the subsequent assignment to the second defendant and that they are entitled to possession of the premises with a view to the sale of the same to recover the money or into the bank.

[8] In Hamilton v Listrum (1845) 7 Ir Eq R 560, 567 the then Master of the Rolls declined to go outside the equivalent statutory provision which had recently come into effect to venture into equities. Blackburn CJ took a similar view in Drew v Lord Norbury (1846) 9 Ir Eq R 171 saying that : "The priority

of registration is made in every instance the criterion by which the priority of right is to be established." Miss Simpson submits that those are not cases of gross negligence and she contends this is. A significant difficulty which she faces is Section 4(3) of the Registration of Deeds Act set out above. She submits that prior and subsequent in that sub-section do not mean what the plaintiff claims. It is dealing with a situation where two documents exist. It seems to me that the prior document is the document created earlier in time before the subsequent document. Therefore the third party as agent of the second defendant coming to register the assignment was registering a document which was subsequent in time to the bank's mortgage which was the prior document. If he had actual knowledge of the bank's mortgage, even if it was not registered, his registration of the subsequent document "shall not operate so as to confer priority on, or make the prior document void in relation to, that subsequent document." This would have been the situation after the end of June 2007. It would not have been the situation if he had registered the assignment within three months as he ought to have done. At that stage neither he nor his client had actual knowledge of the bank's mortgage and they could have effectively obtained priority.

[9] That prior means the earlier in time of the two documents seems to me the natural and ordinary meaning of the word. But one might go further and point out that there would be no need to have the adjective prior at that point in the sub-section if it did not mean that. Even more so there can be no doubt that the bank's mortgage of 2006 cannot be said to be "subsequent" in any sense of the word to the second defendant's assignment of 2007. Section 4(3) therefore seems to me to reinforce the bank's claim here.

[10] I also accept the strength of the plaintiff's citation of the maxim nemo dat quod non habet and of its citation by Millett LJ, as he then was, in McMillan Inc. v Bishopsgates Trust(No. 3) (1995) 3 All ER 747 at 768.

[11] However, Miss Simpson contends that these matters do not assist the bank as the purported registration of 11 July 2007 is not in fact a valid registration. She submits that the bank's mortgage is not a deed. If one looks at the document it has been signed by the first defendant as is accepted. However, although it is purported to be "signed, sealed and delivered by Joseph John Rush" there is in fact no seal of any kind whatsoever on the document, whether embossed, impressed or printed. It is witnessed by two persons who are expressly stated to be bank officials of the Northern Bank Limited at Carrickfergus. She cites Wylie, Irish Conveyancing Law, para. 18.128 as authority for the proposition that a deed requires some form of seal of impression. It will be recalled that the very essence of a deed is that it is under seal and that if under seal it does not require consideration in order to be binding. But Mr Gowdy relies on an express statutory exception to that general principle to be found in Article 3 of the Law Reform (Miscellaneous Provisions) (NI) Order 2005.

"DEEDS AND OTHER INSTRUMENTS

Formalities for deeds executed by individuals

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, covenant, bond, specialty or other instrument, according to the nature of the transaction intended to be effected, which is 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

(ii) at the direction of the individual executing it and in his presence and the presence of two witnesses who each attest the signature; and

(c) delivered as a deed by the individual executing it or by a person authorised to do so on his behalf.

(3) Where an instrument under seal that constitutes a deed is required for the purposes of any statutory provision passed or made before the coming into operation of this Article, this Article shall have effect as to signing, sealing and delivery of an instrument by an individual in place of any provision of that statutory provision as to signing, sealing and delivery.

(4) The statutory provisions mentioned in Schedule 1 (which in consequence of this Article require amendment) shall have effect with the amendments specified in that Schedule.

(5) In this Article 'individual' does not include a corporation sole."

One looks therefore for the requirements of Section 3(2) in this document and above the signature of the first defendant one finds the words: "I/we have executed this Mortgage as a Deed on the date of this Mortgage". So it was clearly expressed to be a deed and a mortgage. It is signed by the individual executing it in the presence of two witnesses who attest the signatures and it seems not in dispute that it was delivered to the bank. That appears to dispose of the point about the absence of the seal.

[12] Miss Simpson then submits that it is not validly attested because the two witnesses are employees of the plaintiff. It is trite law that a party cannot attest the signature to a deed. She submits that employees are in the same position and that their attestation is not valid. However, she is unable to refer to any express authority on that point. Manual and electronic search discloses a very considerable number of cases relating to the witnessing of documents but none of them seem to require, as a principle of common law or equity, that the witness has to be independent. In Seal v Claridge (1881) 7 QBD 516 the Court of Appeal in England had to deal with the issue as to whether a statutory requirement for a solicitor to be the attesting witness under the Bills of Sale Act 1878 Section 10.1 was met if the solicitor in question was the grantee of a bill of sale. There Lord Selborne, LC, held that the meaning of the provision there was that the solicitor "shall be an independent witness. It has been admitted that if the grantor was a solicitor he could not attest his own signature; but it is contended that it is different in the present case for the grantee as a solicitor. It was the intention of the legislature that the nature of the bill of sale should be explained to the grantor; one object no doubt was that he should be adequately protected …" He held that the attestation was therefore insufficient in those circumstances. It seems to me that this is an exception that proves the rule. Without some express statutory provision there is no general requirement for witnesses to be independent of the person to whose signature they are attesting. As I pointed out solicitors or their employees will often witness the signatures of their clients on deeds or wills. Mr Gowdy submitted that if a corporate body such as the plaintiff were not allowed to use employees as witnesses in such situations great inconvenience and uncertainty would be caused. I observe that some corporate bodies have many thousands of employees and unfortunate situations could exist if such persons inadvertently witnessed a document to which their employer was a party, even though they had not the remotest interest in the outcome of the transaction to which their employer was a party. One might also observe that in this age of groups of companies there might be real debate as to which precise corporate body somebody was an employee of at the time of signing. Would this principle extend to all the employees of a group of companies or only to the employees of a particular subsidiary? The purpose of an attesting

witness is to reassure other parties, and where necessary a court, that a signature which purports to be that of an individual was impressed by somebody whom the witness believed to be that individual at the time in question. They are not verifying the wisdom or state of mind of that person at the time, although in certain situations they might be asked whether the party signing was sober or apparently of right mind at the time of signature. I do not think the role goes beyond that. I accept that it is possible that bank employees might attract some commission in this context and might have a conceivable interest in the matter but it does not seem to me that that is enough to establish a new rule of law that attesting witnesses must not be employees of a corporate party to a contract or mortgage. I therefore conclude that this document complied with the requirements of the 2005 Order and was therefore, subject to one point to follow, validly registered.

[13] I would just add that Mr Gowdy also relied on Madden on Registration of Deeds, 2nd Edition, 1901, pp 23-25, where the learned author cited In Re O'Byrne 15 L.R.Ir. 373 as authority for the proposition that a memorandum of further charge was a conveyance within the meaning of the Irish Registry Act. As Lord Cairns said in Credland v Potter L.R. 10 Ch at page 12:

> "There is no magical meaning in the word 'conveyance'; it denotes an instrument which carries from one person to another an interest in land."

It will be recalled that under the Registry of Deeds Act a document can be either a deed or conveyance. This document was capable of conveying an interest in the land in question in the event of default. It may be therefore that even if it was not a deed that it was capable of registration in the Registry of Deeds. I note however that in Schedule 1.2 to the Act there is a reference to any "conveyance or security" which might imply that they are different animals for these purposes. I express no concluded opinion on the matter.

[14] Miss Simpson's further submission is that it is proper and necessary for the court to consider whether the plaintiff here should be denied its remedy because of its own gross negligence. That gross negligence consists, she says, not only of the initial error, probably typographical, in attempting to register the mortgage against Rusk rather than Rush but, as discussed above, the knowledge within the bank that the mortgage was not showing up in a search. It was therefore reasonably foreseeable that a party such as the second defendant could purchase in good faith for value without being aware of the bank's mortgage. There are two aspects of this matter. Firstly Mr Gowdy contends that the introduction of this concept of gross negligence only applies when the court is considering two unregistered dispositions. He accepts that in that context gross negligence might defeat the party which had the document which was prior in time. He contends in the light of the

statutory provisions discussed above it cannot apply to the plaintiff's validly registered mortgage. He submitted there was no authority to support such a contention and indeed Miss Simpson accepted that she relied only on some words of Professor Wylie in his Irish Land Law particularly at 13.152. I am inclined to the view that the plaintiff's submission is right in this regard. The role of equity is wide but it is not untrammelled. The statutory provisions seem clear to me. While in theory one could argue that a party in the position of this plaintiff was estopped from registering this mortgage because it would be unconscionable to do so it is significant that no express example of such a finding by a court has been located. In Northern Counties of England Fire Insurance Co. v Whipp 26 Ch. D. 482, the Court of Appeal, per Fry L.J. at 494 said that "the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner." They did not do so there even though the Plaintiff was guilty of "great carelessness" in dealing with its securities. And see Barton J in Re Greer 1907 1 I.R. 57. On the present facts and without ruling hypothetically on the position if the second defendant's solicitors had sought to register the assignment after three months but before the bank's mortgage was registered, I do not consider that I am at liberty to act as Miss Simpson wishes. I am encouraged in that conclusion by the remarks of Lord Walker of Gestingthorpe in Yeoman's Row Management Limited and Another v Cobb 2008 4 All ER 713; [2008] UKHL55, at paragraph 46.

> "46. Equitable estoppel is a flexible doctrine which the Court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in *Muschinski v Dodds* (1985) 160 CLR 583, 615-616,
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> > 'Under the law of [Australia]—as, I venture to think, under the present law of England—proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party "ought to win" and "the formless void of individual moral opinion2 "".

[15] In the circumstances I need not give any absolutely final ruling on the issue of whether there was "gross negligence" for that reason. Taking into account the points mentioned above by Ms Simpson and some lesser aspects of the deed to which she draws attention, I would hesitate to ascribe the terms "gross negligence". But even if I were to do so, I note the submission of Mr Gowdy that I must balance any fault on the part of his client or its in-house solicitors with fault on the part of the second defendant and her solicitors. As stated above it is clear that her solicitors were at fault in failing to register her assignment within three months. If that had been done her position would have been impregnable. If one takes the equities on what might be described as a net basis therefore one is left with a more modest discrepancy between the parties. Such an approach of balancing the equities might gain support from the maxim: where the equities are equal the law shall prevail. Therefore even if, which I doubt, it was equitable to disregard the priority given by the registration of the mortgage of 1 February 2006 in the Registry of Deeds on 11 July 2007, I do not find on the authorities that it would be right to do so. I find that the plaintiff is entitled to the relief sought. It can be seen from this judgment that, without making an express finding, I do not consider that the second defendant will be left without a remedy for the situation in which she finds herself. I propose to allow her a stay to allow for those under a duty to her to discharge the debt owed to the plaintiff.