Neutral Citation No [2012] NICh 16 | *Ref:* **DEE8511**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **24/5/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

SANTANDER

Plaintiff;

and

S1 and S2

Defendants.

DEENY J

[1] In this proceeding, 2011/089270, just now completed, the plaintiff, Santander (UK) plc, proceeded by way of Originating Summons against "[S1 and S2] of 61b Ballymacombs Road, Portglenone, County Derry [Postcode]". (As of 5th October 2011 the amount remaining due on the mortgage in question was £277,048.77 of which arrears were £7,652.96). In that originating summons pursuant to Order 88 of the Rules the plaintiff sought delivery by the defendants to the plaintiff of possession of the premises described in the second schedule hereto and they are described as "the premises situate at and known as 61b Ballymacombs Road, Portglenone, County Derry [Postcode]" and it is asserted there that it is a dwellinghouse but not one to which part 3 of the Rent Order 1978 applies.

[2] The summons was supported by an affidavit by Edmund Sinclair of Robert G Sinclair and the proceedings were resisted by S1 and S2 with S1 appearing on his own behalf. It was before the Master on 17 November 2011 and on 1 December 2011. On the latter occasion the Master gave an Order for possession. The defendant appellants appealed that Order to this court on 19 December 2011 using incidentally the same address which was consistently used as 61b Ballymacombs Road, Portglenone, County Derry.

[3] They put forward various grounds in support of that appeal and at the direction of the court they put in an affidavit. They did point out that Mr Sinclair had exhibited the wrong conditions governing the loan because it should have been the 2007 conditions and not the 2002 conditions which he had exhibited. The "Standard

Mortgage deed" that the plaintiff relies on bears the stamp '9 March 2009' – a fairly indistinct stamp. It does bear the manuscript date 7 November 2008. There is no seal. The plaintiff through its counsel, Keith Gibson, has sought to deal with the points made by the defendant appellants in their skeleton arguments.

[4] When the matter came before the court I raised with counsel for the plaintiff bank some aspects of the deed which had occurred to me. I think I may deal with two lesser ones. First of all the deed does not record that it is signed, sealed and delivered in the traditional way. The deed came into effect, whatever the precise date was, after 15 November 2005 when the provisions of the Law Reform (Miscellaneous Provisions) (NI) Order 2005 came into force. Article 3 applies. I have dealt with that to some degree in my judgment in Northern Bank Limited v. Rush and Davidson [2009] NICH6; 2010 NIJB 116. The mortgage there was "signed, sealed and delivered by Rush". That is not said here. The provisions of Article 3 of the 2005 Order are as follows:-

> "Formalities for deeds executed by individuals
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> 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."

Pausing there, therefore the requirements of paragraph 2 are mandatory if you choose not to seal your deed.

> "(2) The requirements referred to in paragraph 1 are that the instrument is –
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> (a) expressed to be a deed, or to be a conveyance, assurance, mortgage, settlement, covenant, bond, speciality 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 –
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> (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 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 delivering . . ."

[5] So this mortgage deed, the original of which is now before me today, to comply has to be signed by the individual executing it in the presence of a witness who attests the signature. Well it is not in issue that it is signed by S1 and S2 and it is not in issue that it is witnessed, in the sense that two persons, Patrick Griffin whose occupation and address are given and Elaine Kelly whose address and occupation are likewise given, have signed in the space marked in the presence of the witness (signature and printed name). Have they attested it by so doing? Mr Gibson for the plaintiff relies on paragraph 18-137 of the 3rd Edition of Wylie and Woods Irish Conveyancing Law as indicating that the use of the words 'in the presence of' with the name, address and occupation is sufficient for attestation.

[6] By way of analogy I look at the Wills and Administration Proceedings (Northern Ireland) Order 1994 and I note that Article 5(2) of that which is dealing with the signing of a will says no form of attestation or acknowledgment is necessary. Now it says that although 5(1) (d) says each witness in the presence of the testator either (1) attests the testator's signature or acknowledges his signature.

[7] If one goes to Words and Phrases Legally Defined one finds a case of 1844 : Hudson v. Parker 1 Roberts Ecclesiastical 14 at 26 per Dr Lushington; so it can be seen that this is an ecclesiastical court and of some duration but reading it doesn't seem to me that it is of much assistance to me here but certainly is not hostile to the plaintiff's case. The other cases quoted in Words and Phrases Legally Defined don't seem to require the use of the word "attested" by the witness.

[8] Stroud's Judicial Dictionary of Words and Phrases 7th Edition, volume 1, has under attest, attestation the following:-

"Where an instrument is required to be "attested" the meaning is, that a witness shall be present at its execution and shall testify on it that it has been executed by the proper person."

and that is citing Freshfield v Reid 11 Law Journal Exchequer 193. I am looking at a short report of the case which in fact is from 9 M&W 404. I see, per curiam, the following:-

> "The term "attest" manifestly implies that a witness shall be present, to testify that the party who was to execute the deed has done the act required by the power; the object of which was that some person should verify that the deed was signed voluntarily."

[9] I am inclined to accept the submission of Mr Gibson that on balance, therefore, the omission to expressly recite in the printed form that the witness "attests" that the signature above is that of S1 or S2 respectively is not fatal but as in the events the matter is going to a full hearing I think I will formally reserve my position on it and it might be interesting to discuss it as I have had the benefit of some ex tempore argument from Mr Gibson today but no counsel is instructed on the defendant's behalf. But in any event if I had to decide it today it would not, I find, be fatal to the plaintiff's case.

[10] Secondly, I pointed out that the recitation by S1 and S2 says "signed as a deed by the borrower" but it doesn't say 'delivered as a deed'. It would appear that it no longer needs to say 'signed, sealed and delivered'. Counsel relies on paragraph 18-127 of Wylie's Irish Conveyancing Law and an authority of Sullivan, Master of the Rolls in Evans and Grey (1882) 9 LR Ir 539 as support for the view that this is something that can be inferred and inferred from very little. In this case I am satisfied that he is correct. His solicitor exhibited the mortgage deed or copy thereof to the original affidavit. The original was handed in by the plaintiff's solicitor today to the court. It seems to me clearly established that it was delivered to the mortgagee here and I find in favour of the plaintiff that Article 3 (2) (c) has been satisfied.

[11] The third aspect of it which caused me concern was that I noted with surprise on the copy deed and it is the same on the original, of course, that the form had not been fully completed – that is Abbey's own form because it was Abbey at the time of the loan although already a member of the Santander Group. There is a section marked 'Property Details' and paragraph 1 of that says 'Folio number(s)'. Well on getting the indenture today we find this is not registered land so that would not be appropriate. We then go to paragraph 2 :

> "Property:
>
> The land comprised in the above numbered Folio (when whole Folio) OR (when part of a registered Folio add) part of the land comprised in the Folio being. . [then that first line is blank] being 61b Ballymacombs Road, County Londonderry

> (and/or when unregistered land) the land comprised in an indenture of made between "

then we get the post code which seems to be correctly filled in and then we find the date that is 7 November 2008.

[12] So we have the partial postal address to which people have been writing back and forward but in the wrong place - the form does not comply with its own requirements, so to speak. I also note that it omits the word 'Portglenone' which is in the full postal address. Now this is a mortgage 'deed' by which the borrowers, S1 and S2, have apparently or allegedly demised the property to the lender in this case for a term of 10,000 years – but what have they demised? When one turns to the indenture one finds a very unsatisfactory state of affairs. Not only is the mortgage deed incomplete but the indenture which is the only one that the plaintiff can give me is a copy first of all it seems to me, a photocopy clearly. It bears no date. It does give parties with S1 and S2 as the purchasers. It is signed by the apparent vendor or vendors because James O'Kane is said to be seized of it but the mortgage was in the name of both James O'Kane and Elizabeth Anne O'Kane in favour of the Northern Bank so those persons have all signed it. On this copy it doesn't appear that S1 and S2 have signed it. As they have possession of it that may not be a problem but it does leave one to wonder whether there is a page omitted. The deed recites at paragraph 1:-

> "By virtue of the deeds and documents set forth in the first schedule hereto the said James O'Kane was seized and possessed for an estate in fee simple of inter alia the hereditaments and premises described in the second schedule hereto ("hereinafter called the scheduled premises")."

But when we go to the second schedule we find the following:-

> "All that part of the lands at Ballymacombs Beg situate in the Barony of Loughinsholin in the County of Londonderry comprising 2,760 square metres or thereabouts as more particularly delineated on the map thereof attached hereto and thereon edged red."

So there is no reference to the postal address; there is no reference to Portglenone; there is no reference even to Ballymacomb Road on the mortgage deed as Ballymacombe Road ending with an 'e'. On the deed we have Ballymacombs Beg with no 'e' – 's' instead of 'e'. So we turn to the map to see whether we find there 61a Ballymacombs or Ballymacombe Road and we find a very unsatisfactory map. There are dimensions on it showing a plot of land consistent with land necessary for a dwellinghouse but there is not a single name on the map. It does not give the

townland, it doesn't (which might have been helpful to the plaintiff) give the road that the plot is on – it has no names at all.

[13] Now it seems to me that that is not a satisfactory position. Mr Gibson referred to Wylie's Irish Conveyancing Law again at 19-48 and acknowledged that the learned authors said it is usual to recite the mortgagor's title but he said that perhaps it is not mandatory. The answer may well be in many cases that it would be excessive formalism to query the form but where the form is incomplete and the indenture itself does not bear out the description on the form a problem does arise. I am supported in that view by Fisher and Lightwoods Law of Mortgage 13th Edition at paragraph 1.32 to the following effect:-

> "Unless a subject to mortgage condition is sufficiently precise, it would be void for uncertainty. A condition that a sale was subject to the purchaser obtaining a satisfactory mortgage has been held to be too indefinite rendering the condition itself and the whole contract void."

That textbook has very little on pre 1925 Act mortgages so I can't take it very much further and as I say my time for researching these matters has been limited. Looking at Valentine I am reminded of the distinction between the originating summons procedure which was adopted here by the plaintiff and the writ action which was open to the plaintiff. A writ action allows the plaintiff to fill in any lacuna in its proceedings though it also allows, as I pointed out to S1, a better opportunity for the defendant purchasers to put in a counter claim.

[14] I also take account of Section 26 and Schedule 3 of the Conveyancing Act of 1881 which I have already opened in the course of argument and I note from that that it is clearly provided in the pro forma statutory mortgage to be found in that Act, which still seems to be part of our law though it is not often availed of, that it should recite the mortgagor as beneficial owner "hereby conveys to him all that and etc" i.e. a proper description of the land. It seems to me therefore that this essential proof is not before the court on this originating summons procedure i.e. that the borrowers conveyed a particular piece of land which they owned to the mortgagee. It may well be that it can be remedied by the plaintiff in due course and one can see that one could call a surveyor or perhaps put in an affidavit subject to cross examination or whatever to prove that they are one and the same but it is not sufficiently proven for a decision of the court at the present time.

[15] However the court must be careful not to do injustice to either party. It seems to me therefore that I will find in favour of S1 and S2 on the appeal from the Master but I will give the plaintiff leave to convert the action and will convert the action into one commenced by a writ and that will also allow S1 to put forward the matters that interest him. Some of those matters are clearly futile it seems to me. Santander is, by

a practice direction of the Lord Chief Justice, entitled to represent Abbey and furthermore they are entitled to convey their mortgages if they choose to though they say they have never done so and there doesn't seem to be any evidence that they have. Furthermore the purchasers haven't shown that there is some injustice to them in the wrong conditions being inadvertently exhibited originally or any injustice to them in the conditions themselves so this may prove a purely tactical victory for the purchasers but nevertheless I find that they are entitled to that.

[16] In the circumstances I think they are entitled to their costs as a personal litigant of S1 attending the two hearings, to be taxed in default of agreement but I make no order as to when that is to be paid.