THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Whelan J.
Noonan J.
Haughton J.

Neutral Citation Number [2021] IECA 39
Court of Appeal Record No. 2018/378
High Court Record No. 2006/623 SP

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

- AND –

JERRY BEADES

DEFENDANT/APPELLANT

- AND –

Court of Appeal Record No. 2019/458
High Court Record No. 2006/623 SP

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

- AND –

JERRY BEADES

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 17th day of February 2021

Introduction

1. On 15 September 2020, at a time when the above entitled appeals were pending before this court, Pepper Finance Corporation (Ireland) DAC brought an application before this court by way of notice of motion seeking the following orders: -

(a) an order pursuant to O. 17, r. 4 of the Rules of the Superior Courts ("RSC") and/pursuant to the inherent jurisdiction naming Pepper as a co-respondent to both appeals.

The application was grounded on the affidavit of Todd Bowen sworn on 15 September 2020 together with his supplemental affidavit sworn on 23 September 2020.

2. The title page of this judgment reflects the most up-to-date details of the parties in the underlying High Court proceedings as recorded by the Central Office of the High Court. This should not be taken as a pre-judgment of the issues discussed herein or of any potential future appeals brought by the appellant.

Key background facts

3. The history of the proceedings is fully outlined in the judgments delivered in the appeals bearing record nos. 2018/378 and 2019/458. On 29 November 2006 IIB Homeloans Limited as mortgagee instituted proceedings against the appellant by way of special summons bearing record no. 2006/623 SP seeking an order for possession of two properties situate at Fairview and Little Mary Street respectively in Dublin.

4. An order for possession was granted on 23 June 2008 by Dunne J. in the High Court. The appellant appealed against that determination. The appeal was ultimately heard by the Supreme Court and in November 2014 the said order for possession was affirmed and the appeal was

dismissed. Therefore, there is no extant issue now between the parties with regard to the validity of the order for possession.

Devolution of mortgagee's title

5. All the estate, right, title and interest of the original mortgagee came to vest in KBC Bank Ireland plc by act and operation of law pursuant to the Central Bank Act 1971 and S.I. No. 125 of 2009 in or about June 2009 in accordance with the tenor of the said statutory instrument. KBC Bank Ireland plc further automatically stepped into the shoes of IIB Homeloans Limited by virtue, *inter alia*, of the provisions of the Central Bank Act 1971 for the reasons outlined in the judgments in the related appeals bearing record nos. 2018/378 and 2019/458. It acquired *qua* mortgagee the benefit of the order for possession. Whilst a formal order was made by Costello J. in the High Court on 25 July 2018, following her written judgment of 29 June 2018, amending the title to the proceedings substituting KBC Bank Ireland plc for IIB, the said substitution order was not strictly necessary in law but formally reflects the position that had hitherto obtained by operation of law from June 2009.

6. Under and by virtue of a mortgage sale agreement of 9 August 2018 together with a deed of transfer dated 30 November 2018, Beltany Property Finance DAC took a transfer of, *inter alia*, all the estate, right, title and interest of the original mortgagee, IIB, in the loan facility, the facility letter and the mortgage of 12 June 2003. The order for possession together with the benefit of the order of the Supreme Court made in November 2014 affirming same and dismissing the appeal enured for the benefit of Beltany *qua* mortgagee in succession to IIB.

7. Thereafter pursuant to an order of Reynolds J. made in the High Court pursuant to O. 17, r. 4 on 14 October 2019 Beltany was named as sole plaintiff in the proceedings. Beltany was also granted liberty to issue execution on foot of the possession order of 23 June 2008, pursuant to O. 42, r. 24(a). Both the order and judgment of Costello J. referred to above and the order of Reynolds J. of 14 October 2019 were the subject of separate appeals to this court and separate

judgments will be delivered in respect of the said appeals referred to above. Both the said judgments are intended to be read together with this judgment.

8. The sole issue for determination now is whether Pepper is entitled to an order pursuant to O. 17, r. 4. naming it as a co-respondent to the appeals. That calls for a consideration of the basis on which it frames its entitlement and the claims of the appellant in opposition.

Consumer Protection (Regulation of Credit Servicing Firms) Act 2018

9. The above entitled Act came into operation on 21 January 2019. It effected, *inter alia,* an amendment to s. 28 of the Central Bank Act 1997 by amending the definition of "credit servicing" to provide:-

> "'credit servicing' in relation to a credit agreement, means, subject to subsection (2)-
>
> (a) holding the legal title to credit granted under the credit agreement…"

The essential thrust of the legislation was to ensure that firms or entities providing credit servicing were to hold the legal estate under the mortgage. The Act in effect amended Part 5 of the Central Bank Act 1997 to expand the activity of credit servicing as defined in that Act, to include holding the legal title to credit granted under a credit agreement and associated ownership activities. The net impact of the legislative amendment is consumer driven and ensures that the borrower whose loan or loans are sold maintain the regulatory protections that they enjoyed prior to the sale including the protections provided by the Central Bank's statutory code of conduct. It was the case advanced on behalf of Pepper that it managed the loans in question and that, as such, the instruments executed on 7 August 2020 were necessitated for the purposes of ensuring compliance with the provisions of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018.

Assignment from Beltany to Pepper

10. In its affidavit of 15 September 2020 Todd Bowen, Head of Portfolio Management for Pepper, deposes that pursuant to a mortgage sale and purchase deed of 7 August 2020 made

between Beltany as assignor and Pepper as assignee, Beltany agreed to sell and Pepper agreed to buy the legal interest of Beltany in mortgages securing a portfolio of loan facilities "for the consideration therein mentioned".

11. A global deed of assignment dated 7 August 2020 made between Beltany and Pepper is exhibited with the said affidavit. Mr. Bowen deposes at para. 21 of his first affidavit: -

> "I believe and am advised that the effect of the global deed of assignment was that the legal interest in the loan facility, the facility letter and the mortgage has been assigned absolutely from Beltany to Pepper."

A true copy of the global deed of assignment, partially redacted, is exhibited. The reason for the redaction is explained as being –

> "…due to the fact that Schedule 1 identifies all of the facilities covered by the assignment (including information relating to persons other than the appellant). However, the exhibited copy of the deed contains the relevant extract from Schedule 1 relating to the appellant."

It is not in contention and was not disputed during the course of the hearing that the extract from Schedule 1 to the global deed of assignment which refers to loan ID 582311 pertained to the appellant and the loan and properties the subject of the within proceedings and possession order of 23 June 2008.

12. Redactions are further explained in the deeds as being necessitated by: -

(a) commercial sensitivity (such as disclosure of the confidential terms on which the loan sale was completed):

(b) client confidentiality, such as restrictions imposed by Regulation (EU) 2016/679 which requires the redaction of all personal information relating to other borrowers; and/or

(c) matters which are not relevant to the subject matter of the within proceedings (para. 23 of the first affidavit of Mr. Bowen).

13. In addition to the global deed of assignment the affidavit exhibits a deed of conveyance and assignment dated 7 August 2020 between Beltany and Pepper whereby Beltany granted, conveyed, assigned, transferred and assured to Pepper all its right, title, estate, interest, benefit and obligation (both present and future) in relation to the properties.

14. It is clear that "hello" and "goodbye" letters as they are colloquially described affording notice of the intended assignment to the appellant and notice of its conclusion compliant with the provisions of the Supreme Court of Judicature Act (Ireland) 1877 were served on the appellant on 5 June 2020 and 14 August 2020 respectively. The content of same clearly informed the appellant that Beltany had agreed to transfer its legal ownership of, *inter alia*, his loan together with any related facility letters, mortgages, guarantees, security documents and rights pertaining to his indebtedness to Pepper. The later letter confirms that the transaction had taken effect. There was also a further confirmatory letter notifying the appellant of the transfer of the legal ownership in his loan which letter was dated 31 August 2020. Pepper contends that the appellant received the necessary express written notice of the assignment. Pepper contends that it is necessary and/or desirable that as the current legal owner and assignee of the loan facility, the facility letter and the mortgage it should be made a party to the within proceedings contending that it has an interest in the appeal. It seeks no more than to be named as a co-respondent to the two pending appeals in the above-entitled proceedings.

Position of the appellant

15. The appellant, in opposing the application that Pepper be joined as co-respondent in the two appeals, in an affidavit of 18 September 2020 raises the following points. Firstly, that Mr. Bowen's averment that Beltany wrote to the appellant on 14 August 2020 "in his capacity as a debt [*sic*] (of Beltany)" was "an inadmissible hearsay statement as Mr. Bowen is swearing on

behalf of an entity of which she [*sic*] is not an officer or employee nor does he demonstrate that he has been authorised to make any averment on its behalf." Further the appellant contends that "there is no evidence of service of this notice of motion on Beltany". It is contended that "the consent of Beltany Property" is necessary before the applicant can be joined to the proceedings. It is contended with regard to the global deed of assignment that "there is a complete obscuring of any evidence that this deed applies to any properties other than those the subject of this appeal".

16. With regard to the global deed of assignment it is asserted that on its first page:-

> "…it is stated that the assignor has agreed to sell and the assignee had agreed to purchase the assignor's legal interest in the mortgage assets in the terms and conditions as set out in the mortgage sale and purchase deed dated on or about…2020…It is surprising in what purports to be a true copy of a deed that the month and date are left blank in a section of the document."

It is further contended that there is no evidence that either the global deed of transfer or the purchase deed are "under the company seals of either of the parties to the deed". It is contended that "each document purports to be signed by an attorney however the power of attorney is not exhibited" and that "the affidavit makes no mention of an attorney and therefore only a sealed deed can cause an effective transfer as provided by s. 64 of the Land and Conveyancing Law Reform Act, 2009." The appellant also goes on to aver that there was no mention of the assignment of any possession order. It is contended that for the said reasons Pepper has failed to demonstrate that it is entitled to the order sought to be named as co-respondent to the two appeals, pursuant to O. 17, r. 4.

17. In a second affidavit of Mr. Bowen it is deposed that the deeds were executed by duly authorised attorneys of Beltany and Pepper respectively on foot of powers of attorney:-

> "In the case of Beltany, both the global deed of assignment and the deed of conveyance were executed by Mr. Donal O'Sullivan in his capacity as duly authorised attorney, having been so appointed by power of attorney dated the 31st July, 2020 ('the Beltany POA')".

It is deposed that Mr. O'Sullivan is a director of Beltany and was expressly named in the power of attorney amongst the individuals entitled to execute, *inter alia*, the global deed of assignment in any deed of conveyance relating to "the Project Square portfolio of loan assets". The affidavit deposes that the loan facility, the facility letter and the mortgage form part of this portfolio. In the case of Pepper, both the global deed of assignment and the deed of conveyance were executed by Mr. Dermot Caden in his capacity as a duly authorised attorney having been so appointed on foot of a power of attorney dated 7 February 2020. This affidavit clarifies that the transactions which took place on 7 August 2020 necessitating the application pursuant to O. 17, r. 4 were required by virtue of the provisions of s. 1 of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 which, *inter alia*, "requires that the entity having responsibility for the servicing of a particular loan facility should also hold the legal title in that loan facility." The affidavit confirms that Pepper, in its capacity as the credit servicing firm for Beltany, had responsibility for the management of the loan facility and the mortgage prior to completion of the transaction on 7 August 2020.

18. Mr. Bowen also confirms as follows: -

> "In my capacity as head of portfolio management for Pepper, I am familiar with the terms of, and circumstances surrounding the creation of, the Beltany POA and the Pepper POA. I believe and I am advised that any suggestion to the effect that some infirmity exists in the execution of either the global deed of assignment or the deed of conveyance is plainly incorrect. Both documents are executed in full compliance with the terms and power of attorney exhibited above and in accordance with all applicable legal requirements."

Hearing of motion

19. The motion came on for hearing before this court on 25 September 2020. At the hearing the appellant reiterated his objections to the order being sought asserting that there was a difficulty with the power of attorney. It was contended that Pepper had not reached the "*prima facie*" standard of proof required for the making of an order pursuant to O. 17, r. 4. It was contended that the 7 August 2020 deeds did not comply with the requirements of the Land and Conveyancing Law Reform Act 2009. Objection was made to the fact that execution of the deeds was effected not by the companies but on foot of powers of attorney granted by Beltany and Pepper respectively to two individuals to execute instruments. Further objection was raised to the powers of attorney having been redacted in respect of the names and addresses of the donees of the power. It was argued that pursuant to s. 21 of the Powers of Attorney Act 1996 a power of attorney is proven by producing a true copy. Objections were made to redactions made to the copies of the powers of attorney exhibited which included the home addresses of the donees and certain documents relating to the transaction to give effect to the transfer of the legal title of the Project Square portfolio of loan assets to Pepper. It was contended that before the court could make an order pursuant to O. 17, r. 4 Pepper had to establish that there had been a transmission of interest and that it held both the legal and equitable title. It was contended that there was no proof that consideration had passed between Pepper and Beltany. For the title to pass it was contended: -

> "It has to pass with a deed and there is no receipt for monies paid. What is required is consideration. We aren't told what sum was paid. So I can't see that a contract occurred."

20. In support of his contention that Pepper ought not to be joined as co-respondent to both the KBC and Beltany appeals arising within and on foot of High Court proceedings 2006/623 SP it

was contended, *inter alia*, that the decision of *Bank of Scotland plc v. McDermott* [2019] IECA 142 was a relevant authority with regard to the level of proof required on the presentation of an application for the joinder of a party after judgment has been granted.

Position of Pepper

21. The very limited ambit of the order being sought by Pepper was emphasised to the court, namely to permit Pepper to be represented by counsel "for the course of this morning's proceedings and that is it". It was acknowledged that, by virtue of the transmission of the interest of Beltany to Pepper, it would in due course be necessary to bring applications in a number of appeals pending before the court pursuant to O. 42, r. 24 since Pepper had stepped into the shoes of Beltany as mortgagee in connection with the securities and title and in respect of the orders for possession in question. It was acknowledged that in due course Pepper would be required to apply to seek liberty to execute the possession order made by Dunne J. in 2008. Such an application would have to be moved in the within proceedings before the High Court in the first instance. It was contended in particular that it was at that particular stage that any arguments with regard to substantive issues concerning the transmission of title between Beltany and Pepper might be argued or be of relevance. It was contended in particular that an application pursuant to O. 17, r. 4 ought not to be converted into a mini trial in relation to the issues concerning the validity of the assignment or the instruments or deeds that were before the court. The application was confined to the addition of Pepper as a respondent in appeal 2018/378 and appeal 2019/458 - nothing more.

22. The court was informed that KBC, the immediate predecessor in title of Beltany, was aware of the application but did not propose to participate in the appeal in circumstances where it had effected a complete disposition of all its interest several years before. It had been contended on behalf of the appellant that the "hello" and "goodbye" letters providing notice of the assignment from Beltany to Pepper to the appellant and in particular the "goodbye" letter was hearsay in

circumstances where Mr. Bowen was not in a position to swear to same. The appellant did not deny receiving the "goodbye" letter or the "hello" letter. Counsel pointed out that in fact Mr. Bowen was the author of the impugned "hello" letter. He was a signatory of the letter and he then deposed as to his own letter. It was exhorted on behalf of Pepper that the court ought not, in light of the jurisprudence, to engage in a mini-trial in relation to issues of execution of these or instruments including powers of attorney.

Discussion

23. Order 17, r. 4 provides: -

> "Where by reason of death, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability…it becomes necessary or desirable that any person not already a party should be made a party…an order that the proceedings shall be carried on between the continuing parties, and such new party…may be obtained *ex parte* on application to the Court upon an allegation of such change, or transmission of interest or liability…having come into existence."

24. In the instant case the application is limited to seeking that Pepper be joined in both appeals as co-respondent with Beltany for the purposes of the disposition of the said appeals. The particular focus of O. 17, r. 4 is procedural. It is available in circumstances where a change of party or parties is warranted by reason of, *inter alia,* a transmission of interest. The language of the rule makes clear that the court has jurisdiction to make an order *ex parte* "on application to the Court upon an allegation of such change, or transmission of interest…" (emphasis added).

25. It is well settled in this jurisdiction that the assignment of a loan or the mortgagee's interest under an indenture of mortgage instrument or the registration of a party as successor in title to a charge holder in Part 3 of a folio constitutes an "event occurring after the commencement of a cause or matter causing a change or transmission of interest" for the purposes of O. 17, r. 4. As

the authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) note at para. 6-111:-

> "…the assignment of a loan or chose in action is an 'event' within the meaning of O. 17, r. 4. This was the view of Peart J. in *Irish Bank Resolution Corporation v. O'Driscoll* [(Unreported, High Court, Peart J., 6 February 2015)], who commented that '[t]he event is clearly the purchase by it of the loan book referred to' [para. 9 of judgment]."

26. In *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671 Kelly J. (as he then was), in dealing with an application under O. 15 for an order substituting one entity for another as plaintiff in proceedings, observed at para. 38 that such an application could also have been brought pursuant to O. 17, r. 4 although the said rule:-

> "…does not mention substitution. It does contemplate the application being made *ex parte*. This demonstrates, it seems to me, the form of proof which is required, namely *prima facie* evidence which will justify the court in making the order sought."

Kelly J. was satisfied to make the order in question notwithstanding that certain key documents and exhibits had been redacted "without any explanation being given as to why that editing took place". He observed that he was "unable to discern any disadvantage which flows to the defendant as a result of the order which I propose to make."

27. Considering the onus of proof, at para. 43 he observed:-

> "In my view, the onus of proof on a procedural motion of this sort is very different to the onus of proof which is required at the trial. I do not believe that it would be either appropriate or indeed in the interests of justice that on a procedural motion of this sort, far reaching decisions concerning the efficacy and validity of the underlying sale agreement or the assignment of a notice of that assignment should be made.

> 44. That would turn a procedural motion which, even under the rules is contemplated as one which can be made *ex parte*, into a sort of mini-trial of the action. That is not what is envisaged by the rules of court…"

26. A provision broadly equivalent to O. 17, r. 4 has existed in the rules of court for in excess of 150 years. The purely procedural nature of such an application was repeatedly reiterated in the jurisprudence including *Long v. Crossley* (1879) 13 Ch. D. 388 where Fry J. observed at p. 391:-

> "It is said by Mr. North that, if they are added as co-Plaintiffs, the action must still fail. I think that at present I have nothing to do with that. The object of the provisions of the rules was, not that a party's, case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the Court, whether in his favour or against him. I therefore allow an amendment by adding the proposed co-Plaintiffs…"

The key question identified traditionally was whether the presence of the applicant seeking joinder was warranted or necessary in order to enable the court to effectually and completely adjudicate upon and settle the issues in the case. If it appeared to the court that it was the order that ought to be made, the judgment of Fry J. made clear that the court should decline to enter into an assessment of the ultimate merits of an action or whether the proposed party is likely to succeed.

28. In *Irish Bank Resolution Corporation Ltd. v. Morrissey* [2014] IEHC 527, [2014] 2 I.R. 399 Finlay Geoghegan J. considered an application "brought and pursued primarily pursuant to O. 15, rr. 13, 14 and 15". However she noted that the applicants also relied on O. 17, r. 4. She expressed a view that an applicant ought to adduce sufficient *prima facie* evidence but leave over to the trial the question of whether there was adequate evidence to enable the substituted plaintiff to obtain the reliefs sought in the proceedings.

29. I am satisfied that in cases where no final order has been made a judge is entitled to accede to an application pursuant to O. 17, r. 4 provided a *prima facie* basis for the application is

identified. In circumstances where an order has already been made that in itself is final a modified approach is warranted as outlined below.

Post-order application: Higher burden

30. Given that the order for possession in this case was made several years ago, this application is to be treated as an application made post-order. The order for possession made in 2008 is final and conclusive. However regard must be had by the court to the nature of the order in question and any relevant features - it being in this instance an order which is not self-executing or a kind which requires a further action by way of enforcement process and in particular, *inter alia*, an order for leave to execute pursuant to O. 42, r. 24(a).

31. In such circumstances the judge to whom an application is made for either the substitution of a new party or the addition of a further plaintiff is entitled to have some regard to the merits of the plaintiff's case provided they are reasonably apparent from the grounding affidavit and exhibits in particular.

32. There are material parallels between the facts in the instant case and those arising in *Bank of Scotland plc v. McDermott*, a judgment of this court delivered on 17 May 2019. Counsel for Pepper has emphasised in the course of the application that Peart J. noted: -

> "36. There is, of course, the distinction in the present case that the substitution order is made after final judgment has been granted, and therefore that there is no opportunity at a subsequent trial where issues as to the validity of the assignment of the loans to Ennis might be ventilated. But the fact remains that the application to substitute a party is still one of a purely procedural nature.
>
> 37. Where, as in the present case a substitution application is made after judgment has been granted, and where therefore there is no opportunity at trial to raise any issues in relation to the proofs adduced in support of the application, it seems to me that the *prima*

facie test referred to by Kelly J. in *IBRC v. Comer* is not the correct test. In such cases the correct test is that applicable in civil proceedings generally, namely on the balance of probabilities. …But such applications remain purely procedural in nature, and there can be no question of such an application becoming in the nature of a mini-trial.

38. In the present case the appellant was correctly put on notice of the application and therefore was given the opportunity to raise such issues as he wished to raise, and he did so by raising the question of whether Ennis had established to the required level of proof that the appellant's loans were included in the purchase deed referred to. That argument was put forward. On the evidence adduced by Ennis it was, in my view, beyond any doubt that the appellant's loans were assigned as sworn to by Mr O'Sullivan, and certainly met the test of the balance of probabilities."

33. I am satisfied that represents a correct statement of the law.

34. It is clear from the jurisprudence that, where a purely procedural application to join a party as plaintiff is brought pursuant to O. 17, r. 4, in determining whether, on the balance of probabilities, it is necessary or desirable that a plaintiff be joined in proceedings where a mortgagee has already obtained an order for possession and prior to an order granting leave to issue execution pursuant to O. 42, r. 24 taking place, regard can appropriately be had to the nature of such proceedings and the fact that such an order for possession is not self-effectuating in the context of the exercise of rights by a mortgagee but requires a further order for leave to issue execution. It necessarily follows until the process pursuant to O. 42, r. 24 has concluded the proceedings have not terminated. The rights of the mortgagee do not rest solely on the order for possession which is of limited value without a concomitant right to enforce same.

35. It appears to me that a purposive construction of the rule must be applied having regard to the overall intendment to ensure that justice is done between the parties and to facilitate the administration of justice and that orders that are necessary or desirable can be made in pursuance

of same. It appears to me, insofar as the contrary has been contended by the appellant, that such a contention is erroneous. The right to make an application pursuant to O. 17, r. 4 continues in circumstances such as those obtaining in the instant case for so long as anything remains to be done in the case. In the instant case the aspect of execution remains outstanding.

Hearsay objection

36. I attach significant weight to the fact that the "hello" and "goodbye" letters were served on the appellant. This clearly complied with the requirements for notice in writing pursuant to s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. Furthermore, criticisms of the "hello" letter advanced on behalf of the appellant were devoid of legal merit in circumstances where the said letter was signed by Mr. Bowen, the deponent of the affidavit, wherein he exhibited the said letter. To suggest that the letter was inadmissible as "hearsay" in the circumstances was not correct.

Application of the principles

37. The application, it will be recalled, is limited in nature, being for the purposes of the conduct of the hearing of the appeals and the joinder is to be effected along with and not in substitution for the two named respondents. A cursory perusal of the exhibits on behalf of Pepper demonstrates that the global deed of assignment of 7 August 2020 recites therein that the assignor, Beltany, "has agreed to sell and the assignee (Pepper) has agreed to purchase the assignor's legal interest in the mortgage assets on the terms and conditions as set out in a mortgage sale and purchase deed dated on or about XXX 2020." Much was made of the fact that no specific date was inserted at Recital A. However the global deed of assignment falls to be construed in its totality.

38. In particular, Clause 1.3 defines "mortgage sale and purchase deed" as meaning: -

> "The mortgage sale and purchase deed in relation to the sale of the assignor's legal interest in mortgages securing a portfolio of loan facilities made between the assignor and the

> assignee on the 7th August, 2020 whereby the assignor agreed to sell and the assignee agreed to buy the assignor's legal interest and the mortgage assets for the consideration therein mentioned."

Hence the issues raised concerning Recital A are not sound.

39. Recital B provides: -

> "In consideration of the parties accepting their rights and obligations pursuant to the mortgage sale and purchase deed, the parties have agreed to enter into this deed pursuant to the terms and conditions of the mortgage sale and purchase deed."

Schedule 1 clearly identifies the borrower's ID, the connection ID and the loan ID and it is not disputed that same is referable to the appellant.

Execution by attorney

40. Issues were raised regarding Pepper's execution of the deed by its lawfully appointed attorney. To cause the court to embark on an investigation as to the validity of the execution in the context of a procedural application pursuant to O. 17, r. 4, even in a case where the threshold to be met by the applicant is the balance of probabilities, does indeed amount to a mini-trial. That a deed or instrument is executed on its face should suffice to meet the standard of proof on the balance of probabilities for an order to be made pursuant to O. 17, r. 4 for the joinder of a party even after a final order has been made.

41. Historically it should be observed that s. 46 of the Conveyancing Act 1881 provided that execution of any instrument by the donee of a power of attorney is "as effectual in law" as if the instrument had been executed by the donee in the name and with the signature and seal of the donor. The authority of a company to execute a power of attorney to do acts on its behalf inside this State was recognised by the Supreme Court in *Industrial Development Authority v. Moran* [1978] I.R. 159. In Ireland there is no prohibition on a company or its directors granting a power of attorney even where the articles of association of that company do not expressly authorise it.

42. Powers of attorney are now governed by the Powers of Attorney Act 1996 and a provision substantially similar to s. 46 of the Conveyancing Act 1881 is now to be found in s. 17 of the 1996 Act. Section 17(1) of the 1996 Act provides: -

> "(1) The donee of a power of attorney may—
>
> (*a*) execute any instrument with his or her own signature and, where sealing is required, with his or her own seal, and
>
> (*b*) do any other thing in his or her own name,
>
> by the authority of the donor of the power; and any instrument executed or thing done in that manner shall be as effective as if executed or done by the donee with the signature and seal, or, as the case may be, in the name, of the donor of the power."

43. Section 17(2) specifically caters for powers of attorney granted by corporations: -

> "(2) A person who is authorised under a power of attorney to convey any estate or interest in property in the name or on behalf of a corporation sole or aggregate may either execute the conveyance as provided in *subsection (1)* or, as donee of the power, execute the conveyance by signing his or her name as acting in the name or on behalf of the corporation in the presence of at least one witness and, in the case of a deed, by affixing his or her own seal, and such execution takes effect and is valid in like manner as if the corporation had executed the conveyance."

44. Section 64 of the Land and Conveyancing Law Reform Act 2009, which came into operation in December 2009, governs the formalities for a valid deed. It abolished the requirement for individuals to execute a document under seal before it could be considered a deed. In addition, that section removed the requirement that authority to deliver a deed was required to be given by a deed and this reflects what had previously occurred in relation to powers of attorney pursuant to the Powers of Attorney Act 1996. When s. 17(1) and (2) of the Powers of Attorney Act 1996 are considered in conjunction with s. 64 of the Land and Conveyancing Law

Reform Act 2009 there is clear evidence that the execution of the global deed of assignment by both Pepper and Beltany is valid. Likewise the execution of the deed of conveyance and assignment on 7 August 2020 by both Pepper and Beltany is valid.

45. In the context of execution reliance was placed on the decision in *McGuinness v. Ulster Bank Ireland Ltd.* [2019] IESC 20. The court noted at para. 14: -

> "The core of the dispute between Mr. McGuinness and the Bank is whether the Deed of Appointment, which is the deed of the Bank, is considered to have been 'made' by the Bank or by Mr. McNaughton, who is an individual for the purposes of s. 64(2)(b) of the 2009 Act.
>
> 15. The importance of this arises in the following manner. If it is to be considered as a deed made by the Bank then, in accordance with s. 64(2)(b)(ii), it must be executed under the seal of the Bank in accordance with its Articles of Association in order to be a deed executed under s. 64 and, pursuant to s. 64(3), to have effect 'as if it were a document executed under seal'.
>
> 16. If, on the other hand, as contended by the Bank, the Deed of Appointment was 'made' by Mr. McNaughton pursuant to the Power of Attorney and hence, by an individual, then his witnessed signature is sufficient execution under the section in accordance with s. 64(2)(b)(i)(I) and hence it has effect 'as if it were a document executed under seal', in accordance with s. 64(3)."

46. Finlay Geoghegan J. proceeded to consider the structure of s. 64(2) of the Land and Conveyancing Law Reform Act 2009. She concluded at para. 22: -

> "…where, as here, the Bank has lawfully appointed an individual, Mr. McNaughton, to execute documents, including a deed of appointment of a receiver on its behalf, then as the person who executes the document, he is the person who makes the document for the purposes of s. 64(2)(b) of the 2009 Act. On the undisputed facts of this appeal, Mr.

> McNaughton held a valid power of attorney which authorised him in the name of the Bank and on its behalf to execute and deliver *inter alia* deeds of appointment in connection with receiverships."

She continued: –

> "23. As Mr. McNaughton was the person executing the deed to which the Bank was a party on its behalf, he was the person making the deed within the meaning of s. 64(2)(b)(i) and since he is an individual, his signature in the presence of a witness who attested his signature was a sufficient compliance with s. 64(2)(b)(i)(I). It follows from that conclusion (and compliance with sub-ss.64(2)(a) and (c)) that the Deed of Appointment is a deed within the meaning of s. 64 of the 2009 Act. Further, that it is executed in accordance with s. 64(2) and hence, pursuant to s. 64(3), it 'has effect as if it were a document executed under seal'."

She concluded on the facts of that case that "[c]onsequently, that the Deed of Appointment complied with Clause 9.1 of the Deed of Charge and is a valid appointment."

Power of Attorney - execution

47. The appellant further impugns the validity of the powers of attorney created by Beltany Property Finance DAC on 31 July 2020 and by Pepper. Section 2 of the Powers of Attorney Act 1996 defines "power of attorney" to mean:-

> "…an instrument signed by or by direction of a person (the donor), or a provision contained in such an instrument, giving the donee the power to act on behalf of the donor in accordance with the terms of the instrument".

Part 3 of that Act governs powers of attorney generally. With regard to the execution on behalf of Beltany Property Finance DAC, it will be noted that the execution provides: -

> "Signed by a duly authorised signatory
>
> For and on behalf of:

BELTANY PROPERTY FINANCE DESIGNATED

ACTIVITY COMPANY

In the presence of:"

48. Section 15 provides:-

"(1) Where an instrument creating a power of attorney is signed by direction of the donor it shall be signed in the presence of the donor and of another person who shall attest the instrument as witness.

(2) A power of attorney is not required to be made under seal.

(3) This section is without prejudice to any requirement in or under any other enactment as to the witnessing of powers of attorney or as to the execution of instruments by bodies corporate."

49. Section 41 the Companies Act 2014 provides as follows: -

"Powers of Attorney

41. (1) Notwithstanding anything in its constitution, a company may empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds or do any other matter on its behalf in any place whether inside or outside the State.

(2) A deed signed by such attorney on behalf of the company shall bind the company and have the same effect as if it were under its common seal."

50. Section 17(2) of the Powers of Attorney Act 1996 is a valid deeming provision. A deed or instrument executed by an attorney on behalf of a company will bind that company and has the same effect as if it were under its common seal.

51. Section 41(2) is comparable in import to s. 16(1) of the Powers of Attorney Act 1996 and they are complimentary measures. The latter providing that a power will "operate to confer on the donee or donees of the power acting in accordance with its terms authority to do on behalf of the donor anything which the donor can lawfully do by attorney" irrespective of how it has been

executed. In like manner, the operation of s. 41(2) of the 2014 Act ensures that an instrument signed by the donee of a power of attorney and under his or her seal "shall bind the company and have the same effect as if it were under its common seal", irrespective of the manner of its execution.

52. Thus, the traditional approach in conveyancing which required a power to be executed under a company's common seal to ensure that it was effective to empower the attorney to execute a deed does not any longer represent the law which has been materially modified having regard to the combined effect of s. 16(1) of the 1996 Act and s. 41(2) of the 2014 Act.

53. In my view, those statutory provisions are dispositive of the objections raised with regard to the execution of the powers of attorney by Beltany and Pepper respectively. This court has no need to go behind the instruments which are apparently valid on their face and is entitled to have regard to the transaction intended to be given effect to, as evident from the tenor of the instrument in each case, in determining whether to grant or refuse the procedural application.

Conclusions

54. The threshold to be met by Pepper to establish its entitlement to an order to be joined as co-respondent to the two appeals is a low one.

55. This court has jurisdiction pursuant to O. 86A, r. 2(1)(a) to make orders which the High Court may make pursuant to, *inter alia,* O. 17, r. 4. The deeds and instruments exhibited demonstrate that Pepper is a company with a material interest in the outcome of the two appeals pending before this court. It follows necessarily that it is in the interests of justice that it be joined as a co-respondent in both appeals. Pepper has demonstrated that it is desirable that such an order be made in the interests of justice.

56. In making an order pursuant to O. 17, r. 4 there is no determination of any substantive aspect of the claim in the respective applications brought by KBC Bank Ireland plc and Beltany Property Finance DAC which were the subject matter of orders of the High Court now under

appeal to this court. It will ultimately be a matter for Pepper and/or its co-respondents to establish that it is entitled to the facilities, loan security, mortgage and estates, right, title and interest of the original mortgagee and to the benefit of the judgments and orders and in particular the order for possession obtained by a predecessor mortgagee.

57. I am satisfied that applying the balance of probabilities test to the application Pepper is entitled to the orders sought. Both the deeds were executed by duly authorised attorneys of Beltany and Pepper. As outlined above Mr. O'Sullivan in turn was duly appointed to act as attorney of Beltany by means of a power of attorney dated 31 July 2020. Mr. Dermot Caden was duly appointed by Pepper to act as its attorney by a power of attorney dated 7 February 2020.

58. When the provisions of the Powers of Attorney Act 1996 are considered in conjunction with the relevant provisions of the Companies Act 2014 it is clear that the executions of relevance and in question could not be said to be executions to which s. 64(2)(b)(ii) apply in all the circumstances. Such is clear from the decision of Finlay Geoghegan J. in the Supreme Court in *McGuinness v. Ulster Bank Ireland Ltd*. Having due regard to the Powers of Attorney Act 1996 and the Companies Act 2014 and the operative sections of both as referenced above the instruments including the powers of attorney sought to be impugned by the appellant are to be considered instruments made by the donee of the power pursuant to the power of attorney and as such by an individual. It follows in turn that the witnessed signature in each case suffices to constitute valid execution in accordance with the provisions of s. 64(2)(b)(i)(I) and takes effect in accordance with the provisions of s. 64(3) of the Land and Conveyancing Law Reform Act 2009 "as if it were a document executed under seal".

59. In the premises there is ample evidence before this court that there has been a change or transmission of interest by virtue of which Pepper has acquired an estate or interest subsequent to the institution of the above entitled proceedings and indeed subsequent to the order for the making of the order for possession by virtue of which it is necessary or desirable within the

meaning of O. 17, r. 4 that they not being a party should be made a party to the two appeals above referred to. It is in the interests of justice that they are so joined.

60. The repeated assertions that there are deficiencies in the execution of both or either of the global deed of assignment of 7 August 2020 or the deed of conveyance and assignment (unregistered property) of 7 August 2020 are not made out on any basis. Furthermore it is not appropriate in a procedural application pursuant to O. 17, r. 4 to enter upon a determination as to the validity or efficacy of a deed or instrument as to its import or execution provided there is some evidence upon which the court can rely tending to support the change or transmission of interest contended for – particularly where the party whose interest or title is said to have been acquired indicates no opposition.

61. No prejudice whatsoever has been identified by the appellant as would arise from the joinder in question sought by Pepper.

62. The merits of the application by Pepper is copper fastened by the express terms of the provisions of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018, an act which operates for the benefit of borrowers such as the appellant.

63. Accordingly, Pepper is entitled to be and is joined as co-respondent to both appeals.

64. The judgments in appeals 2019/458, 2018/378 as well as 2019/254 and 2019/487 can be read together, insofar as the issues addressed in one overlaps with those arising in another, along with a motion seeking a stay disposed of at the appeal hearing with an order that costs in the matter be costs in the cause in that appeal.

65. Since the appellant was wholly unsuccessful on all of the grounds relied upon I propose that there be no order as to the costs of the application which was heard with a number of appeals. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms

already proposed by the court, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

66. Noonan J. and Haughton J. are in agreement with this judgment.