[2024] IEHC 145

THE HIGH COURT

[Record No. 2015/5195 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

ANTHONY SHEEDY

DEFENDANT

JUDGMENT of Mr Justice Barr delivered on the 8th day of March 2024.

Introduction.

1. In this application, Everyday Finance DAC ('hereinafter the applicant') seeks the following orders: an order pursuant to O.17, r.4 of the Rules of the Superior Courts: am order substituting it as plaintiff; and an order pursuant to O.42, r. 24 of RSC, for leave to issue execution of the judgment obtained by the plaintiff against the defendant in these proceedings, on 30 June 2017.

2. The defendant has raised a large number of grounds on which he alleges that the applicant is not entitled to the reliefs sought in its notice of motion. His grounds of objection to the granting of the reliefs sought by the applicant, are as follows:

(i) That the applicant's application to be substituted in the proceedings pursuant to O.17, r.4 is misconceived, as that rule only provides for joinder of a party to proceedings, rather than substitution of one party by another;

(ii) that the purported transfer of the defendant's loan from the plaintiff to the applicant was ineffective, as the defendant had not consented to the transfer;

(iii) that once judgment had been obtained by the plaintiff on foot of the loan, then under the doctrine of merger, the underlying loan had been extinguished and was replaced by the judgment; as the deed of transfer between the plaintiff and the applicant, did not mention the judgment that had been obtained, that deed was ineffective to transfer the judgment to the applicant; and in effect, the plaintiff had nothing to transfer when it purported to do so, due to the fact that the loan had been subsumed into the judgment;

(iv) that the judgment that had been obtained by the plaintiff in the High Court against the defendant on 30 June 2017, had been incorporated into a settlement agreement concluded between the plaintiff and the defendant on 02 October 2018 in Circuit Court proceedings in which the plaintiff had sought possession of certain properties owned by the defendant; under the terms of which settlement agreement, all outstanding claims by the plaintiff against the defendant had been compromised; therefore the plaintiff could not transfer the judgment to the applicant by virtue of the subsequent deed of transfer dated 04 June 2019;

(v) that the evidence of Ms Hartigan, as contained in her affidavit sworn on 09 May 2023, was inadmissible, on the basis that it was hearsay evidence;

(vi) that the deed of transfer on which the applicant had based its application, had been redacted to such an extent that the defendant was at an unfair disadvantage, such that the reliefs sought by the applicant should be refused until an unredacted copy of the deed of transfer was furnished to the defendant.

3. These grounds of objection and the applicant's response thereto, will be considered in greater detail later in the judgment.

Relevant Dates.

4. The following is a short chronology of the relevant dates in this application:

04 November 2004	Letter of loan sanction issued, which was accepted by the defendant on 08 November 2004.
16 March 2015	When the defendant defaulted on repayment of the loan, the plaintiff issued the summary proceedings herein.
13 July 2016	The plaintiff issued a civil bill seeking possession of certain property owned by the defendant.
30 June 2017	The plaintiff obtained judgment in the present summary proceedings against the defendant, in the sum of €2,601,519.20, together with costs. The High Court judge refused to place a stay on the judgment. The defendant appealed that judgment to the Court of Appeal.
02 October 2018	The plaintiff and the defendant entered into a settlement agreement in relation to the possession proceedings in the Circuit Court. The settlement agreement was made a rule of court.
14 June 2019	The plaintiff executed a deed of transfer, whereby it transferred a large number of loans, including the defendant's loan, to the applicant.

20 June 2019	The plaintiff sent a "goodbye" letter to the defendant, informing him of the transfer of the loan. A copy of that letter was sent to the defendant's solicitor.
28 June 2019	The applicant sent a "hello" letter to the defendant, informing him that they had acquired his loan from the plaintiff. A copy of that letter was sent to the defendant's solicitor.
11 September 2020	The applicant issues its notice of motion in the present application.

The Settlement Agreement dated 02 October 2018.

5. At the hearing of this application, the defendant relied on the terms of the settlement agreement dated 02 October 2018, in support of his argument that that agreement had incorporated and effectively extinguished, the judgment that had been obtained by the plaintiff some sixteen months earlier, on 30 June 2017. The settlement agreement was reached on the morning on which the plaintiff's application for an order for possession of the defendant's property was due to be heard in the Circuit Court in Tipperary. As the defendant relies heavily on this agreement, it is necessary to set out its terms hereunder.

> *"It has been agreed between the plaintiff and the defendant in the above entitled proceedings that they be compromised on the following terms:*
>
> > *(1) The defendant consents to an order for possession in favour of the plaintiff of the property specified in the schedule to the civil bill herein, subject to the order for possession being stayed in the Circuit Court for a period of 18 months provided that the defendant:*

(a) place the said property on the market, with joint auctioneers, one of which is to be from the plaintiff's panel of auctioneers within a period of six months from the date hereof. The defendant is to fully cooperate with the joint agents in allowing them access to the said property for the purpose of preparing it for sale.

(2) Discharge all sums due to the plaintiff on foot of loan account number 93014804514098, the arrears to be as of the 01 October 2018 in the sum of €2,776,427.87 and in respect of loan account 93014804514411, the amount due as of 01 October 2018 is the sum of €101,423.93, together with continuing interest at current bank rates currently 1.625% and 2% respectively, until payment. All such sums to be discharged within a period of 18 months.

(3) The costs of the within proceedings, together with the costs of the High Court proceedings bearing record number 2015/519S and the Court of Appeal proceedings bearing the record number 2017/000369, be discharged by the defendant. Such costs order is to be taxed in default of agreement.

(4) The guide price of the said property is to be agreed by the joint agents. The defendant shall instruct the joint agents with regard to the manner in which the property is marketed.

(5) The Court of Appeal proceedings, bearing the record number 2017/000369 be struck out forthwith and no further action to be taken therein."

6. The said agreement was signed by the solicitor acting on behalf of the plaintiff and was witnessed by counsel. The agreement was also signed by the defendant, with his signature being witnessed by his solicitor.

The Evidence.

7. The evidence in support of the applicant's application, was grounded on two affidavits, the first of which was the affidavit sworn by Mr Andrew McCudden, who was described as the Head of Compliance in the applicant company. He swore the affidavit on 03 July 2020. Mr McCudden described the plaintiff's claim as being one for monetary judgment in respect of an outstanding debt arising on an unpaid loan, the particulars of which had been set out in the originating summary summons. He referred to an order of the High Court granting the plaintiff judgment against the defendant in the proceedings on 30 June 2017. He stated that this information was based on limited information that was currently available to the applicant, given that it was not currently a party to the proceedings, with the applicant's solicitors having come on record for the applicant for the purpose of making the within application. He stated that in the circumstances, the summary that he had provided of the proceedings to date, may not present a comprehensive overview of the issues arising in the case.

8. Mr McCudden went on to refer to a deed of transfer dated 14 June 2019 under which the plaintiff had unconditionally, irrevocably and absolutely granted, conveyed, assigned, transferred and assured to the applicant, all such rights, title and interest as the plaintiff had in the facility and security documents set out in the schedule contained in the deed of transfer. He exhibited a copy of that deed. He stated that the mortgage assets as defined in the deed of transfer at issue in these proceedings, were identified in the schedule to the deed of transfer and all of the plaintiff's rights thereunder had been

assigned by the plaintiff to the applicant. He stated that the exhibited deed of transfer was the mechanism by which the plaintiff's facility and related security had been transferred from the plaintiff to the applicant.

9. Mr McCudden stated that the redactions to the exhibited deed of transfer were undertaken for reasons of commercial sensitivity and/or bank or client confidentiality, and/or on the basis of irrelevance.

10. The deponent referred to a letter dated 20 June 2019, that had been sent by the plaintiff to the defendant, informing him that the loan facilities and security documentation had been sold and transferred by the plaintiff to the applicant. He exhibited a copy of that letter.

11. The deponent also referred to a letter dated 28 June 2019, sent by the applicant to the defendant, informing him that the loan facilities and security documentation had been sold and transferred to it. He exhibited a copy of that correspondence.

12. Mr McCudden stated that it was his belief and he had been informed by his legal advisers, that as a result of the transfer of the loan and securities as described, which had occurred since the commencement of the proceedings, whereby the interest of the plaintiff in the facilities, in the underlying security and in the proceedings had been wholly transferred to the applicant, in such manner that it had become necessary and expedient that the applicant should be made a party to the proceedings. The deponent stated that it was his belief and he had been advised by his lawyers that the appropriate means by which to give effect to the change of interest that had occurred, was by an order providing for the substitution of the applicant as plaintiff in the proceedings. He also prayed the court for an order dispensing with the need for reservice of any amended proceedings on the defendant.

13. Mr McCudden stated that by reason of the change in ownership which had been effected by the loan sale and transfer as described by him, the applicant was now the party entitled to issue execution on foot of the judgment dated 30 June 2017. He stated that in these circumstances, he believed that there were good grounds for making an order granting the applicant leave to execute on foot of that judgment. Accordingly, he prayed for the reliefs sought in the notice of motion.

14. The defendant swore a replying affidavit on 29 January 2021. He stated that the application to be substituted in the proceedings pursuant to O.17, r.4 was misconceived, as the order referred to "continuing parties", meaning that the proceedings must be extant. He stated that the within proceedings had been closed with the making of a final order for judgment on 30 June 2017. However, he went on to say that he had appealed that order to the Court of Appeal and on that basis "these proceedings have been discharged".

15. The defendant went on to allege that the applicant was not entitled to the reliefs sought, due to the fact that the plaintiff and the defendant had agreed an overall settlement of all disputes, including the within proceedings and the appeal to the Court of Appeal and the repossession proceedings taken in the Circuit Court, by means of a settlement agreement dated 02 October 2018.

16. The defendant stated that it was clear that the plaintiff no longer had an interest in any purported loans or security after the date of the settlement agreement. He maintained that the plaintiff had converted that interest into a contract, which it was submitted replaced the loan the subject matter of the present spent proceedings.

17. The defendant went on to deny that the plaintiff had any right to assign the judgment obtained on 30 June 2017 to the applicant. He stated that the plaintiff had no right to assign any interest that they purported to have in the loans, or security the

subject matter of the herein matter, to the applicant. The defendant stated that the applicant had not particularised its purported entitlement to be substituted into the proceedings. Instead, the applicant had relied on a vague reference to a transfer deed, without any reference to any section or part of the purported deed upon which they sought to rely.

18. The defendant stated that there was no certificate provided certifying that stamp duty had been paid on the deed of transfer; accordingly, it was submitted that it was inappropriate to place the deed in evidence before the court.

19. The defendant stated that the purported deed of transfer was so redacted, as to render it incapable of being understood. He stated that there was only a vague claim of commercial sensitivity and/or client confidentiality, and irrelevance, as a basis for justifying the redactions that had been carried out to the document. He stated that there were redactions in the definition of terms of the contract. There was no explanation as to why same were necessary. He stated that the redactions created uncertainty as to the prescribed meaning of phrases within the document. The defendant maintained that he was prejudiced by not being shown the purported deed of transfer in its entirety.

20. The defendant submitted that the deed of transfer which had been exhibited, was insufficient to establish the applicant's entitlement to any interest, in the loans or security. Nor did it transfer any entitlement to the applicant to be made a party to an existing final order of the court.

21. The defendant maintained that the applicant appeared to be attempting in this application to use a purported transfer of loan and/or security, for the purpose of amending an order of the High Court retrospectively. He stated that any entitlement of the plaintiff to an order for summary judgment against the defendant, did not mean that

the same entitlement applied to the applicant. He maintained that the present application was an attempt to remove the court's scrutiny of an entitlement to such judgment.

22. The defendant stated that the applicant was seeking prematurely to have leave to issue execution on the judgment dated 30 June 2017, as the applicant had failed to particularise any entitlement to the judgment. In this regard, the defendant stated that O.42, r.24 did not apply in the present circumstances. He stated that the applicant was not capable of bringing itself within any of the categories provided for in that rule. He stated that the present application was an attempt to bypass the regular and usual process to enforce purported rights, which rights were denied.

23. In conclusion, the defendant stated that he had never consented to the transfer of his loans, or the security, or the judgment granted by the High Court to the applicant. He stated that there was no evidence that the plaintiff had consented to the substitution application brought by the applicant herein. He stated that the applicant did not have an entitlement to be substituted into the proceedings, as the proceedings had become "spent" by virtue of the judgment that had been given in favour of the plaintiff. He stated that the applicant had no *locus standi* to bring the application, as they were not a party to the proceedings, that had already concluded. He prayed the court for an order refusing the reliefs sought in the notice of motion.

24. A further affidavit was sworn on behalf of the applicant. This affidavit was sworn by Ms Margaret Hartigan, Senior Asset Manager at BCM Global ASI Limited. It was sworn on 09 May 2023. She stated that she was a senior asset manager in the company that had been engaged by the applicant to manage and service certain facilities and securities held by the applicant, including those of the defendant herein. She stated that she had had access to the books and records of the plaintiff and made the affidavit from facts within her own knowledge and from a perusal of the books and records

belonging to the applicant. She was authorised to make the affidavit on behalf of the applicant.

25. Ms Hartigan denied that the within proceedings had "been discharged" as alleged by the defendant. She stated that as of the date of swearing her affidavit, the sum due by the defendant to the plaintiff by virtue of the judgment dated 30 June 2017, remained due and owing, together with such further interest as had accumulated since that time. She stated that having examined the books and records of the applicant, as of 16 March 2023 the sum of €2,984,426.55 was due and owing by the defendant, comprising principal and interest in respect of the loan account number 93014804514098, which account was the subject matter of the judgment obtained on 30 June 2017. She referred to a statement of account dated 29 March 2023, which was exhibited to the affidavit.

26. Ms Hartigan denied that the settlement agreement that had been reached between the plaintiff and the defendant on 02 October 2018, was an overall settlement of all matters in dispute between the parties. She denied that it included settlement of the within proceedings. She stated that the settlement agreement purely related to settlement of the possession proceedings that had been brought by the plaintiff against the defendant in the Circuit Court, wherein the defendant had consented to an order for possession of certain property, subject to a stay of eighteen months; together with an agreement that the property should be sold within that period. The agreement had also provided that the defendant would withdraw his appeal before the Court of Appeal in respect of the judgment obtained by the plaintiff on 30 June 2017, and had further agreed that he would pay the costs of the summary proceedings before the High Court and the Court of Appeal. Ms Hartigan exhibited a copy of the settlement agreement.

27. Ms Hartigan stated that it was her belief and she had been so advised by the solicitors acting for the applicant, that the said settlement agreement did not constitute a compromise of the within proceedings.

28. Ms Hartigan stated that in view of the fact that the defendant had not discharged the sum which was found to be due and owing by him to the plaintiff, it was incorrect for him to allege that the plaintiff, including its successors and assigns, no longer had an interest in the loans and security referred to in the terms of compromise.

29. Ms Hartigan stated that it was her belief and she had been advised by the applicant's solicitors, that the plaintiff was entitled to transfer and assign the rights, title and interest in the loan the subject matter of the proceedings and any rights thereto, to the applicant. She stated that the defendant had in fact provided consent to such assignment under the terms of the loan. She further pointed to the fact that the general terms and conditions governing business lending, and in particular clause 7.15 thereof, which applied to the defendant's loan, provided that the plaintiff was entitled to transfer the said loan without the consent of the defendant. She stated that it was clear from clause 7.15 that the defendant had agreed to the possibility that the plaintiff would transfer and/or assign the benefit of the loan facility to a third party. She stated that by accepting such terms, he had given his consent to any such transfer or assignment.

30. Ms Hartigan stated that it was her belief and she had been advised by the applicant's solicitors, that the deed of transfer was not a deed that attracted stamp duty.

31. She stated that while the deed of transfer had been redacted when exhibited in Mr McCudden's affidavit, it had been redacted for the reasons set out therein, which were valid reasons and were necessary in the circumstances. She stated that the effect of the deed of transfer was clear from the contents of the deed that had been exhibited. She stated that the defendant had not identified how he was prejudiced in any way by

the redactions that had been carried out to the document exhibited to the grounding affidavit. She pointed out that the defendant had not brought any action or complaint in relation to the transfer and assignment to the applicant of the loan facilities that he held with the plaintiff, despite having been given notice thereof in June 2019.

32. Ms Hartigan stated that the assertion that the applicant was attempting by this application to amend the judgment of the High Court, was mistaken. She rejected the suggestion that had been made by the defendant that the within application constituted an abuse of process.

33. Finally, a second affidavit was sworn by the defendant on 14 June 2023. The defendant made the preliminary point that Ms Hartigan did not work for the plaintiff, nor did she work directly in the employment of the applicant. Insofar as she had stated that her affidavit was based on a perusal of the books and records of the applicant, she had not stated to which books and records she was referring. He stated that her means of knowledge was therefore unclear. It was asserted that her affidavit was, at best, hearsay and was possibly speculation and therefore, was inadmissible in evidence.

34. The defendant referred to the settlement agreement dated 02 October 2018. He stated that upon the conclusion of that agreement, the plaintiff had no further involvement with the proceedings herein. The plaintiff had never made an application to substitute any other party, or to enforce the matter. The defendant stated that the settlement agreement clearly incorporated the within proceedings. The fact that he had discontinued his appeal as consideration for the agreement, was undeniable.

35. The defendant stated that as Ms Hartigan had had no involvement in the conclusion of the settlement agreement, her opinion that the settlement agreement did not constitute "an overall settlement" of all matters in dispute between the plaintiff and the defendant, was a bald averment, which had been made without any means of

knowledge. It was merely the opinion of Ms Hartigan as to the legal effect of the settlement agreement. It was asserted that as she was not a legal expert, her opinion as to the correct legal interpretation of the settlement agreement, was inadmissible as evidence. The defendant stated that as the deed of transfer was executed after the date of the judgment which the applicant was seeking to enforce, the deed of transfer did not effect the transfer of the judgment, as it had not been mentioned in the deed itself.

36. The defendant asserted that the deed of transfer, which had been exhibited in the grounding affidavit, had been redacted to such an extent that the redactions prevented the document from revealing what rights or title or interest were transferred by AIB, if any, to the applicant. He stated that the applicant had not established any or any sufficient interest in the facility to prevent there being a *bona fide* doubt as to what interest, if any, it had.

37. The defendant stated that as the judgment was not mentioned in the deed of transfer, there had been no transfer of it to the applicant.

38. The defendant repeated that he did not accept that the deed was not required to have stamp duty paid on it. He also repeated that there was no explanation or justification for the level of redactions that had been made by the applicant to the deed of transfer. He prayed that the court would refuse the applicant's application herein.

Conclusions.

39. The court is satisfied on the evidence before it in the affidavits sworn on behalf of the applicant and on the documents exhibited thereto, that the applicant has established on a *prima facie* basis, that the loan the subject matter of the judgment that was obtained by the plaintiff against the defendant, was validly transferred to it under the deed of transfer dated 04 June 2019. That being the case, it is appropriate for the

court to proceed to examine the various grounds on which the defendant argues that the applicant should not be given the reliefs sought in its notice of motion.

40. The first ground of challenge related to the applicant's entitlement to an order substituting it as plaintiff in the proceedings pursuant to O.17, r.4 of the RSC. That rule provides as follows:

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

41. It was submitted on behalf of the defendant that this rule only provided for the joinder of parties to an action that was continuing; it did not provide for the substitution of a new party for one of the parties originally in the proceedings. This submission was based on the provision in the rule which provided that where an order was made joining a new party to the proceedings, the proceedings should be carried on between the "continuing parties" and such new party, or parties.

42. The defendant also made the subsidiary argument that as a judgment had been obtained in the proceedings, the proceedings were therefore at an end, with the consequence that it was not possible to join or substitute a new party to the proceedings once they had concluded by the delivery of a judgment in the action. It was submitted

that as judgment had been obtained by the plaintiff on 30 June 2017, that brought the proceedings to an end, meaning that it was no longer possible for the applicant to be joined into the proceedings.

43. The court is satisfied that there is no substance in this ground of objection raised by the defendant. The provisions of O.17, r.4 are clear in their terms. It is provided that there can be substitution when there has been a transmission of interest from one party to the proceedings to another person or entity, who is not already a party to the proceedings. The court is satisfied that by virtue of the deed of transfer of 14 June 2019, there was a transmission of interest from the plaintiff in these proceedings to the applicant, such that it is appropriate for the applicant to be joined into the proceedings in substitution of the plaintiff pursuant to the terms of this rule.

44. Insofar as it was argued on behalf of the defendant that once judgment had been obtained, that that brought the proceedings to an end, meaning that there could no longer be a transmission of interest by the judgment creditor to any other party and that it was no longer possible for any person to whom that interest was transferred to be joined into the proceedings, the court is satisfied that the caselaw in this jurisdiction is against that submission.

45. In *Permanent TSB plc v Burns* [2020] IEHC 24, Simons J noted that the test laid down in the leading judgment of *IBRC v Comer* [2014] IEHC 671, provided that where an application was being made prior to entry of final judgment, by a party who wished to be substituted into the proceedings, the test on that application was whether there was *prima facie* evidence that there had been (i) a valid sale of the underlying assets; (ii) a valid assignment of the chose in action; and (iii) a valid notice of the assignment given to the debtor. It was not necessary for the court to adjudicate, at that juncture of

the proceedings, on the efficacy or validity of the assignment, or the efficacy or validity of the notice. Those were matters to be determined at the substantive hearing.

46. The judge went on to note at para. 19 that the standard of proof to be met on an application to substitute a party, which was made subsequent to the substantive hearing, would be higher. This was because there would at that stage, by definition, be no further hearing at which the validity of the assignment, or the efficacy of the notice given, could be ventilated in a further hearing. He stated that the efficacy or validity of the assignment would have to be considered on the joinder application.

47. A similar decision was given by Binchy J when delivering the judgment of the Court of Appeal in *Ulster Bank Ireland Limited v Quirke* [2022] IECA 283, where it was held that the existence of a judgment, was no bar to an application by an assignee of the debt to be joined into the proceedings subsequent to delivery of the judgment.

48. Accordingly, the court holds that the provisions of O.17, r.4 provide for the substitution of a party who has taken an assignment of the underlying loan, as that constitutes the necessary transmission of interest provided for under the rule. The court further holds that the fact that a judgment has already been obtained by the assignor, is no bar to the assignee seeking to be substituted into the proceedings further to the assignment of the debt having taken place.

49. The second ground of objection raised by the defendant was to the effect that the plaintiff had had no right to transfer his loan to the applicant, because the defendant had not consented to its transfer to the applicant. The court is satisfied that there is no substance in this ground of objection.

50. In *AIB Mortgage Bank v Thompson* [2018] 3 IR 172, Baker J (then sitting as a judge of the High Court), having considered the necessary conditions for a legal assignment of a chose in action pursuant to s.28(6) of the Supreme Court of Judicature

Act (Ireland) 1877, which were (a) that the assignment was of a debt or other legal chose in action; (b) the assignment was absolute and was not by way of charge only; (c) it was in writing under the hand of the assignor; and (d) express notice in writing thereof was given to the debtor; she went on to hold that the statutory provision enabling the legal assignment of a debt without the concurrence of the debtor, was a recognition of the reality that a right to sue on a debt was an asset capable of being assigned either for value or otherwise. The 1877 Act created a statutory means by which an assignment was actionable by an assignee at common law (see paras. 15 and 16). This case clearly establishes that for a legal assignment of a chose in action under the 1877 Act to be valid, prior consent of the debtor to the assignment is not necessary.

51. In the present case the fact that the consent of the defendant was not necessary, for the assignment to be effective, was copper fastened by clause 7.15 of the plaintiff's general terms and conditions governing business lending, which applied to the loan applicable to the defendant, which expressly provided that the plaintiff had reserved the right to assign, transfer or sub-participate all or part of any facility to any of the companies in the Allied Irish Banks Group, or to any financial institution, either within the State or otherwise, without the prior consent of the borrower.

52. The court holds that the fact that the defendant may not have given any prior consent to the assignment of his loan by the plaintiff to the applicant, is not relevant to the validity of that assignment, nor to the reliefs sought by the applicant on this application.

53. The defendant's third ground of objection was to the effect that as the judgment was not mentioned in the deed of transfer, it did not transfer the judgment from the plaintiff to the applicant. The defendant further submitted that as the loan had become

extinguished by virtue of the judgment that had been given in respect of the debt created by the loan, the applicant had effectively got nothing under the deed of transfer.

54. In support of the submission that where a judgment was obtained, there was a merger therein of the original debt, which became merged in the judgment, counsel referred to the decision of Bingham LJ in *Director General of Fair Trading v First National Bank plc* [2002] 1 All ER 97, where the learned judge had stated as follows:

> *"It is trite law in England that once a judgment is obtained under a loan agreement for a principal sum and judgment is entered, the contract merges in the judgment and the principal becomes owed under the judgment and not under the contract."*

55. It was submitted that this statement of the law had been accepted as being correct in this jurisdiction in the judgment given in *Harte v Promontoria Aran & Ors.* [2023] IEHC 593. On this basis, it was submitted that the loan had "merged" into the judgment. The effect of that was that the judgment created an "obligation of a higher nature" and the "lesser right is merged into the higher": see the decision of Richards LJ in the Court of Appeal in England and Wales in *Zavarco plc v Nasir* [2022] 2 All ER 388.

56. The common law in Ireland does not appear to support this submission. In *Ulster Bank Ireland Limited v Quirke*, Binchy J followed the decisions in *AIB v McKeown* [2021] IEHC 499 and *Permanent TSB v Beades* [2021] IECA 48, in holding that while the cause of action arising out of an unpaid loan may be extinguished by the subsequent judgment in respect of that debt, that did not prevent the loan from being assigned; in which eventuality, the assignment of the loan was sufficient to bring with it an assignment of the judgment. The learned judge stated as follows at paras. 77 and 78:

"*77. I agree with the submissions of Promontoria on this issue, and I am of the view that the decision of O'Moore J. in Allied Irish banks v McKeown is correct. A loan, for as long as it remains unpaid, continues to exist, even though the cause of action is extinguished by the judgment . However, the loan and the judgment are now, in effect, one, and so the assignment of one is effective to assign the other, or as O'Moore J. put it : "It is sufficient [to transfer the judgment]if the underlying entitlements are so transferred." This view is supported also by the decision of Whelan J. in this Court in Permanent TSB & Anor v Beades, although I recognise that that case did have the added dimension of being concerned with a court order for possession granted pursuant to a deed of mortgage, the assignment of which confers on the assignee the benefit of any order for possession qua mortgagee.*

78. As to the second part of the question posed, i.e. what is the difference between an assignment of a loan in respect of which judgment has been obtained (but in which there is no reference to the judgment) and an assignment of the judgment itself ? In my view there is no difference."

57. The court is satisfied that on the authority of these judgments, an assignment of a loan post judgment is effective to act as a transfer of the judgment itself, even though the transfer of the judgment may not be mentioned specifically in the deed of transfer. Accordingly, the court holds that in this case, the deed of transfer dated 14 June 2019, which transferred the loan in respect of which the judgment of 30 June 2017 had been given, was effective to transfer that judgment to the applicant.

58. The fourth ground of objection raised by the defendant also concerned the issue of merger. The defendant submitted that the judgment that had been obtained by the plaintiff had been incorporated into the settlement agreement dated 02 October 2018

and had been extinguished by that agreement. The defendant argued that the settlement of the Circuit Court proceedings for possession, constituted a settlement of all outstanding issues between him and the plaintiff.

59. On behalf of the defendant, Mr Kennedy BL submitted that it was well established that where proceedings were compromised, the original cause of action was extinguished and became subsumed in the settlement agreement, which constituted a new cause of action in contract: see *Taylor v Smith* [1991] 1 IR 142.

60. Counsel submitted that it was settled law that a compromise agreement in relation to legal proceedings, created a new cause of action. It put an end to the original cause of action, unless there was a clear and express reservation of the original rights or remedies. He submitted that in the settlement agreement in this case, there was no clause in the settlement agreement, preserving the rights or remedies that had been obtained by the plaintiff in the summary proceedings in the High Court.

61. Counsel further submitted that there was nothing to prevent the settlement agreement in relation to the Circuit Court proceedings encompassing other matters, such as the High Court summary proceedings, that had been brought by the plaintiff. He submitted that it was clear from the terms of the agreement that those proceedings had been encompassed within the terms of the settlement agreement. It had been agreed that the defendant would withdraw his appeal from the Court of Appeal; and that he would discharge the plaintiff's costs in the High Court and before the Court of Appeal. It was further stipulated that no further action would be taken in those proceedings. It was submitted that having regard to those terms, the settlement agreement of 02 October 2018, clearly incorporated the High Court summary proceedings and the appeal to the Court of Appeal and had brought them to an end.

62. It was submitted that in these circumstances, neither the plaintiff, nor the applicant, had any right to seek leave to execute upon the judgment that had been obtained by the plaintiff on 30 June 2017, as that had been extinguished by virtue of the subsequent settlement agreement.

63. In response, Mr Brady BL on behalf of the applicant, submitted that the settlement agreement had to be construed in its ordinary and natural meaning and within the context in which it was reached. He submitted that it was clear that that agreement was reached primarily to deal with settlement of the Circuit Court proceedings seeking possession of the defendant's property, which were due for hearing before the Circuit Court on the day that the agreement was finalised. He submitted that insofar as the agreement referred to the summary proceedings in the High Court, its only effect was to place an obligation on the defendant to withdraw his appeal before the Court of Appeal and to pay the costs of the proceedings in the High Court and in the Court of Appeal. He submitted that there was no basis on which it could be argued that the judgment was extinguished, because there was no reference to the judgment in the settlement agreement. Insofar as the within proceedings were mentioned in the settlement agreement, it was confined to an agreement that the defendant would bring the proceedings to an end by withdrawing his appeal and would pay the costs thereof.

64. The court holds that as a general statement of principle, it is correct to say that when proceedings are compromised in a settlement agreement, the original cause of action on which the proceedings were based, is extinguished, unless there is a specific provision in the settlement agreement for its continuance in existence, or for its re-emergence, in the event that the settlement terms are not performed by one or other of the parties to the agreement.

65. The court also accepts the submission made by Mr Kennedy BL, that a settlement agreement in one action, can be broad enough to encompass the settlement of other proceedings, or debts, if that is clearly stated in the agreement.

66. The critical question for determination is: what is the correct interpretation of the settlement agreement concluded on 02 October 2018? To ascertain that, the words used must be given their ordinary meaning and the terms must be construed in the context in which the agreement was concluded.

67. In *Danske Bank AS v Hegarty* [2012] IESC 30, Clarke J (as he then was) accepted the statement of principle set out in Delaney & McGrath "Civil Procedure in the Superior Courts", where the authors had stated that a settlement agreement was a contract and, as such, it was to be interpreted in accordance with the general rules governing the interpretation of contracts.

68. Clarke J held that a settlement agreement in relation to court proceedings, like any other legally binding agreement, was to be objectively construed in accordance with the wording chosen by the parties, seen in the general context of the circumstances in which the agreement was entered into. He stated that the subjective view of the parties as to what the settlement agreement may have meant, was of little relevance. He stated as follows at para. 7.7.

> "*7.7 It is well established in law that the subjective views of the parties to a written agreement are not properly taken into account in its interpretation. This principle applies equally to settlements. See Dattani v. Trio Supermarkets Ltd. [1998] IRLR 23 and Rees v. West Glamorgan County Council [1994] PIQR 37. When parties choose to reduce their settlement agreement to a written form then both sides are kept to that written form. It follows that Mr. Hegarty's view as to what the settlement means is no more relevant than the view of Danske. It is for*

the court to interpret the settlement objectively in accordance with its terms but in context."

69. Adopting these principles to the construction of the settlement agreement of 02 October 2018, the court is satisfied that that agreement was primarily concerned with settlement of the Circuit Court proceedings seeking possession of the defendant's property. The essence of the agreement was that the defendant would consent to an order for possession of the property. He further agreed that there be a stay on the order for possession for eighteen months, during which time, he would cooperate in the marketing of the property for sale.

70. Insofar as the settlement agreement made reference to the High Court summary proceedings, the court is satisfied that the settlement agreement did not extinguish any rights which the plaintiff had under the judgment which it had obtained in those proceedings. The court reaches that conclusion for a number of reasons. First, the terms of the agreement are clear. In relation to the summary proceedings, clause 3 of the agreement was of particular relevance. It provided that, as well as paying the costs of the possession proceedings in the Circuit Court, the defendant also agreed to pay the costs of the summary proceedings in both the High Court and the Court of Appeal, with the provision that such costs were to be taxed in default of agreement. Clause 5 of the agreement provided that the appeal then pending before the Court of Appeal in the summary proceedings, would be struck out forthwith and that no further action would be taken therein.

71. Secondly, if it had been the intention of the parties that by virtue of the settlement agreement concluded on 02 October 2018, the plaintiff would relinquish its rights under the judgment obtained by it on 30 June 2017, the court is satisfied that that

was such a fundamental provision, it would have been clearly stated in the settlement agreement. There is no specific reference to the judgment in the settlement agreement.

72. Thirdly, at the time of the conclusion of the settlement agreement on 02 October 2018, the defendant had an extant appeal against the judgment that had been obtained by the plaintiff against him in the High Court. The settlement agreement provided that the defendant would withdraw his appeal against that judgment. Thus, far from extinguishing the judgment, the settlement agreement made provision that the defendant would remove his extant challenge to that judgment. Once the appeal was withdrawn, there was no remaining legal challenge to that judgment. On this basis, the settlement agreement actually does the very opposite of what is contended for by the defendant in his submission.

73. Fourthly, as well as providing that the defendant would withdraw his appeal against the High Court judgment, the settlement agreement provided that he would pay the plaintiff's costs of the High Court action and of the appeal to the Court of Appeal. Those provisions do not extinguish any rights that had been obtained by the plaintiff in the High Court action. They copper fastened those rights by withdrawing any challenge to the judgment obtained by the plaintiff and by providing that the defendant would pay the plaintiff's costs of those proceedings. The court is satisfied that these terms are inconsistent with any submission that the plaintiff's judgment was extinguished by virtue of the settlement agreement dated 02 October 2018.

74. In these circumstances, I find as a fact that on a proper interpretation of the settlement agreement, the judgment that had been obtained by the plaintiff on 30 June 2017, was not incorporated into the settlement agreement and was not extinguished thereby.

75. Fifthly, the defendant submitted that the affidavit sworn by Ms Hartigan on 09 May 2023, was inadmissible, because it was based on hearsay evidence; she not having any first-hand knowledge of any of the matters deposed to therein. In particular, the defendant objected to the averments in her affidavit referring to the scope of the settlement agreement concluded on 02 October 2018.

76. The court accepts the submission that there is considerable comment in the affidavit sworn by Ms Hartigan, as to the nature and extent of the settlement agreement. Technically that evidence is inadmissible, because Ms Hartigan was not involved in the conclusion of the settlement agreement on 02 October 2018; nor is she an expert in legal matters, as she is a senior asset manager in BCM Global ASI Limited, which is a company that was engaged by the applicant to manage and service certain facilities and securities held by the applicant. In these circumstances, not being a lawyer, or an expert in legal matters, she is not entitled to give opinion evidence as to the extent of the agreement.

77. However, the main purpose of her affidavit was to exhibit the settlement agreement of 02 October 2018, which had been referred to by the defendant in his first replying affidavit, but had not been exhibited by him thereto. She was entitled to exhibit the settlement agreement on behalf of the applicant. Her comments in relation to the interpretation of the agreement and in relation to its scope, were really more properly matters for legal argument. They were put most ably in argument at the bar by counsel on behalf of the applicant.

78. Her affidavit also dealt with the issue of whether the defendant's consent to the assignment from the plaintiff to the applicant was required. In this regard, she quoted clause 7.15 of the plaintiff's general terms and conditions governing business lending and exhibited the facility letter in respect of the loan and the terms and conditions

attached thereto. She was perfectly entitled to put those documents in evidence on behalf of the applicant.

79. In the affidavit, Ms Hartigan also dealt with the redactions that had been made to the deed of transfer that had been exhibited in the grounding affidavit sworn by Mr McCudden. She was entitled to give the applicant's explanation for these redactions. She was also entitled to point out that the defendant, having been given notice of the assignment in June 2019, he had only sought to question the validity of that assignment for the first time in response to the within motion brought by the applicant.

80. The court is satisfied that in its essential elements, the matters dealt with in the affidavit sworn by Ms Hartigan, do not constitute hearsay evidence. Insofar as her affidavit contained comment on the documents that she had exhibited, the court has not had regard to these comments or statements of opinion in reaching its conclusions herein.

81. The final ground of objection raised on behalf of the defendant, was to the effect that the applicant should not be granted the reliefs sought in the notice of motion, because it was seeking to proceed on the basis of the deed of transfer, that had been excessively redacted, such that the defendant was not aware what exact loans and securities had been transferred from the plaintiff to the applicant under that deed.

82. In defence of the redactions that had been made to the deed of transfer, the affidavit sworn on behalf of the applicant stated that the redactions had been made on three grounds: (i) on the basis of commercial sensitivity; (ii) to preserve the confidentiality of other customers of the plaintiff, whose loans had been transferred to the applicant; and (iii) on the ground that the matters redacted were not relevant to the issue of the transfer of the defendant's loan from the plaintiff to the applicant.

83. In argument at the bar, counsel on behalf of the applicant submitted that the essential test for redactions, was whether the unredacted part of the deed of transfer that had been furnished in evidence, was sufficient to establish that a transmission had occurred of the defendant's loan and underlying securities from the plaintiff to the applicant. It was submitted that the deed of transfer that had been exhibited to the affidavit sworn by Mr McCudden, contained all the necessary information to establish that an assignment of the defendant's loan had taken place between the plaintiff and the applicant.

84. It was further submitted that the defendant had not set out any basis on which he believed that the redacted parts of the deed could be of any relevance to the issues that arose on this application. It was submitted that the application was merely a classic "fishing expedition", which had been recognised at law as being an insufficient basis on which to grant inspection of the redacted parts of the document. It was further submitted that the defendant had failed to establish that he was in any way prejudiced due to the redactions that had been made to the deed of transfer in this case.

85. In *Everyday Finance DAC v Woods* [2019] IEHC 605, McDonald J considered the law in relation to redaction of documents and the right of a defendant to obtain inspection of the unredacted parts of the document. He noted that in *Launceston Property Finance v Walls* [2018] IEHC 610, it had been held that it was well settled that in claims of this nature, involving loan portfolio sales, it was established and accepted that plaintiffs are entitled to redact documents for reasons of commercial sensitivity and privacy rights of third parties. In that decision, Noonan J had referred to the decision of Hedigan J in *IBRC v Halpin* (Unreported, High Court, 03 November 2015), where it had been held that it was not enough for a party to say that he wished to see the unredacted part of the document, since that would negative the right to redact.

The party seeking inspection of the redacted parts of the document, must present some concrete argument that can lead the court to order that the redaction be removed. Where a defendant can only say that he does not know what is contained in the redacted portion, but would like to see it, so as to consider whether it might be relevant or helpful, that was held to be insufficient to justify inspection of the redacted parts, as it was classically a "fishing expedition" to see what might be unearthed.

86. McDonald J stated that the judgment of Barniville J (as he then was) in *Promontoria (Arrow) v Burke* [2018] IEHC 773, was consistent with the decision that had been reached in the *Walls* case. In concluding his analysis, McDonald J stated that what was considered by the court to be necessary, are the relevant parts of the deeds which establish the assignment of the loans in issue. If a defendant wishes to see more of the deed, the burden is on the defendant to show why more is necessary. If the defendant is able to discharge that burden, then the burden shifts to the plaintiff to justify the extent of the redactions made. The court accepts this as a correct statement of the law in relation to the extent of redactions that may be permitted to a document that is put in evidence in support of an application.

87. In the present case, the defendant has not established that the portions of the deed of transfer that have been redacted, are relevant to the issue of the validity of the transfer of his loan by the plaintiff to the applicant. It is clear from the parts of the deed that have been exhibited, that the defendant's loan was part of a bundle of loans transferred by the plaintiff to the applicant. The fact of the assignment, is corroborated by the action of the plaintiff in sending the "goodbye" letter to the defendant and to his solicitor on 20 June 2019. The fact of assignment is further corroborated by the actions of the applicant in sending the "hello" letter to the defendant and his solicitor on 28 June 2019.

88. The court is satisfied that the applicant has put sufficient evidence before it to establish the said transfer of the defendant's loan from the plaintiff to the applicant. The court is not satisfied that the defendant has raised an arguable case that he should be entitled to see the portions of the document that have been redacted, because he has not demonstrated how these redacted portions could affect the meaning and effect of the remainder of the document that has been furnished to him. In these circumstances, the court is not satisfied that the defendant has met the burden of proof necessary, to cause the burden of proof to shift to the applicant to justify the extent of redactions made.

89. Furthermore, the defendant has not shown that he has been prejudiced in any way in his defence of the within application, due to the extent of the redactions made to the deed of transfer dated 14 June 2019, that has been exhibited to Mr McCudden's affidavit. Accordingly, the court holds that this ground of objection is without substance.

90. For completeness, the court should note that the objections taken by the defendant to the absence of evidence of payment of stamp duty on the deed of transfer, were formally withdrawn by counsel for the defendant at the hearing of the application. The objection based on mootness, was not pursued in oral argument at the hearing. The court is satisfied that having regard to its findings herein this argument is unfounded.

Decision.

91. As the court has found that the applicant has established that there has been a transmission of interest, such that it is appropriate for it to be substituted as plaintiff; and as it has established that it is appropriate that it be granted leave to execute the judgment obtained by the plaintiff against the defendant on 30 June 2017; and as the court has held that all of the defendant's objections are without substance; the court will

grant the reliefs sought by the applicant in paras. 1, 3 and 4 of its notice of motion dated 11 September 2020.

92. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

93. The matter will be listed for mention at 10.30 hours on 10 April 2024 for the purpose of making final orders.