THE COURT OF APPEAL

UNAPPROVED

NO REDACTION NEEDED

[2021] IECA 256

Record No. 2020/257

Whelan J.
Ní Raifeartaigh J.
Binchy J.

BETWEEN/

BELTANY PROPERTY FINANCE DAC

PLAINTIFF

- AND -

PEPPER FINANCE CORPORATION (IRELAND) DAC

RESPONDENT

- AND -

JERRY BEADES

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 14th day of October 2021

1. This is yet another chapter in a saga dating back as far as 23rd June 2008 when the High Court (Dunne J.) made orders directing the appellant to deliver up possession of the two premises known as 31 Richmond Avenue, Fairview, Dublin and 21 Little Mary Street,

Dublin respectively (the "Properties"). The appellant appealed the judgment of Dunne J. to the Supreme Court, which dismissed the appeal and affirmed the orders made by Dunne J., in a decision handed down on 12th November 2014. There have been numerous other orders and appeals from orders within these proceedings, and it is hard to disagree with the observation made by counsel for the respondent, at the hearing of this appeal, that the proceedings have become *Jarndycian* in character. In any case, this judgment is concerned with just one small development that took place more than twelve years after the orders for possession made by Dunne J., when, by Deed of Conveyance and Assignment dated 7th August 2020 (the "Deed"), the plaintiff ("Beltany") did grant, convey, assign, transfer and assure to Pepper Finance Corporation (Ireland) DAC ("Pepper") all of its right, title, estate, interest, benefit and obligations in the properties described therein (which include the Properties) and the mortgage (executed by the appellant) over the Properties. On the same day, pursuant to a separate Global Deed of Assignment, Beltany transferred, conveyed and assigned to Pepper, *inter alia*, the legal estate in the loan facilities (originally advanced by IIB Home Loans Limited to the appellant), including the loan facility, facility letter and mortgage relating to the Properties. Beltany had in turn acquired its interest in the Properties, the loan facility, facility letter and mortgage from KBC Bank Ireland plc which in turn had succeeded to IIB Home Loans Limited.

2. Arising out of the conveyance of the Properties by Beltany to Pepper, on 8th October 2020 Pepper issued a motion in the High Court seeking the following orders:

(a) An Order pursuant to O.17, r.4 of the Rules of the Superior Courts 1986 and/or pursuant to the inherent jurisdiction of the High Court naming Pepper as the sole plaintiff in these proceedings;

(b) An Order pursuant to O.42, r.24(a) of the Rules of the Superior Courts 1986 and/or pursuant to the inherent jurisdiction of the High Court granting Pepper

liberty to issue execution on foot on the order of the High Court (Dunne J.) dated 23rd June 2008; and,

(c) An Order pursuant to O.28, r.12 of the Rules of the Superior Courts 1986 and/or pursuant to the inherent jurisdiction of the High Court amending the said order of the High Court dated 23rd June 2008 so as to name Pepper as the plaintiff in the title to these proceedings, in place of the respondent.

3. Order 17, rule 4 of the Rules of the Superior Courts ("RSC") provides:

"4. 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."

4. Order 42, rule 24(a) RSC provides:

"(a) where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; … the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly."

5. Order 28, rule 12 RSC provides:

"12. The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all

necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

6. The motion came on for hearing before the High Court (Twomey J.) on 18th November 2020 and in an *ex tempore* decision handed down on that date, Twomey J. granted the orders sought. At the time that the application proceeded before Twomey J., there was a judgment pending before this Court on an almost identical application made directly to this Court in these same proceedings. While I address that in more detail below, I mention it now so as to explain that counsel for the appellant objected to this application proceeding in the court below on the grounds that the High Court was being asked to make "the same decision as is under consideration by the Court of Appeal". He informed the trial judge that objections had been made before the Court of Appeal in relation to the proofs regarding the manner of execution of the Deed, which had been executed on behalf of both parties pursuant to powers of attorney. Counsel informed the trial judge that the Powers of Attorney Act, 1996, requires the production of the original power of attorney to be produced as a proof in such circumstances, and that that was an issue under consideration by the Court of Appeal. He submitted that another issue that was raised was that the power of attorney relied upon was itself executed pursuant to another power of attorney, and that that was also a matter under consideration by the Court of Appeal. He said that the grounding affidavit produced in support of this application made no reference to these matters or to the fact that they were under consideration by the Court of Appeal. For these reasons, he submitted to the trial judge that he should not enter into a consideration of the application.

7. In reply to these submissions, counsel for Pepper said that the appellant had not put in any affidavit in response to this application, raising any of the objections advanced, even though he had been given the opportunity to do so. He submitted that the question of execution of documents was a matter of fact, which should have been addressed by affidavit,

thereby affording Pepper the opportunity to reply. Not having done so, he submitted, it was not now open to the appellant to raise the objections advanced on his behalf. He agreed with counsel for the appellant that the arguments mentioned had been raised previously before this Court in another application, and he arranged for the affidavits produced before this Court on that application to be made available to the trial judge.

8. The trial judge delivered a brief *ex tempore* decision in the matter. He accepted the submission of counsel for Pepper that the application was unopposed in circumstances where no replying affidavit had been filed by the appellant. He expressed the view that the question as to whether or not the Deed was properly executed, or whether the execution pursuant to a power of attorney was duly authorised, was a factual matter, and if the appellant wished to raise objections to these matters, he should have done so by way of affidavit.

9. The trial judge noted that this was a procedural application. He was satisfied that in circumstances where the application was being brought after the conclusion of the substantive proceedings, that the applicable test, as to whether or not there had been a transfer of an interest in the Properties such as to justify the granting of the application, was that the court must be satisfied on the balance of probabilities that such a transfer had occurred. The trial judge stated that the court had been provided with cogent evidence of such a transfer. He did not accept that he should not deal with the application on the basis that there was a judgment pending from this Court, in view of the fact that the question as to whether or not Pepper should be substituted for Beltany in the proceedings is a matter for the High Court at first instance, and the matters under appeal to this Court were separate substitution applications. Having reached all of the foregoing conclusions, he granted the application under O.17, r.4.

10. He then proceeded to deal with the second application, being the application under O.42, r.24, to grant Pepper liberty to issue execution on foot of the order of the High Court

of 23rd June 2008. He stated that since the court was satisfied that Pepper had succeeded to the interests of Beltany in the Properties, it followed that Pepper was entitled to the benefit of the orders made by Dunne J. on 23rd June 2008 and he granted that application also.

11. In his Notice of Appeal of 4th December 2020, the appellant raises ten grounds of appeal.

(1) The first of these is that the trial judge erred in proceeding to deal with the application before him in circumstances where there was a decision pending from this Court on an almost identical application (the only difference between the two applications being that on this application Pepper seeks to be named as sole plaintiff in the proceedings, whereas on the application before this Court, Pepper sought to be named as co-respondent for the purpose of two appeals, also in these proceedings, that were then before this Court). As a matter of fact, it is correct that such a decision on appeal was pending at the time, and on 17th February 2021, this Court (Whelan J.) handed down a decision on that application, to which I refer in more detail below.

(2) The High Court erred in fact and in law in holding that Pepper had met the threshold of proof required to establish on the balance of probabilities that it had taken a transfer from Beltany of its interest in the within proceedings. (I should say here that the notice of appeal erroneously refers to the respondent on the appeal as being Beltany, and to it taking a transfer from its predecessor in title, but it is clear it should be referring to Pepper as respondent - it having been the applicant in the High Court, and to its predecessor in title as being Beltany. This same error appears throughout the notice of appeal and where necessary I will adjust the following grounds of appeal to reflect the true position).

(3) The trial judge erred in fact and in law in holding that cogent evidence of the alleged transfer of interest between Beltany and Pepper had been adduced.

(4) The trial judge erred in fact and in law in holding that the application was not opposed on account of the fact that the appellant had not sworn an affidavit in opposition to the application.

(5) The trial judge erred in failing to explain why the evidence of the transfer as between Beltany and Pepper was cogent in light of submissions that the Deed of Conveyance did not meet the requirements for a valid deed as set out in s. 64 of the Land and Conveyancing Act 2009 and that the power of attorney relied upon in relation to its execution was challenged on the basis that neither the original nor a certified copy had been produced in evidence.

(6) The trial judge erred in holding that the question of whether the evidence adduced met the threshold on the balance of probabilities was a question of fact rather than a question of law.

(7) The trial judge erred in holding that the appellant should have sworn an affidavit as to the adequacy of the proofs put forward by the respondent.

(8) The trial judge erred in holding that the application was procedural in nature only, since it was an application made post-trial.

(9) The trial judge erred in holding that the Court of Appeal's deliberations did not affect the application before him.

(10) The trial judge erred in fact and in law in being influenced by the fact that the application before him could have been brought *ex parte.*

Submissions

Submissions of Appellant

12. The appellant commenced his submissions with a further attempt to impugn the order of Dunne J. of 23rd June 2008. He asserts that the mortgage exhibited to the affidavit grounding the application for judgment against him was not executed by the borrower, i.e. the appellant himself. It hardly needs to be said that it is not open to the appellant to impugn the order of Dunne J. more than thirteen years after it was granted, and more than seven years after his appeal from that order of Dunne J. was dismissed by the Supreme Court.

13. The appellant submits that the trial judge erred in holding that the application was not opposed on the basis that the appellant had not filed an affidavit in response to the application. He referred to the decision of the Supreme Court in *Bank of Ireland v. O'Malley* [2019] IESC 84 in which Clarke C.J. stated:

> "However, it also seems clear that the obligation on a defendant to establish an arguable defence is, in reality, one which only arises if the plaintiff has first placed sufficient evidence before the court to establish *prima facie* the debt alleged is due."

In other words, he submitted that it was a matter for Beltany to adduce sufficient evidence to satisfy the court that its application should be granted, and he was entitled to put Beltany on full proof in this regard, without the need to file any affidavit in opposition to the application.

14. The appellant submitted that the trial judge applied the incorrect standard of proof applicable to such applications. He submitted that the trial judge was required to be satisfied that Pepper had established a *prima facie* case that it had taken a transfer of Beltany's legal estate in the Properties, and that Pepper had not produced evidence sufficient to establish such a case (para. 5 of his submissions). However, this submission is misconceived. It is clear that, whatever about the evidence produced before the court below, the trial judge

applied the higher standard of proof on such applications, i.e. the "balance of probability" test which is the test applicable in circumstances where the party seeking to be substituted for the plaintiff is making the application in circumstances where judgment has already been granted, as is the case here. Having applied the correct test, the trial judge was satisfied that that the proofs advanced by Pepper satisfied that higher test. Obviously, however, the appellant's submission regarding what he submits was a deficiency in the evidence relied upon by the trial judge must apply with even greater force to the higher test.

15. The appellant submitted that the documents relied upon by Beltany did not comply with the requirements for execution of such documents as set forth in s. 64 of the Land and Conveyancing Law Reform Act 2009. In particular, the appellant submitted that the documents were not executed under the seal of Beltany or Pepper, but were instead executed pursuant to powers of attorney. He claimed that the powers of attorney were themselves executed pursuant to another power of attorney which was not produced to the court. He submitted that, if the formalities relating to the execution of the Deed were not complied with, all that passed under the Deed from the transferor (Beltany) to the transferee (Pepper) was, at most, an equitable interest in the Properties. He further argued that even an equitable interest may not have passed, owing to an absence of consideration.

16. At para. 11 of his submissions, the appellant stated:

> "As these matters were before the Court of Appeal it is submitted that the learned judge erred in making orders on an issue which was in the process of being decided by the Court of Appeal and in which identical issues involving the same parties were being considered. It is submitted that the current Respondent could have made its substitution application to the High Court rather than the Court of Appeal but chose not to do so. Having failed to have its application granted immediately by the Court

of Appeal it then resorted to the High Court, to make an application it could have made months previously."

Arising out of this submission, the appellant claims that this give rises to a risk of a conflict of decisions between the High Court on the one hand, and the Court of Appeal on the other, where both courts were invited to consider the same issues simultaneously.

Submissions of Respondent (Pepper)

17. At the outset, Pepper submits that in her judgment of 17th February 2021, Whelan J. addressed the precise transmission of interest from Beltany to Pepper which forms the subject matter of this appeal. Pepper submits that this Court only needs to consider the decision of Whelan J. in order to dismiss this appeal in its entirety. Since this submission, if accepted, will have the effect of disposing of this appeal, it is appropriate at this juncture to consider the judgment of Whelan J. of 17th February 2021.

Judgment of Court of Appeal of 17th February 2021

18. As mentioned above, this Court (Whelan J.) gave judgment in these same proceedings on an almost identical application on 17th February 2021. This was one of three judgments delivered by Whelan J. in these proceedings on that date. The other two judgments were concerned with appeals brought by the appellant from orders previously made by Costello and Reynolds JJ. in the High Court, whereby they had made orders similar to those now sought by Pepper (pursuant to Orders 17 and 42 RSC) in relation to the earlier transactions whereby the Properties and facilities had been acquired, firstly by KBC Bank Ireland plc, and secondly by Beltany. Whelan J. dismissed the appeals brought by the appellant in relation to the orders of Costello and Reynolds JJ. Before doing so however, she addressed an application made directly to the Court by Pepper by way of notice of motion seeking "an order pursuant to O. 17, r. 4 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction naming Pepper as a co-respondent to both appeals", i.e. the appeals the

subject of the other two judgments which I have mentioned above. The need for that application arose out of the execution of the Deed by Beltany and Pepper, as did the application the subject of this appeal.

19. In her judgment dealing with the application before her, Whelan J. explains that following the coming into operation on 21st January 2019 of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (the "Act of 2018"), it became a requirement for firms or entities providing credit servicing facilities to financial institutions that held security for loans pursuant to a deed of mortgage to hold the legal estate under the mortgage. The purpose of this legislation was to ensure that borrowers whose loans are sold retain the benefit of regulatory protections that they had enjoyed prior to the sale of their loans, including the protections provided by the Code of Conduct of the Central Bank. Pepper had been providing credit servicing facilities to Beltany in connection with its loan portfolio, and it became necessary for Pepper to take a conveyance of the legal estate of the properties securing any loans within the portfolio that it managed on behalf of Beltany, pursuant to the Act of 2018. These included the loans relating to the Properties.

20. In any case, the application the subject of the decision of Whelan J. required precisely the same consideration of the Deed and related documents as now arises in relation to the same documents on the application that came before Twomey J. on 18th November 2020, and in the context of the same Rule of the Superior Courts, i.e. O. 17, r. 4 RSC. It is clear that the reason that Pepper made the application that it did to this Court was that it was necessary for it to do so in order to be heard in the appeals to this Court from the decisions of Costello and Reynolds JJ. Quite properly, Pepper did not make any more broad an application than was necessary to this Court, having regard to this Court being an appellate court. It was therefore necessary for Pepper to make the application that it did to the High

Court, as a court of first instance, for all other purposes, including the enforcement of the judgment of Dunne J.

21. It is further clear that while the purposes of the application to this Court, dealt with by Whelan J. on the one hand, and the application made to the High Court (now under appeal), on the other, were different, so far as O. 17, r.4 RSC is concerned, the applications are in all other respects identical. They required consideration of the same documents, the same legislative provisions and the same jurisprudence. They involved the same parties, and were brought within the same proceedings. The parties were fully represented, and there was a full hearing at which substantially the same submissions were made on behalf of the parties (as reflected in the decision of Whelan J.) as were made at the hearing of this appeal. Having heard and considered all of those arguments, Whelan J. concluded at paras. 59 and 60 as follows:

> "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 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.
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> 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 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."

Decision

22. As I mentioned above, counsel for the appellant submitted to the trial judge that he should not deal with the application before him because judgment was awaited from this Court on an identical application, brought in these proceedings, that raised precisely the same issues as this application. In his written submissions to this Court, while the appellant refers to the application made to this Court (which gave rise to the decision of Whelan J.), he makes no reference at all to the decision of Whelan J., or its implications for this appeal, even though that decision was handed down almost four months before he delivered his written submissions in connection with this appeal. However, it is clearly implicit from his ground of appeal no. 9 (set out at para. 11 above) and his submissions on this appeal (see para. 16 above) that the appellant himself is of the view that the decision of Whelan J. would be determinative of this appeal also. Moreover the appellant, representing himself at the hearing of this appeal, appeared to accept that that decision of Whelan J. was determinative of this appeal also, although he suggested that he might yet attempt to appeal that decision to the Supreme Court.

23. In my opinion there is not the slightest doubt but that the decision of Whelan J. is indeed determinative of this appeal so far as concerns that part of the decision of the trial judge as relates to the application advanced under O.17, r.4. The passages from the judgment of Whelan J. cited above make it abundantly clear that she was satisfied that, on the balance of probabilities, there had been a transfer or transmission of interest in the Properties (and the mortgage over the Properties) such as to entitle Pepper to an order under O.17, r.4 RSC. The only distinction between the application addressed by Whelan J. in her judgment and the application before the trial judge is that the latter was an application to appoint Pepper

as sole plaintiff in the proceedings, whereas the former was an application to have Pepper joined as a co-respondent for the limited purpose of the two appeals then before this Court. That distinction however, has no bearing upon the question of transmission of interest in the Properties, which fell to be determined on each application having regard to the same principles. That being so, and since the objections raised by the appellant to each application were, on their own case, the same, it follows that the appeal from the order made by the High Court pursuant to O.17, r.4 must be dismissed.

24. The trial judge also granted the orders sought pursuant to O. 42, r.24(a) and O. 28, r.12 RSC. While these orders were also appealed, no separate grounds of appeal relating to these orders were advanced, and nor were any submissions specifically addressing these orders advanced by the appellant. It seems fair to conclude that in practical terms, the appellant was relying upon succeeding with his appeal against the order made under O. 17, r.4 for the purpose of having the other orders set aside. That being the case, it follows that his appeal against those orders must also be dismissed.

25. Whelan and Ní Raifeartaigh JJ. have expressed their agreement with this judgment. As this judgment is being delivered electronically, my provisional view is that the costs of the appeal should follow the event and that the appellant should pay the costs of Pepper, to be adjudicated in default of agreement. If any party wishes to contend that a different order as to costs should be made, written submissions no longer than 2,000 words should be filed in the Office of the Court of Appeal within 14 days following electronic delivery of this judgment with the other party being entitled to respond by written submission no longer than 2,000 words within a further period of 14 days.