APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/49

Noonan J.
Haughton J.
Allen J.

Neutral Citation Number [2023] IECA 161

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF/APPELLANT

AND

OLIVER MOLONEY

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 23rd day of June, 2023

Introduction

1. This is an appeal by a mortgagee against an order of the High Court (Egan J.) made on 18th January, 2022 by which the plaintiff/appellant's application pursuant to O. 42, r. 24 of the Rules of the Superior Courts for liberty to issue execution on foot of an order for possession made on 11th October, 2010 was refused.

2. The net issue on the appeal is whether the High Court judge erred in her conclusion that the appellant – who had obtained the order for possession and who had been at that time and remained the registered owner of the charge on the relevant Folio – had not established that it was entitled to issue execution on foot of the order.

Background

3. The appellant was formerly known as G. E. Capital Woodchester Home Loans Limited. On 11th October, 2012 it changed its name to Pepper Finance Corporation (Ireland) Limited and on 29th October, 2015 it was re-registered as a designated activity company, Pepper Finance Corporation (Ireland) DAC.

4. On 19th December, 2006 the respondent executed a charge over his dwellinghouse in Tuam, County Galway, to secure the repayment of a loan of €125,000 together with interest over twenty-five years and the charge was duly registered on 11th February, 2008 as a burden on Folio 31892F, County Galway. The loan very soon went into arrears and by special summons issued on 3rd November, 2008 the appellant applied to the High Court for an order for possession.

5. On 11th October, 2010 the High Court (McGovern J.) made the order sought. There was no attendance by or on behalf of the respondent.

6. On 14th September, 2011 the appellant took out an execution order on foot of the order for possession but it was not executed.

7. On 11th October, 2012 the appellant changed its name to Pepper Finance Corporation (Ireland) Limited.

8. By notice of motion issued on 4th December, 2012 the appellant applied to the High Court for an order pursuant to O. 42, r. 21 for the renewal of the order of possession – that is

the execution order – and such an order was made by the High Court (Dunne J.) on 4th February, 2013. Again the order shows that there was no attendance by or on behalf of the respondent. That motion did not address the change in the appellant's name and did not take account of the fact that the renewal application had not been made within the one year in which the execution order was in force – the significance of which is apparent from the later judgment of Dunne J. given on 3rd December, 2013 in *Carlisle Mortgages Ltd. v. Canty* [2013] IEHC 552, [2013] 3 I.R. 406.

9. By notice of motion issued on 22nd February, 2013, the appellant applied to the High Court for an order pursuant to O. 42, r. 24 for leave to issue execution on foot of the order for possession. That motion was thought to have been necessitated by the change in the plaintiff's name, but the motion did not seek the amendment of the title to the proceedings. The order sought was made by the High Court (Dunne J.) on 15th April, 2013, again in the absence of any attendance by or on behalf of the respondent.

10. By notice of motion dated 28th January, 2014 and returnable for 10th February, 2014, the appellant applied to the High Court for an order pursuant to O. 42, r. 20 for the further renewal of the order of possession – that is the execution order. By then, Dunne J. had given her judgment in *Carlisle Mortgages*. By the time the appellant's motion for renewal came before the High Court the execution order had expired and the application was refused by McGovern J. on 10th February, 2014.

11. The difference between a renewed execution order and a new execution order is that a renewal preserves the priority of the original execution order. In a case, for example, in which there are competing judgment creditors seeking to enforce money judgments by orders of *fieri facias* this might be significant but in the case of an order for possession there is no practical issue of priority. On 2nd April, 2014 a new execution order was taken out in the

office but in circumstances to which I will come, that order of possession was not executed either.

12. The next step in the proceedings was that by notice of motion issued on 3rd November, 2017 and originally returnable for 20th November, 2017 the appellant applied for an order for the amendment of the title of the proceedings to reflect the change in its name – which had occurred on 11th October, 2012 – and the change in its status – which had occurred on 29th October, 2015 – to Pepper Finance Corporation (Ireland) DAC, and an order pursuant to O. 42, r. 24 giving liberty to the appellant to issue execution on foot of the order for possession which had been made on 11th October, 2010. The notice of motion also sought an order pursuant to O. 42, r. 20 for the renewal of the execution order which had issued out of the office on 2nd April, 2014; which, in light of the decision in *Carlisle Mortgages*, plainly could not be done.

13. The three and a half years which had elapsed between 2nd April, 2014 and 3rd November, 2017 was explained by the affidavit of Ms. Caroline Loftus, senior operations manager, filed in support of the motion.

14. Ms. Loftus deposed that there had been significant engagement between the appellant and the respondent between February, 2014 and May, 2015 in the course of which the respondent completed two income and expenditure forms and spoke with and attended a number of meetings with his relationship manager and authorised the community welfare officer in Tuam Health Centre to discuss his mortgage account with the relationship manager. The respondent made a number of proposals and a small number of small payments and at one stage asked whether he might stay in the house until his youngest child finished her Leaving Certificate.

15. On 24th May, 2015 the respondent wrote to the appellant to authorise it to discuss *"repayment restructure plans with my son Neil Maloney, regarding the above mortgage*

account." By letter dated 17th July, 2015 Mr. Maloney proposed that he would buy the house from the appellant and said that he had been in contact with a mortgage broker. Thereafter there was fairly regular engagement between the appellant and Mr. Maloney in the course of which Mr. Maloney advised the appellant of the progress of his plan to borrow money to buy the house, and in the course of which he made a number of payments on account.

16. In her affidavit grounding the motion Ms. Loftus listed and briefly described the various conversations and meetings with Mr. Maloney and the lack of any real progress, which culminated in a decision by the appellant on 17th July, 2017 to seek leave to execute the order for possession. That application was necessary as upwards of six years had elapsed since the making of the order for possession and, as I have said, was made by notice of motion issued on 3rd November, 2017 which was originally returnable for 20th November, 2017.

17. On 20th November, 2017 Mr. Maloney attended court and the motion was put back to allow him time to save money and to have work carried out to the house which he hoped would allow the debt to be refinanced. When the motion was next listed on 12th February, 2018, Eager J. made an order in the terms of para. 1 of the notice of motion amending the name of the plaintiff.

18. The appellant's motion came back before the High Court, Coffey J., on 9th April, 2018, when, as Mr. Maloney later deposed, he *"shared"* all that he had been doing since May, 2015 and his *"findings on the legal and beneficial owner of the debt."* In essence, Mr. Maloney's researches had brought him to believe that there had been a transfer of his father's loan and that the appellant was no longer the person entitled to issue execution on foot of the order for possession. No formal order was then made by the High Court but the uncontested evidence of Mr. Maloney was that Coffey J. gave him – that it to say Mr. Maloney – liberty

to file affidavits setting out what he thought was a defence which his father had to the motion and instructed the appellant's side to respond to them. This, as Mr. Maloney later said, set off a chain of events which would see him attend before the High Court on 28 further occasions over the next four years.

19. On one of the three adjournments between 9th April, 2018 and 23rd July, 2018 – it is unclear which because no formal order was made – McDermott J. disallowed an objection by the plaintiff to Mr. Maloney appearing and gave him liberty to file further affidavits. Over the following fifteen months there were eight adjournments.

The issues raised in answer to the motion for leave to issue execution

20. In the first of three affidavits sworn and filed on behalf of the respondent on 25th April, 2018 Mr. Maloney more or less confirmed the evidence of Ms. Loftus as to the engagement between the appellant and initially the respondent and later Mr. Maloney, between the making of the order for possession and the issue of the motion then before the High Court for liberty to issue execution.

21. The substance of Mr. Maloney's evidence was that he believed, based on what he believed was sound evidence, that the appellant was not the party entitled to issue execution on foot of the order for possession.

22. Mr. Maloney exhibited what he described as a compilation of extracts from the statutory financial statements of G.E. Capital Home Loans Limited, a statutory declaration of two of the directors of G.E. Capital Home Loans Limited, a newspaper clipping, and an anonymised Determination of the Tax Appeals Commission which taken together showed – he said – that on 28th September, 2012 G.E. Capital Woodchester Home Loans Limited had sold its entire mortgage portfolio and associated rights *"in a true sale"* to a company called

Windmill Funding Limited *("Windmill")*. Mr. Maloney suggested, firstly, that the effect of the *"true sale"* by G.E. Group to Windmill meant that the appellant had no *locus standi* and secondly, that the order for possession – which he suggested had been made *"in favour of the GE Group and not the plaintiff"* – was void.

23. Incidentally, Mr. Maloney did not disclose the provenance of the copy documents by reference to which he had come to his belief or how he came to know or believe that the anonymised Determination of the Tax Appeals Commission related to the appellant.

24. In response to the affidavit of Mr. Maloney a further affidavit of Ms. Loftus was filed on 25th May, 2018. Insofar as is material for present purposes, Ms. Loftus deposed that on 28th September, 2012 a Netherlands corporation called Pepper Netherlands Holding Coöperatie U.A. purchased the entire share capital of G.E. Capital Woodchester Home Loans Limited, and that on the same day the loan facilities, including the respondent's loan, were securitised by means of a sale of the beneficial interest in the facilities and security by G.E. Capital Woodchester Home Loans Limited to Windmill Funding Limited, with G.E. Capital Woodchester Home Loans Limited retaining the legal title to the loans and facilities as well as the exclusive right to exercise the powers thereunder. Ms. Loftus deposed that the loan documentation had expressly confirmed the appellant's entitlement to securitise the mortgage and exhibited the relevant documentation. She also pointed out that the appellant remained the registered owner of the charge on the Folio. All of this, she said, was reflected in the Determination of the Tax Appeals Commission but that Determination, she suggested, had no bearing on the fact that the appellant remained *"the lender of record for the defendant's mortgage."*

25. A second affidavit of Mr. Maloney sworn on 10th July, 2018 was largely argumentative but – citing a number of passages from the Determination – Mr. Maloney suggested that the portfolio management agreement between the appellant and Windmill

required that the appellant could only act on the directions of Windmill and that in the absence of confirmation that the appellant was acting on the instructions of Windmill, it was *"acting in direct contradiction to its legally binding agreement with Windmill."* The proposition was that absent express confirmation that the respondent was acting in compliance with the portfolio management agreement, it was to be assumed or inferred that it was not. Mr. Maloney also suggested that the agreement between G.E. Capital Woodchester Home Loans Limited and Windmill was a transfer of ownership of the charge.

26. A third affidavit of Ms. Loftus sworn on 13th September, 2019 was largely argumentative but she did exhibit an updated certified copy Folio and rejected the assertion that the Windmill agreement was a transfer of the charge within the meaning of s. 64 of the Registration of Title Act. Ms. Loftus also exhibited a Property Registration Authority Legal Office Notice No. 1 of 2014 which stipulated that discharges and vacates of charges in favour of G.E. Capital Woodchester Home Loans Limited would thenceforth be executed under the name of Pepper Finance Corporation (Ireland) Limited and that on application by Pepper Finance Corporation (Ireland) Limited in any particular case, it might be registered in substitution for G.E. Capital Woodchester Home Loans Limited as owner of individual charges, on payment of a fee of €40. Ms. Loftus did not explain why that procedure had not been availed of.

27. A third affidavit of Mr. Maloney filed on 29th October, 2019 repeated what he had previously said and, by reference to other passages in the Determination, made other new arguments, again directed to the proposition that by reason of the Windmill agreement the appellant was not the party entitled to execution on foot of the order for possession. Mr. Maloney pointed to para. 37 of the Determination, in which the Tax Appeals Commission set out sixteen matters which had been accepted by the appellant's witness in cross-examination by counsel for the Revenue, of which Mr. Maloney highlighted four, which were that:-

- Post execution of the various agreements of 2012, the appellant was subject to close control by Windmill, was required to account regularly to Windmill, and was required to manage the loan book in accordance with the constraints imposed by the portfolio management agreement.
- Windmill was entitled to terminate the agreement prior to its five-year expiry if the appellant breached the agreement; and if the agreement was terminated, the appellant would lose its legal title to the loans.
- The witness accepted that one clause of the portfolio management agreement set out 41 covenants/obligations with which the appellant was obliged to comply. Senior counsel for Revenue put it to the witness that this clause imposed on the appellant a series of contractual obligations which significantly constrained and defined what the appellant was legally required and entitled to do vis-à-vis the assets.
- The witness accepted that the agreement contained a lengthy list of circumstances in which the agreement could be terminated and that if the agreement were terminated this would end the appellant's relationship with the mortgage loans and it would also mark the end of its relationship with Windmill and the end of its legal title to the loan book.

28. Mr. Maloney suggested that *"this compendium of statements to the Tax Appeals Commission are admissions of the real truth and are fatal to the [appellant's] application."* He suggested that the five-year period of the portfolio management agreement had expired and that *"no presumption could be made this agreement remains in place, nor can it be ascertained if any of the lengthy list of circumstances in which the agreement would have been prematurely terminated have ever arisen, thus long since terminating 'Peppers' contract with 'Windmill'".*

29. The appellant's motion was listed for hearing on 22nd January, 2020. Reynolds J. then identified a potential problem with the order of McGovern J. of 10th February, 2014. As I have said, the motion which had been before the court on 10th February, 2014 was an application pursuant to O. 42, r. 20 for the renewal of the execution order of possession but the order drawn suggested that the application – which had been refused – was a motion pursuant to O. 42, r. 24, for the renewal of the order for possession. The motion before the court on 22nd January, 2020 was a motion pursuant to O. 42, r. 24 and a potential issue was identified as to whether the appellant's motion was *res judicata*.

30. On 3rd February, 2020 the appellant issued a motion pursuant to O. 28, r. 11(b)(i) – the slip rule – to correct the written order of 10th February, 2014 to show that what had been refused was an application pursuant to O. 42, rule 20. That motion was heard by Simons J. on 24th February, 2020 and, for the reasons given in a written judgment delivered on 2nd March, 2020 ([2020] IEHC 105) was granted.

31. Then came COVID-19. The High Court quickly made arrangements to deal with as much of its business as possible by remote hearings but for a long time could not accommodate cases in which one or more parties were unrepresented.

The High Court judgment

32. The appellant's motion for leave to issue execution was eventually re-listed for hearing before the High Court (Egan J.) on 12th October, 2021. By order made on 18th January, 2022, for the reasons given in a written judgment delivered on 3rd December, 2021 ([2021] IEHC 761) the appellant's motion was refused.

33. In a nutshell, the judge found that there was insufficient evidence that the appellant was entitled to issue execution but went on to say that if there had been, she would, in the exercise of her discretion, have made the order sought under O. 42, rule 24.

34. The judge quickly disposed of the respondent's argument that his contract had been with Woodchester and not Pepper by pointing to the change of name and status, so that Woodchester and Pepper were one and the same. She noted later that the order sought for the change of the appellant's name in the title of the proceedings had been made by Eager J. on 12th February, 2018. On the evidence, there was never any basis for the assertion that the order for possession had not been made in favour of the appellant and there is no appeal against the judge's finding and conclusion on this.

35. As to the application pursuant to O. 42, r. 20, the judge – by reference to *Carlisle Mortgages* – carefully and clearly explained the difference between an order <u>for</u> possession (made by a judge) and an order <u>of</u> possession (issued by the Central Office) and rejected an argument that it was open to the court, on an application made seven years after it was issued, to renew the order of possession issued on 2nd April, 2014. In the light of the judgment in *Carlisle Mortgages,* the application in 2017 to renew the execution order which had expired in 2015 was clearly misconceived and unsurprisingly, there is no appeal against the judge's analysis and conclusion on this question.

36. At the start of her judgment, the High Court judge identified the primary issue between the parties as being whether – as contended by the respondent – the effect of the sale of the appellant's entire portfolio to Windmill was that the appellant did not have the right to enforce the charge, or whether – as contended for by the appellant, the loan book was merely securitised and the legal interest remained vested in the appellant. As I will come to – and, in fairness, as is evident later in the judgment of the High Court – that was not precisely correct. To be sure there was a good deal of toing and froing in the affidavits about the effect of the

Windmill transaction, but the appellant's core legal argument was that the respondent was not entitled to go behind the register.

37. Having identified the applicable provisions of the Rules of the Superior Courts in O. 42, r. 24 and the leading authority as the judgment of the Supreme Court in *Smyth v. Tunney* [2004] 1 I.R. 512, the judge correctly found that to obtain leave to issue execution under O. 42, r. 24, in a case in which six years had elapsed since the judgment or order, the appellant would first have to satisfy the court that it was the party entitled to issue execution, and if it did that, that the power to grant leave to issue execution is discretionary.

38. Having examined the affidavits of Ms. Loftus, on the appellant's side, and Mr. Maloney's, on the respondent's side, and the arguments as to the effect of the transaction documents, the judge concluded at para. 56 that *"... the [respondent's] point that the [appellant] does not presently own the legal interest in the charge has been fairly made"* and at para. 57 that *"There is clearly an issue between the parties as to whether the [appellant] retains the legal interest in the mortgage…".* She found that it had been clear from the time Mr. Maloney swore his first affidavit that the true nature of the sale of the loan book to Windmill and of the nature of the interest retained by the appellant were in issue and that the appellant had had a considerable time in which to place before the court the necessary proofs and had not done so. The judge was not satisfied that the appellant had shown that it was the party entitled to issue execution on foot of the order for possession and for that reason refused the appellant's application.

The appeal

39. By notice of appeal dated 28th February, 2022 the plaintiff appealed.

40. I pause here to say that, in the event, the appeal was unopposed. In the High Court, by leave of the judge, the respondent was represented by Mr. Maloney. Mr. Maloney applied to this court for leave to represent the respondent on the appeal but for the reasons given in my judgment delivered on 14th December, 2022 (with which Noonan and Haughton JJ. agreed) ([2022] IECA 287) that application was refused. While one of the grounds of appeal was that the High Court judge had erred in allowing Mr. Maloney to be heard, that was not pursued as a ground on which the High Court order should be set aside.

41. The substance of the appeal – put variously, this way and that, in ten of the grounds of appeal – was that the High Court judge erred in looking behind the Folio. In particular, it was submitted that although the judge correctly referenced s. 31 of the Registration of Title Act, 1964, she erred in finding that the Folio was only conclusive up to the date of printing of the certified copy.

42. The decision of this court *Tanager v. Kane* [2018] IECA 352, [2019] 1 I.R. 385 makes clear that in hearing an application for possession of registered land, the High Court may not entertain a challenge to the correctness or conclusiveness of the register. I accept the submission on behalf of the appellant that the same principle must apply to an application for leave to issue execution on foot of an order for possession made in favour of a registered owner of a charge.

43. In this case, as I have said, there was no doubt but that the appellant was the registered owner of the charge on the respondent's Folio. On the evidence, it would have been a simple matter for the appellant to have had its name on the register updated but I accept the submission on its behalf that the fact that it failed to do so did not give rise to any doubt or issue as to the identity of the charge holder.

44. I am unconvinced by the argument made on behalf of the appellant that the effect of the order made by Dunne J. on 15th April, 2013 was that the appellant's entitlement to issue

execution was *res judicata*. That was an order made on an unopposed motion pursuant to O. 42, r. 24 for leave to issue execution in circumstances in which six years had not elapsed since the making of the order for possession and in which there had been no change in the party entitled to execution. Moreover, while it is now said or surmised that that application was necessitated by the change in the appellant's name in the meantime, the motion did not address the change of name.

45. Neither am I immediately convinced that the effect of the order made by Eager J. on 12th February, 2018 for the change on the name of the appellant in the title to the proceedings was that the question of its entitlement to issue execution was *res judicata*. If that were so, the only issue remaining would have been whether the appellant had shown a reason why the order had not been executed so as to engage the discretion of the court to make the order sought and to justify the exercise of that discretion in favour of making the order sought. That is not the basis on which the motion was argued in the High Court. Rather, the judge was invited to assess the evidence as to the identity of the appellant and of its entitlement to issue execution, and did so.

46. While the central focus of the appeal was very much on the conclusiveness of the Folio, it was also contended that the judge erred in the emphasis which she placed on the Determination of the Tax Appeals Commission, which, it was said, was not binding and *"of little relevance."* It seems to me that the proposition that the Determination had any relevance is inconsistent with the core submission that it had none but I will nevertheless deal with the judge's analysis of the Determination.

47. In the course of her summary of the factual background and prior applications in the proceedings, the judge noted that on the motion issued on 22nd February, 2013 for leave to issue execution and the later motion issued on 28th January, 2014 to renew the first order of possession no reference had been made in the grounding affidavit to the sale of the loan book

to Windmill. The judge noted the averment of Mr. Maloney that the sale of the loan book was a *"true sale"* and that of Ms. Loftus that *"pursuant to the securitisation transaction"* the appellant had alienated only the beneficial interest in the charge and remained possessed of the legal interest in the charge. The judge noted that Ms. Loftus had not identified her means of knowledge; had not stated that she had read the relevant transaction documents or had been appropriately advised, and she said that crucially, the transaction documents had not been exhibited.

48. In her analysis of the issue as to whether the appellant was entitled to issue execution, the judge first found that G.E. Capital Woodchester Home Loans Limited, Pepper Finance Corporation (Ireland) Limited and Pepper Finance Corporation (Ireland) DAC were one and the same legal entity: the appellant. She correctly identified ss. 30(6) and 63(12) of the Companies Act, 2014 as spelling that out and rejected the respondent's argument that his contract was with Woodchester and not Pepper. There is no cross appeal against that finding.

49. The question at the heart of the judgment of the High Court, and of the appeal, is whether what was said about the sale of the loan book had any bearing at all on the appellant's entitlement to issue execution of the order for possession. In the written submissions filed on the appeal and in the oral presentation of the appeal, counsel nailed the appellant's colours firmly to the mast of section 31. However, the judgment of the High Court – and the reference in grounds of appeal to the *"little relevance"* of the Determination and the emphasis which the judge placed upon it and the inferences she drew from it – betrays that the argument in the High Court may not have been as sharply focussed.

50. The High Court judge, at para. 43, noted the contrary averments of Mr. Maloney – that the sale was of both the legal and beneficial interest – and of Ms. Loftus – that the appellant had retained the legal interest. I see merit in the judge's observation that Ms. Loftus did not say that she had read the documents or that she had been appropriately advised

by someone who had read the documents as to their effect. However, if what Ms. Loftus had to say as to the effect of the documents was mere assertion, it seems to me that Mr. Maloney's averment was no less a mere assertion.

51. The argument which Mr. Maloney sought to make as to the effect of the sale to Windmill was based on the findings and conclusions of the Tax Appeals Commission. The appellant's primary position was that the Determination of the Tax Appeals Commission was irrelevant to any question of its entitlement to issue execution but it went on to argue that, in any event, there was no basis in the Determination for Mr. Maloney's assertion that the legal as well as the beneficial interest in his father's loan and security was transferred to Windmill.

52. With respect, it seems to me that in addressing the arguments, the judge did not really compare like with like. If, as the judge found, it was not sufficient for the appellant to rely on the characterisation in the Determination of the transaction documentation, I do not understand how it might have been sufficient for the respondent to have done so. As I will come to, the Tax Appeals Commission was not concerned with the enforceability of the loans and security as between the appellant and the borrowers but if it was relevant at all, the Determination directly contradicts the assertion that the effect of the Windmill transaction was to transfer the legal as well as the beneficial ownership of the security.

53. In his third affidavit, Mr. Maloney focussed on four of the sixteen concessions on behalf of the appellant set out at para. 37 of the Determination, on which four he sought to rely in support of his argument that the Windmill agreement might have expired or been terminated. The first of the sixteen concessions was that:-

> *"Prior to the transfer [the appellant] had complete beneficial and legal ownership of the loans i.e. it owned the assets outright. <u>Post the transfer, it held the legal title only</u>."* [Emphasis added.]

54. Moreover, according to the Determination, at para. 8, *"the appellant agreed to sell the beneficial interest in its mortgage loan book to a special purpose vehicle … which was established solely for the purpose of acquiring the beneficial interest in the loan book …"* and *"… the appellant agreed, inter alia, to hold the legal title to the mortgage loans on trust for SPV."* [Emphasis added.]

55. While the transaction documents underlying the Determination were not before the High Court, the premise of the respondent's argument was that their effect was apparent from the Determination. The premise of the appellant's alternative argument – that if was the Determination was relevant it did not support the respondent's contention – was, similarly, that the effect of the transaction documents was correctly stated in the Determination. It seems to me that the premise of the judge's finding that the transaction documents ought to have been exhibited in order that the court might have been satisfied that the legal interest in the loan books remained vested in the appellant, must necessarily have been that there was a question as to the effect of those documents. While it is true that Mr. Maloney had asserted that the legal as well as the beneficial title had been transferred to Windmill, there was simply no basis for it. On the face of the Determination – if it was relevant or admissible – the appellant held the legal title to the security.

56. It seems to me, with respect, that the judge did not really engage with the appellant's primary argument that the Determination was simply irrelevant. As the Determination shows, the issue before the Tax Appeals Commission was whether the appellant was entitled to carry forward trading losses incurred before the transfer against later profits. That, in turn depended on whether, by reason of the transfer, the business theretofore carried on by the appellant had ceased, or there had been a major change in the nature or conduct of the company's trade. Quite apart from the fact that the Determination was put up by the respondent in an attempt to undermine the register – and quite apart from the fact that it did

not – the issue before the Tax Appeals Commission was quite different to the issue before the High Court.

57. At the hearing before the High Court and again on the appeal, the appellant relied on the transcript of an *ex-tempore* decision of Ní Raifeartaigh J. of 11th January, 2018 in a case of *Pepper Finance Corporation (Ireland) DAC v. Hanlon* in which the borrowers sought to rely on the same Determination of the Tax Appeals Commission. In that case – as the High Court in this case noted – Ní Raifeartaigh J. was satisfied that the plaintiff, the appellant in these proceedings, retained the legal interest in the loan and security and had the exclusive power to exercise the powers thereunder. Further – as the judge noted – Ní Raifeartaigh J. cited established legal authority to the effect that a securitisation transaction does not invalidate or affect the entitlement of the holder of a legal interest in the security to enforce that security for the benefit of the beneficial owner.

58. In this case the High Court judge distinguished *Hanlon* on two grounds, first, that Ní Raifeartaigh J. had the transaction documentation and was therefore in a position to independently confirm that Pepper retained the legal interest and secondly, that in *Hanlon* the Folio entry had been updated to show Pepper Finance Corporation (Ireland DAC), as the owner of the relevant charge.

59. What appears to have happened in *Hanlon* is that after an appeal to the High Court from the Circuit Court had been heard, the borrowers sought to rely on the Determination of the Tax Appeals Commission on which the respondent in this case sought to rely. The transcript shows that the copy of the Determination handed in to court was incomplete (apparently because the borrowers' printer had run out of ink) but Ní Raifeartaigh J. correctly surmised the reliance which the borrowers sought to place on it. Ní Raifeartaigh J. said that if she felt for a minute that the Determination might be of legal relevance, she would have reopened the matter but found that *"... there is no possible way that this could assist the*

defendants." The issues before the Tax Appeals Commission, she said, were different, and that body's determinations were not binding on the High Court. It is clear from the transcript in *Hanlon* that Ní Raifeartaigh J. did have the securitisation documents and went through them carefully to explain to the borrowers why their view that the plaintiff had no legal entitlement to seek an order for possession was wrong. However, it is not authority for the proposition that the registered owner of a charge must disprove an assertion that someone else might be entitled to be registered.

60. In this case, the judge found at para. 48 that the appellant could not rely on evidence of fact given in another case. That is undoubtedly correct. The judgment of Ní Raifeartaigh J. in *Hanlon* could certainly be relied on in an appropriate later case as having set a precedent but in this case – apart altogether from the fact that the Windmill documents were not before the court – the respondent was neither privy nor party to *Hanlon* and the judgment cannot be relied on as having had the effect that any issue in this case is *res judicata.*

61. However, *Hanlon* is clear authority – if authority be needed – for the proposition was that it was sufficient in law for the appellant to show that that it had the legal title. Perhaps with the benefit of hindsight, Mr. Maloney's assertion could have been comprehensively refuted by the appellant exhibiting the Windmill transaction documents but in truth the only purpose of that would have been to attempt to prove a negative or to disprove a bald assertion which was contradicted by the evidence offered by Mr. Maloney in support of it. More to the point, whatever about the practical appeal of demonstrating conclusively that Mr. Maloney's assertion was wrong in fact, Mr. Maloney's challenge to the appellant's ownership of the charge was an impermissible challenge to the conclusiveness of the register.

62. The second point of difference between this case and *Hanlon* is that in *Hanlon* the name of the owner of the charge had been updated on the Folio while in this case it was not. In her second supplemental affidavit sworn on 13th September, 2019 Ms. Loftus exhibited a

certified copy Folio dated 15th August, 2019 which showed the charge registered in the name of G.E. Capital Woodchester Home Loans Limited and a Property Registration Authority Notice No. 1 dated 9th January, 2014 to the effect that on application by Pepper Finance Corporation (Ireland) Limited in any particular case it might be registered in substitution for G.E. Capital Woodchester Home Loans Limited as the owner of individual charges, on payment of a fee of €40. I am bound to say that I find it something of a puzzle as to why that was not done in this case but I respectfully disagree that *Hanlon* is distinguishable by reference to the fact that the appellant's name was not updated on the Folio.

63. As in the case at hand the judge earlier found, there is no question but that Woodchester and Pepper are one and the same or that, albeit under a former name and status, the appellant is the registered owner of the charge.

64. The judge, at para. 54, correctly identified Mr. Maloney's argument as being that as a result of the sale of the loan book, the appellant was no longer entitled to be registered as the owner of the charge. There was no issue as to the fact that the appellant was so registered. The judge noted that the certified copy Folio relied on was dated 13th August, 2019 and, in the following paragraph, said that in light of the issue raised by Mr. Maloney, she was not prepared to find that an extract that was two years old was sufficient to resolve the issues in dispute. Again, with respect, I do not understand the significance of the date of the Folio extract. There was no suggestion that there had been any change in the register after 13th August, 2019. While the judge quite correctly observed that in *Hanlon* the register had been updated, I do not understand her to have attached any significance to the fact that this had not been done in this case.

65. In *Tanager DAC v. Kane* Baker J. (with whom Peart and Whelan JJ. agreed) said, at para. 67:-

"67. A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is the registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification."

66. I accept the submission on behalf of the appellant that the same principle must apply to an application for leave to issue execution on foot of an order for possession as applies to an application for the substantive order. A plaintiff who shows that he was at the time of the making of the order for possession and remains the registered owner of the charge thereby shows that he is the party entitled to issue execution on foot of the order.

Conclusion

67. The only issue on this appeal was whether the appellant had demonstrated that it was entitled to issue execution on foot of the order for possession made on 11th October, 2010. The judge correctly found that the appellant was one and the same as the named registered owner of the charge shown on the Folio but erred in allowing the respondent to seek to go behind the register.

68. In my view, the appellant proved its entitlement to issue execution on foot of the order for possession and is entitled to the order sought.

69. I would allow the appeal and make an order pursuant to O. 42, r. 24 granting the appellant liberty to issue execution in respect of the order for possession made on 11th October, 2010.

70. As to the costs, my provisional view is that the appellant having been wholly successful on the appeal is entitled to the costs of the appeal. The application to the High Court was one which – six years having elapsed since the making of the order for possession – would have been necessary in any event but was made a great deal more protracted and expensive than it otherwise would have been. Again, provisionally, I would propose an order that the appellant recover from the respondent two thirds of the costs of the application to the High Court.

71. I would give leave to the respondent, within a period of fourteen days, to file and serve a short written submission – not exceeding 1,000 words – in relation to the proposed costs order; and I would give leave to the appellant within a period of fourteen days thereafter to file and serve such a submission, whether in response to any submission that may be made by the respondent or otherwise in relation to the proposed order as to the costs in the High Court.