[2020] IEHC 35

THE HIGH COURT

[2019 No. 131 CA]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

RICHARD CONWAY

AND

ROSE (OTHERWISE KNOWN AS ROSALINE) CONWAY

DEFENDANTS

JUDGMENT of Mr. Justice Heslin delivered on the 31st day of January 2020,

Background

1. This case comes before the court by way of a notice of appeal dated 27 March 2019, pursuant to which the Defendants appealed against a judgment and order of the Circuit Court. The relevant pleadings comprise the Circuit Court Civil Bill for Possession, issued on 09 October 2015 and the Defendants' notice of motion, issued on 13 February 2017. The Defendants' motion was grounded on the affidavit sworn by the first named Defendant on 13 February 2017. A number of further affidavits were sworn during the course of the Circuit Court proceedings which were heard before His Honour Judge Comerford on 24 November 2017, 06 July 2018 and 09 July 2018, including an affidavit dated 26 June 2018 which was sworn by the first named Defendant seven months after day one of the Circuit Court hearing, but shortly before day two and three of same. In a judgment delivered on 20 March 2019, Judge Comerford decided that the Plaintiff was entitled to possession of the Defendants' property and refused the reliefs sought by the Defendants in their motion. The relevant order issued from the Circuit Court on 20 March 2019 and the Defendants appeal against this order. The Defendants represented themselves at the hearing, which proceeded by way of an entire rehearing of the matter, de novo, lasting 3 days.

2. On the morning of day 3 of the hearing, the Defendants made an application for an adjournment which, for reasons detailed in an ex-tempore judgment, I refused to grant. Shortly before 12 noon on day 3 of the hearing, the Defendants made an application to admit material which was not before the Circuit Court, specifically a report concerning "Windmill Funding DAC", dated 31 December 2017, which the Defendants regarded as evidence upon which they proposed to rely and, for reasons detailed in a second ex-tempore judgment, I refused that application. This judgment deals with both the Plaintiff's application in the aforesaid Civil Bill and the Defendants' application by way of the said motion.

The property sought by the Plaintiff

3. On foot of the Civil Bill, the Plaintiff seeks an order for possession of property which is described in the schedule thereto as being: -

> "All that and those the premises known as 33 Highfield Downs, Swords, Co. Dublin, more particularly described in Folio 74990 F Co. Dublin" (hereinafter "the property").

The relief sought by the Defendants

4. The Defendants' notice of motion seeks a range of reliefs, the relevant ones for the purposes of this judgment being the following: -

> "2. An Order that the Defendants in accordance with O. 17, r. 3 submit Form 8 to the Plaintiff named herein to provide information as to the specified matters already requested of them and recorded in the affidavits of the Defendants.
>
> 3. An Order requesting permission under O. 7 of the Circuit Court Rules to issue and service a third party notice.
>
> 4. An Order that the Defendants in accordance with O. 17, r. 3 to request disclosure of further information from the Plaintiff now relevant in the context of the Plaintiff's new claim on a late filed affidavit to be "lender of record" based on a transaction they claim to have initiated which is disputed by the Defendants.
>
> 5. An Order that the case is dealt with in plenary proceedings".

The Affidavits

5. During the hearing the following affidavits were opened to the court in their entirety: -

i. The affidavit of Caroline Loftus, sworn 05 October 2015.

ii. The affidavit of Richard Conway sworn 12 April 2016.

iii. The affidavit of Richard Conway sworn 11 May 2016.

iv. The affidavit of Caroline Loftus sworn 10 June 2016.

v. The affidavit of Richard Conway sworn 07 November 2016.

vi. The affidavit of Caroline Loftus sworn 02 December 2016.

vii. The affidavit of Richard Conway sworn 08 December 2016.

viii. The affidavit of Richard Conway sworn 12 December 2016.

ix. The affidavit of Caroline Loftus sworn 13 December 2016.

x. The affidavit of Richard Conway sworn 13 February 2017.

xi. The affidavit of Richard Conway sworn 19 April 2017.

xii. The affidavit of Caroline Loftus sworn 19 April 2017.

xiii. The affidavit of Richard Conway sworn 8 May 2017.

xiv. The affidavit of Grainne Naughton sworn 18 May 2017

xv. The affidavit of Richard Conway sworn 22 June 2017.

xvi. The affidavit of Richard Conway sworn 26 June 2018.

6. In reaching the findings detailed in this judgment, I have carefully considered the contents of all the foregoing affidavits sworn in these proceedings, together with the exhibits thereto. I have also carefully considered the contents of the submissions made, both oral and written, by the parties to these proceedings, as well as the authorities relied upon by the parties. In circumstances where this case proceeded by way of an entire re-hearing, I did not consider it necessary or appropriate to consider the contents of the Defendants' legal submission, dated 9th December, 2019 entitled "Analysis of Circuit Court Findings". I did, however, consider the contents of all the following written submissions made by the Defendants:

1. Legal submission entitled "Denial of Debt", dated 9th December 2019;

2. Legal submission entitled "Deponent Credibility", dated 9th December 2019;

3. Legal submission entitled "Statutory Declarations", dated 9th December 2019;

4. Legal submission entitled "Mortgage Sale Deed", dated 9th December 2019;

5. Legal submission entitled "True Sale of Mortgage Portfolio", dated 9th December 2019;

6. Legal submission entitled "Release of Legal Rights", dated 9th December 2019;

7. Legal submission entitled "Property Registration Authority", dated 9th December 2019;

8. Legal submission entitled "Windmill Funding Limited", dated 9th December 2019;

9. Legal submission entitled "Cross Examination at the Tax Appeal Commissioner", dated 9th December 2019;

10. Legal submission entitled "Denial of Plenary Hearing", dated 9th December 2019;

11. Legal submission entitled "Distinguishing Precedents", dated 9th December 2019;

12. Legal submission entitled "Motion to Dismiss", dated 9th December 2019;

13. Legal submission entitled "Denial of Plenary Hearing", dated 9th December 2019

14. Legal submission on behalf of the Defendants/appellants, dated 19th December 2019.

The Registration of Title Act, 1964 ("the 1964 Act")

7. The Registration of Title Act, 1964, provides, inter alia, as follows: -

"62. — (1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way

of annuity or otherwise, and the owner of the charge shall be registered as such. . ..

(7) When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession".

Section 62(7) of the Registration of Title Act, 1964, is the statutory basis upon which possession of the property is sought by the Plaintiff.

The Charge registered at Part 3 of Land Registry Folio 74990

8. A copy of Land Registry Folio 74990 F, Co. Dublin, being the property which is the subject of these proceedings, comprises Exhibit "E" as referred to in the affidavit of Caroline Loftus, sworn on 05 October 2015. Part 2 of the said folio records the Defendants as owners. Part 3, which deals with "Burdens and notices of burdens", contains the following entry: -

> "27 – JUL – 2007 D 2007 BN 038812 A Charge for present and future advances repayable with interest. GE Woodchester Home Loans Limited is owner of this charge" (hereinafter "the charge").

In para. 9 of her affidavit, sworn on 05 October 2015, Caroline Loftus avers that the charge in question was registered against the Defendants' interest in Folio 74990 F of the Register, Co. Dublin on 27 July 2007 and I accept that evidence, which is reflected in the relevant entry on Folio 74990 F, Co. Dublin.

9. In light of the evidence, I am satisfied, as a matter of fact, that the property is subject to the charge registered on 27 July 2007, the owner of the charge being the corporate entity then known as GE Woodchester Capital Home Loans Limited, having company registration number 34297, being the company registration number of the Plaintiff.

Change of name by a company

The Companies Act, 1963 provides, inter alia, the following: -

"23. — (1) A company may, by special resolution and with the approval of the Minister signified in writing, change its name…

(3) Where a company changes its name under this section, the registrar shall enter the new name in the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case.

(4) A change of name by a company under this section shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or

commenced against it by its former name may be continued or commenced against it by its new name".

In light of the foregoing statutory provisions, it is indisputable that a company may change its name. Doing so is not at all unusual and the ability of a company to change its name is one of the features of corporate legal personhood. The Plaintiff company has changed its name on a number of occasions and the series of names by which the Plaintiff has been known since incorporation comprises one of the exhibits in these proceedings.

A designated activity company

10. The Companies Act, 2014 contains a "procedure for re-registration as designated activity company . . ." and s. 63(12) states the following: -

> "12. The re-registration of an existing private company as a designated activity company pursuant to this Chapter shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status".

11. The Plaintiff is a designated activity company and Exhibit "A" referred to in the Affidavit of Caroline Loftus sworn on 10 June 2016 comprises a copy of a "Certificate of Incorporation On Conversion To A Designated Activity Company", dated 29 October 2015, given under the hand of the Registrar of Companies in which it is certified that "Pepper Finance Corporation (Ireland) Designated Activity Company formerly registered as a Limited Company has this day been converted under the Companies Act 2014 to a Designated Activity Company".

12. In light of the evidence, it is clear that the Plaintiff company has undergone several changes of name. Indeed, Exhibit "B" to the first named Defendant's affidavit sworn on 8th December 2016 comprises a copy of a "Certificate of Incorporation of a Company", dated 15 July 2016, given under the hand of the Registrar of Companies in which it is certified "…that company number 34927 Pepper Finance Corporation (Ireland) Designated Activity Company was originally called "Endeavour Securities Limited". The said certificate then sets out, in chronological order, the various other names by which the company was known, specifically "United Dominions Trust (Ireland) Limited", "Woodchester Home Loans Limited", "GE Capital Woodchester Home Loans Limited", "Pepper Finance Corporation (Ireland) Limited" and, from 29 October, 2015, "Pepper Finance Corporation (Ireland) Designated Activity Company". I am satisfied, as a matter of fact, that the Plaintiff was known as GE Woodchester Capital Home Loans Limited when the charge against the Defendants' property was registered and I am satisfied that the current name of the Plaintiff is Pepper Finance Corporation (Ireland) Designated Activity Company. I am also satisfied that, despite the changes of name, the Plaintiff company was and is the same legal entity which was originally incorporated under company registration number 34927. I am entirely satisfied that, as a matter of fact, the company with registration number 34927 is the Plaintiff in these proceedings and is pursuing these proceedings under its current name.

Conclusiveness of the Register under the 1964 Act

13. In the case of *Tanager Designated Activity Company v. Rolf Kane* [2018] IECA 352, the Court of Appeal considered certain questions of law referred by Noonan J. The first of these questions posed was as follows: -

> "1) does the defendant have an entitlement to challenge the registration of the plaintiff as owner of the charge at entry no. 7 on the defendant's folio in these proceedings having regard to the conclusiveness of the Register pursuant to s. 31 of the 1964 Act?"

The Court of Appeal answered that question in the negative. The foregoing is of considerable relevance to the present proceedings. In short, there is no doubt about the conclusiveness of the entry, in Part 3 of Folio 74990 F, County Dublin, of a charge dated 27 July 2007 in favour of GE Capital Woodchester Home Loans Limited, being the name of the Plaintiff herein when the charge was registered. In light of the foregoing, there is before the court conclusive evidence that the Plaintiff is the owner of the charge registered in the Land Registry against the Defendants' property and I accept that evidence.

Averments by the Defendants concerning company 34927

14. In para. 15 of his affidavit sworn on 26 June 2018, the first named Defendant makes the following averment: -

> "I say the fact that company registration No. 34927……originated and owned the Mortgage Portfolio . . ."

At para. 79 of the same affidavit, the first named Defendant makes the following averment: -

> "I say again the original lender was legal entity 34927 . . . "

In para. 164 of the said affidavit, the first named Defendant makes the following averment: -

> "164. I say the GE Group through its wholly owned and controlled legal entity 34927, GE Woodchester Capital Home Loans Limited, registered a charge against the Folio of the Defendants' family home on 27th July 2007".

15. The company with registration number 34927 is, beyond doubt, the Plaintiff herein. As regards the foregoing averments by Mr Conway, I am satisfied, in light of the evidence, that the Plaintiff "originated and owned the mortgage portfolio", the Plaintiff was "the original lender" to the Defendants and the Plaintiff "registered a charge against the Folio of the Defendants' family home".

Offer of mortgage loan 22 March 2007

16. The "letter of offer of mortgage loan" comprises Exhibit "C" as referred to in the affidavit of Caroline Loftus sworn on 5 October 2015. The offer was made to the Defendants and is explicitly stated to be on the following basis: -

"This offer is subject to the loan being secured by a first legal mortgage/charge for present and future advances in favour of the Lender over the property described in Part 1. It is also subject to your general acceptance of, and compliance with the Standard, Special and General terms and conditions as detailed in parts 2, 3 and 4 respectively".

The loan is stated to be for the sum of €540,000 at an annual percentage rate of charge ("APR") stated to be 7.33%. The period of agreement was stated to be twelve years, involving 144 repayments, with each instalment stated to be €5,553.26. Clause no. 4, under the heading "Repayment" contains, inter alia, the following: -

"(b) In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in Clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan".

In other words, if there was a failure to repay, the lender was entitled to make a demand for the entire loan, comprising principal and accrued interest. The lender, as made clear in this 22 March 2007 offer, was the company then known as GE Capital Woodchester Home Loans Limited, being the Plaintiff herein. On the evidence before me, I am satisfied that the Defendants accepted the loan offer and I note that on p. 11, of the letter of offer of mortgage loan, both of the Defendants' signatures are witnessed by a solicitor, the date being given as 16 April 2007.

Mortgage dated 26 April 2007

17. I also find, as a fact, that the Defendants entered into an indenture of mortgage with the Plaintiff, dated 26 April 2007. A copy of the said mortgage comprises Exhibit "D" as referred to in the affidavit of Caroline Loftus sworn on 5 October 2015. The second page of the mortgage contains, inter alia, the following definition: -

"7. "event of default" means any of the events stipulated in paras. (a) to (j) inclusive of sub-clause 9.01 hereof;".

On internal p. 5 of the said mortgage, under the heading "Covenants for Payment" the following is set out: -

"3.02 All moneys remaining unpaid by the Borrower to the Lender and secured by this Mortgage shall immediately become due and payable on demand to the Lender on the occurrence of any of the following events, that is to say: -

(a) On the happening of any event of default other than an event specified in para. (i) of sub – clause 9.01 hereof; or . . .

…and the Borrower hereby further covenants with the Lender to pay to the Lender forthwith the sum so demanded together with further

interest at the rate applicable to the relevant secured loan from time to time and at any time until the same shall have been repaid and shall be payable after as well as before any judgment or order of the Court".

On internal p. 13 of the mortgage under the heading "Exercise of Mortgagee's Powers", the following is set out: -

"9.01 The Lender shall not exercise any of the powers provided for in Clause 8 hereof or conferred by statute until any of the following events shall occur: -

(a) default is made in payment of any monthly or other periodic payment or in payment of any other of the secured moneys hereunder; or . . ."

Internal p. 21 of the mortgage makes it clear that the borrower is the Defendants, whereas the description of the mortgage property is the property described in Folio 74990 F, Co. Dublin. It is not disputed that the Defendants signed internal p. 22 of the mortgage in the presence of a solicitor. Internal p. 29 of the mortgage bears a Land Registry stamp with a dealing number which is stated to be "D 2007 DN 038812 A" and, as a matter of fact, this is the same dealing number which is recorded in Part 3 of the Land Registry Folio 74990 F of the Register, Co. Dublin, in respect of the charge registered on 27 July 2007, owned by GE Capital Woodchester Home Loans Limited, being the Plaintiff herein.

Mortgage repayments

18. In para. 10 of her affidavit sworn on 05 October 2015, Caroline Loftus avers to the fact that the Defendants defaulted in respect of monthly mortgage repayments and refers to a statement of account comprising Exhibit "F" to her affidavit. I accept the evidence given by Ms. Loftus. I am satisfied, on the evidence, that an event of default occurred in respect of the mortgage. I find, as a matter of fact, that the Defendants have not made any mortgage repayment since April 2015, with the exception of a data access request fee of €6.35 made on 9 December 2015. The failure to make mortgage repayments does not appear to be disputed by the Defendants. At no stage do the Defendants claim to have made any payments in respect of the mortgage for which they have not been given credit in the statement of account exhibited by Ms. Loftus, which statement covers the period from 02/08/2013 to 30/09/2015.

Formal demands for repayment

19. I accept the evidence given by Ms. Loftus of the fact that formal demands, date 01 May 2015, were served on each of the Defendants. I am satisfied, on the evidence, that the Plaintiff was entitled to serve such demands having regard to the fact that the Defendants defaulted in relation to their payment obligations under the mortgage. The letters of demand, comprising Exhibit "G" as referred to in the affidavit of Caroline Loftus sworn on 5 October 2015, are similar in terms, and contain, inter alia, the following statements: -

"An event of default has occurred pursuant to the terms of your mortgage agreement as you have failed to make a payment(s) on the due date. Your account is now 35 payments in arrears. Your mortgage account is currently showing outstanding arrears and charges of €148563.86. The Mortgage Arrears Resolution Process (MARP) no longer applies to this account. . ..

> We now formally demand full payment of the entire balance due and owing by you on the Mortgage Account pursuant to your Mortgage Agreement. The balance as at 01 May 2015 is €623069.88 together with continuing interest which is accruing at the daily rate . . .."

I am satisfied, on the evidence, that letters of demand were in fact sent to the Defendants and that this did not result in full payment of the entire balance due and owing in respect of the relevant mortgage, as demanded, nor did the sending of said letters result in any payment being made by the Defendants.

Demands for vacant possession

20. I am also satisfied that, by letters dated 18 May 2015, which were sent to the Defendants, respectively, a demand was made of each Defendants that vacant possession of the property be provided, which letters also stated that if the arrears were discharged within ten days, proceedings for repossession would not be issued. These letters comprise Exhibit "H" to the affidavit of Caroline Loftus sworn on 5 October 2015. Vacant possession was not provided.

The Defendants' opposition to the Plaintiff's claim

21. In ten affidavits, in extensive written submissions and by way of oral submissions during the trial, the Defendants vigorously oppose the Plaintiff's claim. In this judgment I address the principal arguments made by the Defendants.

The claim that there is no charge in the name of the Plaintiff

22. In para. 33 of his affidavit sworn 12 April 2016, the first named Defendant makes the following averment: -

> "I say and believe that there is no instrument of charge "sufficient to charge the land" registered with the Land Registry in the name of the Plaintiff company Pepper Finance Corporation (Ireland)".

Having regard to the evidence before the court, and my findings detailed above, I am bound to reject that assertion. The Plaintiff is, without doubt, the owner of the charge registered in the Land Registry against the Defendants' property.

The claim that the Defendants did not enter any agreement with the Plaintiff

23. In para. 40 of the same affidavit the first named Defendant makes the following averment: -

> "I say that the Defendants did not enter into any agreement whatsoever with the Plaintiff company to borrow any funds and that as a consequence the amounts mentioned above as "due and owing" are unsubstantiated allegations".

On the evidence, I am bound to reject this assertion made on behalf of the Defendants. Indeed, the true effect of averments by Mr Conway (at paragraphs 79 and 164 of Mr Conway's 26 June 2018 Affidavit) is to acknowledge the contrary.

The Defendants' claim that the Plaintiff lacks title to the charge

24. It is clear from the contents of the first named Defendant's affidavits that the opposition to the Plaintiff's claim relies on a central assertion, namely that the Plaintiff in these proceedings does not have title to the charge registered against the relevant property in Part 3 of Land Registry Folio 74990 F. This assertion is made numerous times and in a variety of ways in the first named Defendant's affidavits, one example of which is the averment contained at para. 15 of the first named Defendant's affidavit, sworn 8 December 2016, in which he states inter alia: -

> ". . .while the name change from Pepper Finance Corporation (Ireland) Limited to Pepper Finance Corporation (Ireland) Designated Activity Company is a name change that does not entail the transfer of ownership of 34927 as a wholly owned company in the Pepper Group, the name change from GE Capital Woodchester Home Loans Limited to Pepper Finance Corporation (Ireland) Limited does represent a transaction transferring ownership of 34927 from the GE Group to the Pepper Group".

25. I am satisfied that the distinction which the first named Defendant seeks to draw between the effect of two name changes concerning the Plaintiff company has no basis in law. Similar comments apply in relation to the averments made by the first named Defendant in paras. 21 and 22 of the same affidavit, in which he asserts: -

> "I say that at points 8 and 9 of the affidavit the deponent implies that by virtue of this listing, the Plaintiff company registration 34927 as a wholly owned company in the Pepper Group is the same company enjoying unbroken succession and decision making capacity from 1996 to the present.
>
> I say that any such assertion again relies on a name change only ignoring the sale of company registration 34927 from the GE Group to the Pepper Group, and that in all material ways that matter the company listed in 1995 is not the same company as the Plaintiff save for the registration number".

The foregoing assertion has no basis in law and I reject it.

Alleged lack of locus standi

26. In para. 45 of the first named Defendant's affidavit sworn 8 December 2016, he makes the following averment: -

> "I say and believe that on foot my statements, exhibits and analysis in this and previous affidavits that the Plaintiff company, Pepper Finance Corporation (Ireland) Limited, has no Locus Standi whatsoever in this matter and that all their claims are vexatious, without substance whatsoever, and are frivolous and bound to fail".

On the evidence before this Court I reject the foregoing assertion insofar as it is made in respect of the Plaintiff, being Pepper Finance Corporation (Ireland) Designated Activity Company.

Claims that the Plaintiff's deponents lack credibility and means of knowledge

27. The Defendants also take issue with what they describe as the credibility of the Plaintiff's representatives and do not accept that they have a means of knowledge in relation to their sworn evidence. In an affidavit sworn on 05 October 2015, Ms. Caroline Loftus avers that she is the Operations Manager of the Plaintiff, employed by the Plaintiff, and that she is duly authorised by the Directors of the Plaintiff to make her affidavit on behalf of the Plaintiff and that she does so from facts within her own knowledge save where otherwise appears and where so appearing she believes the same to be true. In her affidavit sworn on 10 June 2016, Ms Loftus avers that she is an employee of the Plaintiff and that she makes her affidavit from facts within her own knowledge save where otherwise appears and, where so otherwise appearing, she believes the same to be true and accurate in every respect. In her 02 December 2016 affidavit, Ms Loftus avers to the fact that she is the Plaintiff's Senior Operations Manager and, as well as being duly authorised, she avers that she make her affidavit from facts within her own knowledge and from a careful examination of the books and records of the Plaintiff save where otherwise appearing and where so appearing she believes the same to be true and accurate in all respects. She makes similar averments in other affidavits, including that sworn by her on 13 December 2016, being a short affidavit pointing out that, due to an administrative oversight, the document exhibited at "A" to her prior affidavit was the Certificate of Incorporation on Change of Name from GE Capital Woodchester Home Loans Limited to Pepper Finance Corporation (Ireland) Limited, rather than the Certificate of Incorporation on Change of Name from Woodchester Home Loans Limited to GE Capital Woodchester Home Loans Limited and she exhibits the correct document.

28. I am satisfied that nothing turns on the initial error which was quickly corrected. In her affidavit sworn on 19 April 2017, Ms Loftus again avers to the fact that she is the Plaintiff's Senior Operations Manager and, as well as being duly authorised, she avers that she makes her affidavit from facts within her own knowledge and from a careful examination of the books and records of the Plaintiff save where otherwise appearing and where so appearing she believes the same to be true and accurate in all respects. In an affidavit sworn on 18 May 2017, Grainne Naughton avers that she is the Plaintiff's Head of Residential Mortgages, and that she makes her affidavit on behalf of the Plaintiff being duly authorised by it to do so. She avers that she does so from facts within her own knowledge and from a careful examination of the books and records of the Plaintiff, save where otherwise appears, and where so appearing she believes the same to be true and accurate in all respects. I am satisfied that there is no evidence before the court, as opposed to assertion made by the Defendants and unsupported by evidence, which casts any doubt on the foregoing averments or casts doubt on credibility and/or the means of knowledge of Ms Loftus or Ms Naughton.

Allegations of dishonesty and fraud

29. In para. 4 of the first named Defendant's affidavit sworn 13 February 2017, he makes the following averment: -

> "I say and believe that the Plaintiff herein has presented information to the Honourable Court with dishonest intent, has deliberately induced reliance on their

untrue representations of fact and as a consequence is fraudulently and dishonestly attempting to deprive the Defendants of their Family Home.

I also say and believe that the dishonest intent includes an agreement between two or more parties and as a consequence the Defendants require the implementation of a third party procedure to enable the true facts of the case to be presented to the Honourable Court".

In paragraph 6 of the same affidavit, the first named Defendant refers to what he describes as "…the underlying dishonest intent contained in the complexity hiding the transparency of the Plaintiff's actions." I find no evidence whatsoever to support the foregoing claims. Having regard to the evidence before the court, I am bound to reject these assertions made on behalf of the Defendants.

References to Securitisation in the Defendants' loan offer and mortgage

30. The loan offer dated 22 March 2007, which the Defendants accepted, contained a number of clauses in relation to securitisation. Clause 10 of the letter of loan offer states, inter alia: -

"(a) The Borrower's attention is drawn to the fact that the Loan and the Lender's Security and any associated rights and interest . . . will be freely transferable by the Lender. . . whether as part of a loan transfer and securitisation scheme or otherwise, on such terms as the Lender may think fit".

Clauses 11.07 to 11.09 of the Deed of Mortgage, which the Defendants entered into, state, inter alia: -

"11.07 (a) The lender may at any time and from time to time transfer or enter into contractual arrangements concerning all or part of the legal or equitable benefit of this Mortgage including the security hereby created on the Mortgaged Property ... on such terms as the Lender may think fit, without notice to the Borrower or any other person ...

(b) Without prejudice to the generality of the foregoing, where the Lender holds the debt(s) in respect of which the security in the form of this Mortgage is given on trust for a third party auditor where the Lender holds the debt(s) following an equitable assignment thereof to a third party the Borrower hereby acknowledges and agrees that the Lender may hold this Mortgage on the same terms and with like effect as it holds the debt(s) in respect of which the security in the form of this Mortgage is being given and this Mortgage will be in full force and effect in respect of all such debt(s) and the benefit of the security created by this Mortgage is intended by the Borrower and the Lender to be transferable in like manner and with the same effect as the debt in respect of which the security is given.

11.08 Without prejudice to the generality of sub-clause JI. 07 the Lender may (a) at any time securitise this Mortgage without any consent of the Borrower save as is

contained in sub-clause 11.09 hereof and without further notice to the Borrower or any other person.

11.09 (i) Without prejudice to the generality of the foregoing, the Borrower hereby irrevocably consents to:

(a) all or any future transfer of the legal or equitable benefit of this Mortgage including the security hereby created on the Mortgaged Property ...

(c) the inclusion of this Mortgage including the security hereby created on the Mortgaged Property and any secured loan in any Securitisation scheme,

(ii) The borrower hereby irrevocably consents and agrees to be bound by:

(a) the provisions of any securitisation scheme. . .."

In light of the foregoing, the Plaintiff was entitled to enter into a securitisation transaction which would include the Defendants' mortgage and related security.

Securitisation and the Mortgage Sale Deed ("MSD")

31. In an affidavit sworn on behalf of the Plaintiff on 2 December 2016, Ms Caroline Loftus avers, inter alia, that: "On 28 September 2012, Pepper Netherlands Holding Coöperatie UA purchased the entire share capital of the Plaintiff. Subsequent to the change of ownership, on 28 September 2012, the Plaintiff sold the beneficial interest in its mortgage book, including the Defendants' loan accounts, to Windmill Funding Limited ("Windmill"). Following that transfer, the Plaintiff, as lender of record retained the exclusive legal right to enforce the legal rights and obligations owed to it pursuant to the mortgage deed executed by the Defendants herein." In the manner detailed in this judgment, I am satisfied that no evidence has been put before this court which calls the forgoing into question.

32. On 18 May 2017, Ms Grainne Naughton refers to a Mortgage Sale Deed dated 28 September 2012 (hereinafter "the MSD") which was entered into between the Plaintiff (under its former name), Windmill, Pepper Netherlands Holding Coöperatie UA and TMF Trustee Limited. Ms Naughton states, inter alia, the following:

"4. By Mortgage Sale Deed dated 28 September 2012 the Plaintiff herein (then named GE Capital Woodchester Home Loans Limited) entered into an

agreement with 3 other entities.

5. I say that Clause 2.3 of that agreement states:

> "The seller hereby confirms and acknowledges that on and following Completion and until perfection in accordance with Clause 5 of this Deed, it will hold legal title to the Mortgage Loans sold hereunder, together with the Related Security and the benefit of the Relevant Insurance Policies as bare Trustee for the Issuer (or, following enforcement of the security created pursuant to the Deed of Charge, for the Note Trustee)
> [My emphasis]

Clause 5.1 states, inter alia, as follows:

> "The sale and purchase of the Mortgage Loans and their Related Security provided for hereunder shall be perfected by the Seller as soon as possible following a demand by the Issuer or Note Trustee which may be in any circumstances …'
> [My emphasis]

7. I say that it is clear from the foregoing that until perfection (in accordance with clause 5.1) occurs, the loan accounts and their associated security have been the subject of a securitisation transaction whereby the Plaintiff herein retains legal title as bare trustee.

8. In that regard I can confirm to this Honourable Court that neither the Issuer nor the Note Trustee have served a demand in accordance with clause 5.1 and as such the Plaintiff herein retains legal title to the loan and its related security as bare trustee for the Issuer pursuant to the securitisation transaction provided for in clause 2.3."

33. The MSD, with redactions, is exhibited by Ms Naughton. In circumstances where a page was illegible, a legible copy was handed into court by the Plaintiff during the hearing which I accepted *de bene esse.* I am satisfied that nothing turns on this, as I accept the sworn evidence given by the Plaintiff to the effect that it transferred the beneficial, but not the legal interest in the Defendants' mortgage by means of the MSD, which averments are not met with any evidence, as opposed to assertions to the contrary. The Plaintiff's averments are also entirely consistent with the relevant entries in the Land Registry in respect of the Defendants' folio. It is beyond doubt that the Plaintiff is registered as the owner of a charge which appears as a burden on part 3 of the Defendants' folio and, in the manner explained earlier in this judgment the charge relates to the mortgage granted by the Defendants in favour of the Plaintiff. Furthermore, during the course of his submissions the first named Defendant stated that "our mortgage was performing when it was sold" and in light of all the foregoing, there would not appear to be any genuine dispute about the fact of sale of the Defendants' mortgage – as opposed to the Defendants' claim that the Plaintiff has divested itself of the entire interest, in same, both legal and beneficial. On the evidence, I accept, as a fact, that the beneficial interest, but not the legal interest, in the charge over the Defendants' property was sold pursuant to the MSD. The MSD features very heavily in the Defendants' opposition to the Plaintiff's claim and for this reason certain key assertions made by the Defendants in respect of the MSD are summarised and analysed below.

The claim that the Plaintiff divested itself of all rights regarding the mortgage portfolio

34. In opposing the Plaintiff's claim the Defendants place significant reliance on Exhibit "RC 1" to the affidavit sworn by the first named Defendant on 19 April 2017 and I have carefully considered its contents. This exhibit comprises a document prepared by the first named Defendant which is entitled "Forensic financial report into 'The Windmill Transaction'". In the body of the report, under the heading of "The conclusions and consequences based on

the evidence presented are:", the first named Defendant makes, inter alia, the following assertions: -

"1. GE Capital Woodchester Home Loans Limited as a wholly owned legal entity in the GE Group company registration no. 34927 sold its Mortgage Portfolio and Related Security on 28th September 2012 to Windmill Funding Limited, company registration no. 514093 thus divesting itself of all rights and obligations regarding the mortgage portfolio and related security . . ..

5. The name change of legal entity 34927 from GE Capital Woodchester Home Loans Limited to Pepper Finance Corporation (Ireland) Limited (now DAC) does not in any way change or affect the fact that GE Capital Woodchester Home Loans Limited sold its mortgage portfolio and related security to Windmill Funding Limited on 28th September 2012, before legal entity 34927 was purchased by Pepper Netherlands Holding Coöperatie UA and became a wholly owned company in the Pepper Group.

6. The legal entity 34927 when purchased by Pepper Netherlands Holding Coöperatie UA company registration number 55309763, "did not and could not have as an asset a GE Mortgage Portfolio and Related Security or any rights or obligations regarding such a Mortgage Portfolio and Related Security".

35. The foregoing are assertions made on behalf of the Defendants, in particular by the first named Defendant, who is an accountant by profession. These assertions are based on the first named Defendant's analysis of certain financial records and to the conclusions he has drawn from that analysis. Even if the Defendants genuinely believe these assertions to be true, they are made in the face of evidence to the contrary from three sources. Firstly, there is conclusive evidence, in the form of the entries on Land Registry, County Dublin, that the Plaintiff was and remains the owner of the charge registered in Part 3 of Folio 74990 F. Secondly, the court also has before it sworn affidavit evidence to the effect that the Plaintiff did not divest itself of all rights and obligations regarding the relevant mortgage portfolio and related security, including the Defendants' mortgage, when it entered into the MSD on 28 September 2012. Thirdly, the contents of the Mortgage Sale Deed itself evidence that the Plaintiff was and remains the legal owner of the mortgage portfolio in question, pending a future transfer of the legal interest.

The "Windmill Transaction"

36. The assertions made by the Defendants in respect of what they describe as the "Windmill Transaction" are of central importance to their opposition to the Plaintiff's claim. These assertions are summarised in Exhibit "A" to the first named Defendant's affidavit sworn on 22 June 2017. Under the heading "Description of "The Windmill Transaction":", the first named Defendant makes the following assertions:

"1. On 28th September 2012 GE Capital Woodchester Rome Loans Ltd (Co Reg 34927) a subsidiary of GE Capital Woodchester Ltd (Co Reg 9380) sold its Mortgage Portfolio and Related Security to Windmill Funding Ltd.

2. Using the proceeds of this sale GE Capital Woodchester Home Loans Ltd entered into a restricted financial procedure the giving of financial assistance by a company for the purpose of acquisition of its shares" Companies Acts 1963 — 2012.

3. The restricted procedure was the giving of financial assistance, lain the proceeds of the sale of its Mortgage Portfolio and Related Security to Windmill, to Pepper Netherlands Holding Coöperatie UA (Dutch Co) to enable that company buy 100% of the Share Capital of Co Reg 34927.

4. To validate the restricted procedure the directors of GE Capital Woodchester home Loans Ltd made statutory declarations (5528286 and 5528288) on 2 September 2012 describing the transaction (The Windmill Transaction).

5. The Statutory Declaration 5528286 at point 6 states: (Dutch Co = Pepper Netherlands Holding Coöperatie UA)

> "The Company proposed to enter into a mortgage sale deed under which the company would sell to the Issuer (Windmill) the Collections and Mortgage Loans together with the benefit of their related security -"
>
> At 6(a) "the company would direct that the issuer (Windmill) pays the consideration due to the company under the Mortgage Sale Deed in satisfaction of the company's liability to make a loan to, or create another form of receivable loan from DutchCo under the Issuer Facility Agreement".
>
> At 6(b) the loan or receivable granted by the Company to DutchCo under the Seller Loan Agreement would be . . .extinguished.
>
> At 7(c) "the purpose for which the Company intends DutchCo to use such financial assistance is to enable DutchCo pay the consideration in connection with its purchase of shares in the Company".

6. On 28 September 2012 from the proceeds of the Windmill transaction facility (i.e. the loan granted from the sale by OB Co Reg 34927 of its Mortgage Portfolio and Related Security to Windmill), DutchCo purchased 100% of the Share Capital of Company reg. 34927. The name of this Company was changed to Pepper Finance Corporation (Ireland) Limited (now DAC), and this Pepper company claims in legal proceedings to be the company that issued mortgage loans in 2007".

37. A key aspect of the Defendants' opposition to the Plaintiff's claim is the assertion that, prior to entering into the MSD, the Plaintiff divested itself of the entirety of its rights in respect of a mortgage portfolio which included the Defendant's mortgage and that, as a consequence, the Plaintiff has no entitlement to bring the present proceedings. It was clear from the submissions made by the first named Defendant throughout day 3 of the trial that the Defendants are genuinely convinced that the "true facts" are being hidden from the court, including that the MSD which gave effect to a securitisation transaction in 2012 was a "sham", that the Plaintiff in these proceedings does not have any title to the Defendant's mortgage, and that the Defendants were entitled to deny the debt due to the

Plaintiff because of conclusions the Defendants have come to following an analysis by the first named Defendant of certain financial records.

The Defendants' denial of the debt

38. Among the submissions made by the first named Defendant is that the Defendants are entitled to "deny the debt" on the basis that, according to the Defendants, it is "not on the Plaintiff's balance sheet". It was made clear by the first named Defendant during his submissions on behalf of the Defendants that their denial of the debt was based on the first named Defendant's view of the financial records. I am satisfied that what the Defendants can or cannot identify on the Plaintiff's balance sheet is not dispositive of any issue in these proceedings, but it seems clear that the Defendants are convinced that their analysis of financial records reveals what the first named Defendant described in his submissions as "an absolute sale" in respect of the relevant mortgage portfolio, including the Defendant's mortgage, such that the Plaintiff has no title to the relevant charge and has no entitlement to bring the present proceedings and, in the foregoing context, the MSD is, according to the Defendants, a "sham document", which claim I now turn to.

The claim that the MSD is a "sham document"

In making a variety of assertions to the effect that the Plaintiff has no legal interest in the charge which appears at Part 3 of the Defendant's Folio, the Defendants describe as a "sham document", the MSD dated 28th September 2012 made between GE Capital Woodchester Home Loans Limited (therein described as Seller and Portfolio Manager), Windmill Funding Limited (therein described as "Issuer"), Pepper Netherlands Holding Coöperatie UA, and TMF Trustee Limited (therein described as "Note Trustee"). The Defendants assert that the MSD is a "sham" because, according to the Defendants, it hides what they refer to as the "true facts" in relation to what they describe as the "Windmill Transaction". The Defendants assert that the "true facts" of the "Windmill Transaction" demonstrate that the Plaintiff had and has no rights in respect of the charge registered against the Defendants' home on the relevant Folio and that the securitisation transaction evidenced by the MSD is a "sham" designed to "obfuscate". Among other things, the Defendants argue that a loan was necessary to facilitate the MSD and, based on the first named Defendant's analysis of certain accounts, the Defendants claim that the loan does not exist. The Defendants argue that the MSD "has no evidential value". At para. 4 of his affidavit sworn on 22 June 2017, the first named Defendant makes, inter alia, the following averment: -

> ". . . the proven facts being that the Plaintiff could not have initiated the securitisation as the securitised GE mortgage portfolio is proven never to have been owned by the Plaintiff".

The consequences of the Defendants' assertions

39. The Defendants' make a plethora of arguments in opposition to the Plaintiff's claim and it is impractical to rehearse each and every one of them, or the numerous variations of these arguments, in this judgment. I have, however, carefully considered all the arguments made by the Defendants and the documentation upon which they are based, which include but are not limited to the contents of statutory declarations, statutory

accounts and extracts from accounts and notes to financial statements. I have also carefully considered, in particular, all the Defendants' assertions in relation to the "Windmill Transaction" and the MSD. Regardless of how they are put, the inescapable logic of what the Defendants assert includes, at least, the following:

a. that the Plaintiff entered into the MSD despite the fact that it had no interest whatsoever in the relevant mortgage portfolio, the subject of the MSD;

b. that it did so consciously and fraudulently;

c. that each of Windmill and Netherlands Holding Coöperatie UA and TMF Trustee Limited and all those who control those entities decided to enter into the MSD, despite the fact that that the Plaintiff had no interest whatsoever in the relevant mortgage portfolio, the subject of the MSD;

d. that all legal and/or financial and/or other professional advisors to all four parties to the MSD either failed to notice that the Plaintiff had no interest in the relevant mortgage portfolio as a result of such due diligence as was carried out, or were prepared to advise that the MSD be entered into, notwithstanding the fact that a third party, not named in the MSD, was the true owner;

e. that, over seven years after the MSD was entered into, no objection has been made by any of the parties to the MSD to the fact that the true ownership of the relevant mortgage portfolio, including the Defendants' mortgage, is with a third party;

f. that, for a period of over seven years, a third party, being the "true owner" of the relevant mortgage portfolio, has had an entitlement to be registered as the owner of the Defendants' mortgage but has failed to register their ownership and has, instead, allowed the official public record of ownership to remain uncorrected and false;

g. that an entry in the Land Registry, in particular the entry on part 3 of the Defendants' Folio of a charge in favour of the Plaintiff, is not conclusive, is incorrect and cannot be relied upon by this court.

Conclusions in relation to the Defendants' assertions concerning the MSD and "Windmill Transaction"

40. I have given very careful consideration to all statements deposed to by the Defendants, to all documentation exhibited by the Defendants and to all submissions made by the Defendants, including, in particular, the Defendants' assertions in relation to the MSD and the "Windmill Transaction". In my view, the Defendants' assertions and the consequences which inevitably flow from those assertions are simply not credible. On the evidence before me I am bound to reject the assertions made by the Defendants to the effect that the Plaintiff has divested itself of all rights in the relevant mortgage portfolio, including rights in respect of the Defendants' mortgage. Regardless of how genuinely the Defendants may believe that there is evidence in support of the various claims made by them, I am satisfied that such claims are no more than bare assertions which are not

supported by fact and which are entirely undermined by evidence to the contrary and I accept what the Plaintiff says, in sworn affidavit evidence, with regard to the MSD. Having carefully considered all the evidence before the court, I reject the Defendants' assertion that there is proof that the Defendants' mortgage is not owned by the Plaintiff in these proceedings. I am entirely satisfied that none of the assertions made by the Defendants amounts to evidence, much less evidence sufficient to cast any doubt concerning the definitiveness of the relevant Land Registry Folio entries, in particular, the charge registered at Entry 8 of Part 3 of Folio 74990 F of the Land Registry, Co. Dublin, in favour of the Plaintiff. Nor does any statement, assertion, exhibit or submission made by the Defendants constitute, in my view, evidence that the MSD amounts to a "sham" or that the court can or should look behind it or treat its contents with suspicion.

41. The first named Defendant submitted that, as well as being a "sham document", the MSD is one of critical importance to the Plaintiff's claim. I do not share the Defendant's view in relation to the significance of the MSD, in circumstances where the Plaintiff is, without doubt, the registered owner of a mortgage and charge in respect of the Defendants' property and seeks possession of same, having regard to the provisions of s. 62(7) of the Registration of Title Act, 1964, having served formal demands, which were not satisfied, for the repayment of monies due on foot of the mortgage which the Defendants granted in favour of the Plaintiff and against the background of the Defendants' default in relation to making the required mortgage payments. Based on the evidence before me, I am entirely satisfied that the Plaintiff is the registered owner of the charge, at Entry 8 of Part 3 of the Land Registry Folio 74990 F, Co. Dublin. I am equally satisfied, having considered all the evidence, that the effect of the MSD was to securitise the Defendants' loan and related security upon the terms set out in the MSD. I am also satisfied, on the evidence, that perfection, in accordance with Clause 5.1 of the MSD, has not occurred, and that the Plaintiff continues to hold legal title to the Defendants' loan and the related security and is entitled to seek possession of the property. I reject, on the evidence before me, the assertion by the Defendants that the Plaintiff does not have title to the charge in respect of the Defendants' property of which it is the registered owner. I reject the Defendants' assertions, having carefully considered the entirety of the affidavits, exhibits and submissions put forward by the Defendants including, but not limited to, the Defendants' assertions concerning what it regards as the "true facts" flowing from what it describes as the "Windmill Transaction" as well as the Defendants' assertions that the MSD is a "sham" document.

The MSD judicially considered

42. It is also of significance to note the contents of the specific MSD at issue in the within proceedings have been the subject of judicial consideration by Ní Raifeartaigh J. in *Pepper Finance Corporation (Ireland) Designated Activity Company v. Hanlon* (Unreported, High Court, 11 January 2018) and by Binchy J. in *Pepper Finance Corporation (Ireland) Designated Activity Company v. Jenkins* [2018] IEHC 485. In both cases, it was held that the legal effect of the Deed was that the Plaintiff held legal title to the loans and mortgages. Ni Raifeartaigh J. stated the following: -

> "On the 28th September 2012, Pepper Netherlands took over the entire share capital of Woodchester, then that name changes to Pepper Finance Corporation (Ireland) on the 11th October 2012 in accordance with the Companies Act 1963, and there is an exhibit which is a certificate of incorporation during the name change from Woodchester to Pepper Finance Corporation (Ireland) Ltd.
>
> Separately, if you like, what happened is that the Plaintiff sold the beneficial interest in its mortgage book which included the Defendants' mortgage, to Windmill Funding Ltd. and I note that again to a layperson it may seem as if something is sold it is a simple matter, as if you have a book and you give it to someone else and you sell it. It all goes. But in fact the legal complexities are much more than that, parts of it can be sold and parts of it are retained and there can be a split between the legal and the beneficial ownership. it is not simply as straightforward as the thing, a mortgage, being like a tangible thing that simply transfers in its entirety and what is clear here from the affidavit, and I have studied the documents again carefully, because I am conscious of the seriousness of the matter for the Defendants, the final affidavit of Caroline Loftus set out the actual mortgage deed dated the 28th September 2012.
>
> Unfortunately, one really does have to be a lawyer to understand what he is exactly saying, but this mortgage sale deed on 28th September 2012 is between GE Capital Woodchester Home Loans, a seller and portfolio manager, then there is Windmill Funding Ltd. who are the issuer. There is Pepper Netherlands who we know subsequently and GE Woodchester becomes Pepper Finance DAC, the Plaintiff in the present case".

The views expressed in the judgment of Ní Raifeartaigh J. in *Pepper Finance Corporation (Ireland) Designated Activity Company v. Hanlon* were adopted by Eagar J. in *Pepper Finance Corporation (Ireland) Designated Activity Company v. Rooney* [2019] IEHC 541.

The nature of a securitisation transaction

43. The MSD evidences a securitisation transaction. In considering the nature of a securitisation transaction, McGovern J. in *Anthony Freeman and Another v. Bank of Scotland Plc and Others* [2014] IEHC 284 stated, at para. 8, as follows:

> "It is an important principle in securitisation transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank. Where customers have provided their consent as part of the standard mortgage terms and conditions, they are not specifically notified that their mortgage has been securitised."

McGovern J. went on to state, at para. 11, that:

> "At all times, legal title to the loans and related security remained with BOSI until the completion of the transfers to the Issuer and notification of the transfers being

given to the borrower. Such transfers would only be completed and notifications given in the circumstances set out in Clause 7.1 of the Mortgage Sale Agreement between BOSI and the Issuer. No event specified in Clause 7.1 occurred and the assignment of each of the Plaintiffs' loans and related security was effected in equity only."

44. In *Thomas Kearney v K.B.C. Bank Ireland Plc and Another* [2014] IEHC 260, Birmingham J, as he then was, observed: -

> "In relation to the emphasis that the Plaintiff places on the issue of securitisation, observations made by Peart J. in *Wellstead v. Judge Michael White and Anor*. [2011] IEHC 438, are very much on point. There, Peart J. observed: -
>
> > 'But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors'.
>
> "The views expressed by Peart J. with which I find myself in complete and respectful agreement, also, accords with the approach of the English Court of Appeal in the case of *Paragon Finance plc v. Pender* [2005] EWCA Civ 760, wherein The Court of Appeal was of the view that all that the special purpose vehicle acquired, under an uncompleted agreement to transfer the legal charge, was an equity in the mortgage. Paragon remained the legal owner, and as registered proprietor of the charge, retained all the powers of a legal charge, including the right to possession, nor was it necessary to join the special purpose vehicle."

45. This position was recently re-affirmed by Noonan J. in *Governor and Company of the Bank of Ireland v. McMahon* [2017] IEHC 600, where the learned Judge, having considered the authorities on the issue concluded, at para. 13, that:

> "It is therefore clear beyond doubt that the McMahons are not entitled to make any complaint based on any alleged securitisation of their loan as they expressly consented to it. Further, even if that were not the case, the authorities to which I have referred make clear that securitisation, if it occurred, does not affect the lender's right to recover the debt."

46. I am satisfied, on the evidence, that in the present case, the Plaintiff retained the right to enforce the security, consistent with the retention by the Plaintiff of the legal interest as provided for in the MSD. I am also satisfied that the Defendants' consented to the securitisation transaction which took place. The views expressed in the judgment of Ní Raifeartaigh J. in *Pepper Finance Corporation (Ireland) Designated Activity Company v. Hanlon* are relevant in the present case, insofar as they concern the very same MSD and I

adopt the learned Judge's decision. The description of the securitisation process set forth by McGovern J. in *Anthony Freeman and Another v. Bank of Scotland Plc and Others* mirrors that in the present proceedings, as evidenced by the contents of the MSD and the sworn evidence on behalf of the Plaintiff, which I accept.

A third party entitled to be registered as owner of the charge

47. In the course of his submissions, the first named Defendant also asserted that, notwithstanding the information recorded in the Land Registry, the real or true owner of the relevant mortgage portfolio, including the Defendant's mortgage, is a party other than the Plaintiff and the first named Defendant suggests that it is this third party which should register itself as owner of the Defendant's mortgage. It is clear that this assertion by the Defendants is based on their contention that the Plaintiff is not the owner of any interest in the charge registered against their folio. Having carefully considered the evidence, I reject the Defendants' assertion that there is a third party, other than the Plaintiff, who is the "real" or "true" owner of the charge over the Defendants' property and is entitled to be registered as such. That assertion is made without evidence and I am satisfied that there is overwhelming evidence to the contrary.

The Defendants' arguments based on a decision of a Tax Appeal Commissioner

48. The first named Defendant also makes assertions based on a decision of a Tax Appeal Commissioner in *Corporation Y Limited (Appellant) v. Revenue Commissioners* 24 TACD 2017. I am satisfied that the decision of the Tax Appeal Commissioner in *Corporation Y Ltd. v. The Revenue Commissioners* concerned whether the Plaintiff was entitled, or not, to carry forward losses in respect of the Plaintiff's pre – 28 September 2012 business, in order to set such losses against profits from the Plaintiff's post – 28 September 2012 business. The question which arose during the course of the Tax Appeal Commissioner's determination concerned whether the Plaintiff was engaged in the same trade, both before and after the securitisation transaction which is evidenced by the MSD. The Tax Appeal Commissioner decided that, on 28 September 2012, the essential characteristics of the Plaintiff's business changed, such that, thereafter, the Plaintiff was in the business of administration and collection not for its own benefit, but for the benefit of others, such that the set-off of losses against profits should be refused. The first Defendant argues that the findings of the Tax Appeal Commissioner mean that a Plaintiff does not have title to the relevant mortgage portfolio including the mortgage and charge registered against the Defendants' home. This submission by the Defendants is wrong both in fact and in law. In the manner set out above, this court has found that the Plaintiff clearly does have title to the charge over the Defendants' property. Furthermore, the decision of Ní Raifeartaigh J. in *Pepper v. Hanlon* handed down on Thursday 11 January 2018 makes it clear that a determination of a Tax Appeal Commissioner could never bind this Court. I am satisfied that, even if the Tax Appeal Commissioner had made the findings contended for by the Defendants, that would not determine the issues which this Court is required to determine with regard to the Plaintiff's title to the charge registered in the Land Registry on the Defendants' folio. The following is a verbatim extract from the transcript approved by Ní Raifeartaigh J. in relation to her decision in *Pepper v. Hanlon:* -

> **"Ms. Justice Ní Raifeartaigh:**

> "So the position is that what is sought to be relied on is a determination of the Tax Appeals Commission and what I am sure the Defendants don't understand is that even if it were favourable to them on an issue that this Court would have to determine, this Court would not be bound by it, that is the central point. No matter what the Tax Appeals Commission had determined would not bind this Court. This Court is not bound by determinations of the Tax Appeals Commission. The court is bound by the law as set down in the legislation, in the authorities have been handed down by the High Court, the Court of Appeal and the Supreme Court, that is what this Court is bound by. It also is relevant that the information or a determination of a Tax Appeals Commission is relating to an issue of taxation, whereas the issue before the court is a different one, it is the entitlement of a party to recover a property which was the subject of mortgage agreement so it is a different issue".

The foregoing comments by the learned judge apply equally to the facts in this case. In short, the Defendants' attempt to construct an argument that the Plaintiff is not the registered owner of the relevant mortgage, with reference to what the Defendants believe was decided by the Tax Appeal Commissioner, is without merit, regardless of how genuinely held the Defendants' views may be.

Section 28(6) of the Supreme Court of Judicature Act 1877

49. Another difficulty for the Defendants in seeking to argue that the Plaintiff lacks title to the charge in respect of which it is the registered owner, arises by virtue of s. 28(6) of the Supreme Court of Judicature Act 1877. In *AIB Mortgage Bank v. Thompson* [2018] 3 IR 172, Baker J. provided the following guidance in relation to the nature and effect of s. 28(6), at [27-28] as follows: -

> "That a debtor be given notice of the assignment of a debt or chose in action is important for practical and legal reasons. A debtor must know to whom the debt is due, and from what date a debtor may with certainty pay a debt to an assignee.
>
> Section 28(6) identifies the date at which the assignment of a debt or chose in action becomes effectual in law to transfer or pass the legal right to such debt or chose in action and all legal remedies for enforcement. Thereafter, and following upon notice, the power to give a good discharge for the debt thereby vests in the assignee without concurrence of the assignor".

50. The Defendants argue that, notwithstanding the explicit terms of the MSD, both the legal and equitable interests in their loan and mortgage were transferred to Windmill Funding Limited. In the manner explained earlier in this judgment I have found that there is no evidence to support this assertion by the Defendants and I am entirely satisfied that there is overwhelming evidence which proves that the Plaintiff is the legal owner, properly registered, of the mortgage and charge affecting the Defendants' property. Even if that were not so, and even if, contrary to the explicit averments on behalf of the Plaintiff and contrary to the contents of the MSD, both the legal and equitable estates in the relevant mortgage portfolio, including the Defendants' loan and security, had been transferred by

the Plaintiff to Windmill Funding Limited, any such alleged "absolute" transfer of rights by the Plaintiff would be ineffectual against the Defendants, in the absence of the written notice of such absolute transfer as required under s. 28(6) of the Supreme Court of Judicature of Ireland Act, 1877. The consequences of a failure to give the notice required by the 1877 Act would be that the vendor, in this case the Plaintiff, retains the interest, the subject of the assignment. In my view the notice requirements of the 1877 Act create another insurmountable problem for the Defendants' in seeking to oppose the Plaintiff's claim, even on the Defendants' own case.

51. That is not, of course, the end of the matter, because the court has before it evidence, in the form of sworn averments on behalf of the Plaintiff, that there was no transfer by the Plaintiff of the legal, as opposed to the beneficial, interest in the relevant mortgage portfolio, including the Defendants' mortgage and those averments are entirely consistent with the contents of the MSD and I accept that evidence. Furthermore, having considered all the evidence in this case, I find as a fact that no notice, of the type required by s. 28(6) of the Supreme Court of Judicature (Ireland) Act, 1877 has been provided to the Defendants. As a consequence, I am absolutely satisfied on the evidence before this Court that the entity entitled to pursue possession of the property pursuant to s. 62(7) of the Registration of Title Act, 1964 is the Plaintiff, being the legal owner of the relevant charge, and I reject the Defendants' assertions to the contrary which, in my view, can properly be characterised as bare assertions. That is not to say that the assertions are not made in a most lengthy, complex and repetitious manner, but in my view, the claims never go beyond mere or bare assertions, unsupported by evidence.

Claims based on the Defendants' regulatory status

52. Insofar as the Defendants question the Plaintiff's regulatory status, I am satisfied on the evidence before this Court that the Plaintiff has been a "credit institution" within the meaning of the Consumer Credit Act, 1995 (as amended) since 3 December 1996. On that date, the Minister for Enterprise and Employment certified the Plaintiff as such a credit institution, in the context of S.I. 369 of 1996 - Consumer Credit Act, 1995 (Section 2) (No. 2) Regulations, 1996. Indeed, in para. 19 of the first named Defendant's affidavit sworn on 8 December 2016, Mr. Conway makes the following averment: -

> "I say that the Company Woodchester Home Loans Ltd., registration number 34927 as a wholly owned subsidiary of the GE Group was listed as a credit institution under S.I. 369 of 1996 – Consumer Credit Act 1995".

53. The first named Defendant goes on to exhibit a copy of the relevant regulations, the second page of which confirms that "Woodchester Home Loans Ltd." is a credit institution" provided that the APR charged by such person in respect of any credit granted to a consumer is less than 23%". Company Number 34927 is, of course, the Plaintiff in these proceedings, employing its current name. There is no evidence before the court that credit has been granted in excess or 23%. Furthermore, the letter of offer of mortgage loan dated 22 March 2007, which was signed by both the first and second named Defendants on 16 April 2007, and witnessed by a solicitor, clearly states, on page 1 of 11:

"APR 7.33%". The said mortgage also contains the following, on internal page 9 of 11, at Clause 12(ii): -

> "The Lender is a prescribed Credit Institution within the meaning of the Consumer Credit Act 1995. GE Capital Woodchester Limited trading as GE Money is a multi-agency intermediary regulated by the Irish Financial Services Regulatory Authority".

In light of the evidence, I am satisfied that, insofar as the Defendants assert that the Plaintiff was not entitled to advance a loan to them, or did not advance such a loan, I entirely reject such claims.

Summary of conclusions and decision regarding Plaintiff's claim for possession

54. I am entirely satisfied that the Plaintiff is the registered owner of a charge affecting the Defendants' property, namely the charge which appears at entry number 8 on Part 3 of Land Registry Folio 74990 F, Co. Dublin. I am satisfied that this "charge for present and future advances repayable with interest" as described in Part 3 of the aforesaid Folio, with dealing number "D 2 007 DN 038812 A", is one and the same as the 26 April 2007 mortgage and charge which was granted by the Defendants in favour of the Plaintiff. I am satisfied than an "event of default" occurred as defined in the mortgage and charge, entitling the Plaintiff to make a demand for the repayment in full of the mortgage. I am satisfied that a valid demand was served on each of the Defendants, in accordance with the provisions of the relevant mortgage and charge. I am satisfied that the Defendants, having been served with valid demands, made no payment whatsoever in respect of the monies due to the Plaintiff under the mortgage, whether principal or interest. I am satisfied that, for the purposes of s. 62(7) of the Registration of Title Act, 1964, repayment of the principal money secured by the instrument of charge has become due. Having carefully considered all the evidence, I am satisfied that it is appropriate to order possession of the property to be delivered to the Plaintiff and I will so order. Superior Court authorities make it clear that the scope of the discretion conferred on the court in the context of a s. 62(7) application for possession is very limited, but, in view of the overwhelming evidence in favour of the Plaintiff in these proceedings, I am entirely satisfied that it is proper, in the present case, to grant possession of the property in favour of the Plaintiff on foot of the proceedings which have been brought by the Plaintiff in a summary manner as provided for in s. 62(7).

Decision regarding the Defendants' claim to be entitled to a plenary hearing

55. In a notice of motion dated 13 February 2017, issued by the Defendants in the Circuit Court, Item 5 comprises a request for an order that the case be dealt with in plenary proceedings. During the course of submissions, the first named Defendant repeatedly argued for a plenary hearing but for the reasons set out in this judgment, there is no basis upon which the court could properly direct a plenary trial. That would be entirely wasteful of resources and would have the effect of delaying further the Plaintiff's entitlement to possession. On affidavit, in written submissions and during oral submissions at the hearing of this matter, the Defendants repeatedly referred, inter alia, to the decision of Mr Justice McKechnie in *Harrisrange Ltd. v.* Duncan [2002] IEHC 14, [2003] 4 IR 1 and argued that they should be entitled to a plenary hearing. The

Harrisrange decision concerned a claim, instituted by way of a summary summons, in which the Plaintiff sought summary judgment in respect of a specific sum of money for mesne rates. It was not a statutory claim for possession of property, pursuant to s. 62(7) of the Registration of Title Act, 1964, by the registered owner of a charge. For the avoidance of doubt, however, even if it was appropriate to apply the test in *Harrisrange* in the present case, I would be entirely satisfied that the Defendants had failed to meet the threshold required for the court to direct a plenary trial. I say this because of my findings of fact as detailed in this decision and the evidence in support of the Plaintiff's case. Put simply, I am entirely satisfied that, even when taken at its height, what the Defendants say as a basis for opposing the Plaintiff's claim can be properly characterised as no more than bare assertions, unsupported by evidence. In other words, despite the number and length of the Defendants' affidavits and exhibits, and the apparent sincerity with which they make a wide range of assertions, I have concluded that what they say by way of a supposed defence to the Plaintiff's claim is unsupported by fact and is simply not credible, having regard to the overwhelming evidence in support of the Plaintiff's case. In relation to the legal issues which arose in this case I am also entirely satisfied that they were capable of being resolved without any need for a plenary hearing. The Defendants have clearly devoted an enormous amount of effort to the defence of the present claim and may well be very sincere in their beliefs but, having regard to the evidence, they are sincerely wrong.

Decision regarding the balance of the relief sought in the Defendants' motion

56. For the reasons set out in this judgment, I refuse all of the reliefs sought by the Defendants in their motion dated 13 February 2017. Insofar as the reliefs sought at para. no. 2 of the notice of motion is concerned, I am entirely satisfied that the Defendants had sufficient particulars of the Plaintiff's claim. Furthermore, despite the fact that the Defendants' sought relief pursuant to O. 17, r. 3 of the Circuit Court Rules (which specifies that "any party to a proceeding may also, at the time specified in the last preceding Rule, by notice in writing, require the other party to furnish such further information as is reasonably necessary as to any specified matter arising upon the claim in a civil bill . . ."), I am satisfied that the substance of the request is not truly to seek particulars in respect of the Plaintiff's claim. Similar comments apply in relation to the reliefs sought at para. 4 of the Defendants' notice of motion. In substance, these are not, in my view, requests for particulars, but, rather, in the nature of interrogatories and an attempt by the Defendants to have the Plaintiff provide information on a wide range of issues, none of which could properly be said to be reasonably necessary in the context of understanding the Plaintiff's claim or preparing a defence to same. I am also entirely satisfied that the reliefs sought at para. no. 3 of the Defendants' notice of motion is entirely inappropriate. Nowhere in any of the ten affidavits sworn on behalf of the Defendants is any claim against a third party made out. It was neither necessary nor appropriate that any third party be joined in order for the court to determine the issues properly before it.

In light of the foregoing, the Plaintiff is entitled to an order for possession of the mortgaged property.