APPROVED **[2021] IEHC 18**

THE HIGH COURT
CIRCUIT APPEALS

2020 No. 19 CA

BETWEEN

PERMANENT TSB PLC
(FORMERLY IRISH LIFE & PERMANENT PLC)

PLAINTIFF

AND

NOEL MORRISSEY
ANDREA MORRISSEY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 January 2021

INTRODUCTION

1. The within proceedings come before the High Court by way of an appeal against an order for possession granted by the Circuit Court. This judgment is delivered in respect of a preliminary application, made in advance of the hearing of the appeal, to add another financial institution as a second plaintiff to the proceedings. The application is made pursuant to Order 17, rule 4 of the Rules of the Superior Courts.

2. The defendants have indicated that they have no objection to the application. The purpose of preparing this short judgment is to address the standard of proof, and to explain the limited effect of the proposed joinder.

PROCEDURAL HISTORY

3. The plaintiff, Permanent TSB plc ("***PTSB***"), instituted these proceedings before the Circuit Court seeking to recover possession of lands owned by the defendants. The proceedings are predicated on two indentures of mortgage and charge ("***the mortgages***") said to have been entered into between PTSB, as mortgagee, and the defendants, as mortgagors.

4. The Circuit Court made an order for possession on 14 January 2020. The defendants have brought an appeal against that order. The appeal has not yet been listed for hearing.

5. Start Mortgages DAC ("***Start Mortgages***") now applies to be added to the proceedings as an additional plaintiff. The basis of the application is that the ownership of the mortgages entered into by the defendants has been transferred from PTSB to Start Mortgages as part of a much larger transaction involving the sale of a "loan book" previously held by PTSB.

6. The solicitor acting on behalf of the defendants has indicated in correspondence (dated 11 October 2020) that her clients do not object to the proposed joinder, and would not be attending at the hearing of the motion.

APPLICATION TO MAKE START MORTGAGES A PARTY

7. The application to make Start Mortgages a party to the proceedings has been made pursuant to Order 17, rule 4 of the Rules of the Superior Courts. The Order reads as follows.

> 4. Where by reason of death, or *any other event** occurring after the commencement of a cause or matter and causing a *change or transmission of interest or liability*,* or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and

> such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.
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> *Emphasis (italics) added.

8. The interpretation of Order 17, rule 4 has been considered in a number of recent judgments. The Court of Appeal addressed two aspects of the wording of the Order as follows in *Stapleford Finance Ltd. v. Lavelle* [2016] IECA 104. First, it was held that the phrase "any other event", in the opening sentence of the Order, included events such as the assignment of loans and a chose in action. An "event" is not confined to an extraneous event (such as death or bankruptcy), but also embraces an event such as a contract for the sale of loans and mortgages.

9. Secondly, it was held that the phrase "change … of interest" was not confined to an interest in land, but embraced an assignment of a chose in action. It was further held that there was no distinction in this regard between the assignment of a chose in action and the assignment of an *existing* cause of action. The Court of Appeal held (at paragraph 20 of the judgment) that the legislative intent of the Supreme Court of Judicature Act (Ireland) 1877 would be defeated if it were not possible to substitute the assignee as a party.

> "Since the Supreme Court of Judicature Act (Ireland) 1877 it has been possible legally to assign a chose in action. The intent of the statute is to do away with the formal necessity of joining the assignor in any proceedings brought by the assignee to enforce the chose in action. The legislative intent is defeated if the rules of court do not provide for of the substitution of the assignee of the chose in action as plaintiff in proceedings commenced by the assignor. […]"

10. At a later point in the judgment, the Court of Appeal observed that a requirement for an assignee to have to commence *new* proceedings (as opposed to its being made a party to existing proceedings taken by the assignor) could lead to very considerable wasted time,

effort and expense. It could also present difficulties in respect of the Statute of Limitations.

11. The question of whether Order 17, rule 4 can be invoked in proceedings seeking the recovery of lands by way of an order for possession has been expressly considered in *Danske Bank v. Macken* [2018] IEHC 356 and *Permanent TSB v. Doheny* [2019] IEHC 414. In each instance, the High Court accepted that it is open to the transferee under a deed of transfer to apply to be made a party to possession proceedings which had previously been instituted by the transferor.

12. The nature and extent of the evidence which must be adduced in support of an application under Order 17, rule 4 has also been addressed in the case law. The leading judgment remains that of the High Court (Kelly J.) in *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671. The judgment was delivered in respect of an application by the purchaser under the sale of a bank's loan book to be substituted as plaintiff in existing proceedings. The sale was characterised as an assignment of a chose in action for the purposes of section 28 of the Supreme Court of Judicature Act (Ireland) 1877. Crucially, the application had been made *prior to* the substantive hearing of the proceedings. The High Court held that the legal test for such an interlocutory application is whether there is *prima facie* evidence that there has been (i) a valid sale of the underlying assets; (ii) a valid assignment of the chose in action; and (iii) a valid notice given. It was not necessary for the court to adjudicate, at that juncture of the proceedings, on the efficacy or validity of the assignment or the efficacy or validity of the notice. Those were matters to be determined at the substantive hearing.

13. The standard of proof to be met on an application to substitute a party which is made *subsequent to* the substantive hearing will be higher. This is because there will, by definition, be no further hearing at which these matters can be ventilated. Put shortly,

the efficacy or validity of the assignment will have to be considered on the joinder application.

14. The differing roles of the court, depending on the timing of the application, are explained as follows by the Court of Appeal in *McDermott v. Ennis Property Finance DAC* [2019] IECA 142.

> "37. Where, as in the present case a substitution application is made after judgment has been granted, and where therefore there is no opportunity at trial to raise any issues in relation to the proofs adduced in support of the application, it seems to me that the prima facie test referred to by Kelly J. in *IBRC v. Comer* is not the correct test. In such cases the correct test is that applicable in civil proceedings generally, namely on the balance of probabilities. The evidence will nonetheless be adduced in the normal way in such applications by affidavit, and if necessary any deponent may be cross-examined on their affidavit as provided for by the Rules of the Superior Courts. But such applications remain purely procedural in nature, and there can be no question of such an application becoming in the nature of a mini-trial."

15. The position in the present case is somewhat different. Whereas an order of possession has been made by the Circuit Court, that order is not final in that there is an appeal pending before the High Court. That appeal has not yet been heard and determined. The position is more analogous to that considered by the Court of Appeal in *Irish Bank Resolution Corporation Ltd v. Halpin* [2014] IECA 3. On the facts of that case, an application had been made in the context of a pending appeal to *substitute* a second financial institution for the original plaintiff. The Court of Appeal indicated that such a substitution would be inappropriate in circumstances where it is sought to uphold, on appeal, a judgment granted to the original plaintiff. The original plaintiff must remain in the proceedings. The party who asserts that they have succeeded to the original plaintiff's interest can, however, be joined to the proceedings as an *additional* plaintiff.

16. The Court of Appeal was satisfied in *Halpin* that the transferee in that case had adduced evidence which had established, on a *prima facie* basis, that it was entitled to the benefit

of the loan facilities underlying the claim, pursuant to a deed of transfer between it and the original plaintiff. As such, the transferee was entitled to participate in the appeal.

17. The Court of Appeal was careful to explain, however, that it had not reached any definitive conclusion on the entitlement, if any, of the transferee to enforce a judgment obtained by the original plaintiff. See paragraph 28 of the judgment as follows.

> "[…] As such [the transferee] is a person with a material interest in the outcome of the two appeals before this Court. Hence it is in the interest of justice that [the transferee] be added as a party to the proceedings and permitted to participate as a respondent in the hearing of the appeals, but confined to any argument advanced by [the original plaintiff] in the High Court or which it may properly advance on the appeal in reliance upon the evidence before the High Court on the respective dates. It appears appropriate that [the transferee] be added as a plaintiff in the proceedings and a respondent to the appeal. In making this order the Court is not determining the claimed entitlement of [the transferee] to the judgments obtained by [the original plaintiff]. It is simply determining that it has put forward evidence on a *prima facie* basis that would entitle it to be joined as a co-plaintiff in the proceedings for the purpose of pursuing its claim either to the facilities which it contends have been transferred or to the judgments which it contends have been transferred or assigned."

18. These observations were made in the context of an appeal from the High Court to the Court of Appeal. I am satisfied that the underlying rationale applies equally to an appeal from the Circuit Court to the High Court. Accordingly, in deciding whether to allow Start Mortgages to be joined to the within proceedings in the context of the pending appeal, it is sufficient that it establishes an interest in the mortgages on a *prima facie* basis.

EVIDENCE OF TRANSFER

19. The application to join Start Mortgages to the proceedings is grounded on an affidavit sworn by Eva McCarthy on behalf of Start Mortgages DAC dated 15 July 2020. Ms McCarthy identifies herself as the "litigation manager" for Start Mortgages DAC, but goes on to explain that she is employed by Start Mortgages Holding Ltd., which she

describes as the parent company and sole shareholder of Start Mortgages DAC. Ms McCarthy sets out her means of knowledge as follows.

> “1. I am the Litigation Manager for Start Mortgages Designated Activity Company (‘the Applicant’) and employed by Start Mortgages Holding Limited (‘SMHL’) which is the parent company and sole shareholder of the Applicant. SMHL manages and services all loans held by the Applicant. I make this affidavit on the Applicant’s behalf and with its authority, from facts within my own knowledge and from a diligent perusal of its books and records, save where otherwise appears and where so otherwise appearing I believe the same to be true. I also make this application with the consent and authority of the Plaintiff.”

20. Ms McCarthy has exhibited, as part of her affidavit, a deed entitled “Irish Law Global Deed of Transfer, Conveyance and Assignment (Excluding Property)”. This deed is dated 7 February 2020, and has been entered into by Permanent TSB plc, as the seller, and Start Mortgages DAC, as the buyer.

21. Ms McCarthy avers that the loan facility and indenture of mortgage and charge the subject-matter of the proceedings have been transferred to Start Mortgages under this deed of transfer.

> “12. On 7 February 2020, the Bank executed a Deed of Transfer (‘the Transfer Deed’) whereby the Bank transferred all its rights, title, interest, estate, benefit and entitlement (past and present) in and under the Underlying Loans and each of the Finance Documents (as each of the capitalised terms is defined in the Transfer Deed) which includes the Facilities and the Charges in the within proceedings to the Applicant (‘the Transfer’). I beg to refer to a copy of the Transfer Deed and to the relevant extracts from Schedule 1 to the Transfer Deed confirming the inclusion of the Defendants’ mortgage loan accounts, the Facilities and Charges upon which, pinned together and marked with the letters and number EMcC1, I have signed my name prior to the swearing hereof.
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> 13. At Schedule 1 to the Deed of Transfer as exhibited at EMcC1 above, there are a number of headings and entries which remain unredacted. The account number column in Schedule 1 identifies the loans which are the subject of the Transfer. As part of Schedule 1, the Defendants’ account numbers [Redacted by the High Court] – appear in the ‘Account Number’ column at pages 274, 476 and 505 thereof.”

22. The affidavit goes on to explain that information relating to borrowers who are not parties to the proceedings has been removed or redacted entirely for reasons related to commercial sensitivity, restrictions imposed by the Data Protection Acts 1988 to 2018 and banker/client confidentiality.
23. Correspondence notifying the defendants of the transfer (so-called "Goodbye letters" and "Hello letters") has been exhibited. The affidavit also exhibits an extract from a Form 56 (Transfer of Charge) which has been filed with the Property Registration Authority.

CONCLUSION AND FORM OF ORDER

24. Having regard to the evidence summarised above, I am satisfied that Start Mortgages DAC has established a *prima facie* basis for being joined to the proceedings as an additional plaintiff. In particular, there is *prima facie* evidence that there has been (i) a valid sale of the underlying assets; (ii) a valid assignment of the chose in action; and (iii) a valid notice given.
25. Accordingly, I will make an order pursuant to Order 17, rule 4 joining Start Mortgages DAC as an additional party to the proceedings, and providing that the proceedings shall be carried on between the defendants, as continuing parties, and Start Mortgages DAC and Permanent TSB plc.
26. An order is also made amending the title of the plaintiff in the within proceedings to add Start Mortgages DAC in addition to Permanent TSB plc, the title hereof to be duly entered in the Central Office of the High Court with the proper officer.
27. In circumstances where Start Mortgages DAC has not made any application for costs, and where the defendants will not have occurred costs as they did not have to attend at the hearing of the motion, I will make no order for costs in respect of the motion.

28. This matter will be listed, for mention, before me on Friday 26 February 2021 at 10.45 a.m. to fix a hearing date for the underlying appeal.

Approved
Garrett Simms