

THE HIGH COURT

[2021] IEHC 59
[2015/179 SP]

BETWEEN

AVESTUS CAPITAL PARTNERS

PLAINTIFF

AND

STAPLEFORD FINANCE LTD.

AND

CAPITA TRUSTEE SERVICES LTD.

DEFENDANTS

RULING of Mr. Justice Brian O'Moore delivered on the 28th day of January, 2021.

1. This is a motion brought on behalf of Everyday Finance DAC ('Everyday') seeking an order pursuant to Order 17, rule 4 of the Rules of the Superior Courts naming Everyday as the First Claimant in these proceedings in substitution of Stapleford Finance Limited ('Stapleford'). The application is opposed by the Second Claimant ('Capita'). I will in sequence set out the nature of these proceedings, the basis of Everyday's application, the grounds of resistance by Capita, and my conclusion on the motion.
2. The proceedings are ones in which Avestus Capital Partners ('Avestus'), which is a real estate investment and asset manager, holds proceeds from two investments in respect of which competing claims have been made. The two investments are respectively The Mall of Sofia Shopping Centre and the Galeria Kazimierz (in Krakow). The competing claims are from Stapleford, joined to the proceedings on the basis of its claim that these funds are caught by security furnished by a Mr. Peter Lavelle to Anglo Irish Bank Corporation PLC ('Anglo') and that this security has been transferred to it, and Capita, which denies (*inter alia*) that the funds are so secured. Capita is the trustee of a trust the original beneficiaries of which were Mr. Lavelle, his wife and their children.
3. Everyday wishes to be substituted for Stapleford in these proceedings, and claims that it is entitled to such an Order as the security over the funds has been transferred to it. The grounding affidavit of Andrew McCudden exhibits the two relevant security deeds of assignment by which Mr. Lavelle appears to have provided Anglo with security over his interests in the Sofia and Krakow assets. Mr. McCudden also avers that the relevant loans from Anglo to Mr. Lavelle, and the associated securities were assigned to Stapleford in 2014. Whether or not this was done is an issue to be decided at the hearing of the Special Summons. It is not a matter for the current application, and inasmuch as counsel for Capita sought to cast doubt on the validity of any of the transactions prior to the purported assignment of rights to Everyday I find that such submissions are not germane to the questions which I must now decide.
4. Mr. McCudden goes on to describe the assignment by Stapleford to Pepper Finance Corporation (Ireland) DAC ('Pepper') of the legal title in the relevant loan facilities and the associated securities. This was done, according to Mr. McCudden, in order to facilitate Pepper acting as servicing agent in respect of the loans.

5. Finally, Mr. McCudden avers that in November 2019 Stapleford agreed to assign to Everyday 'all of the rights, title, interest and benefits which it had pursuant *inter alia* to the Loan Facilities and Security Deeds of Assignment [...]' He then avers that these entitlements were transferred by Pepper to Everyday by Deed of Assignment ('the Deed') of the 24th of January 2020.
6. The Deed and the Loan Sale Deed (of November 2019) are exhibited by Mr. McCudden.
7. This evidence is not contradicted. The only evidence in response from Capita is an affidavit of Jamie Darwin of Apex Financial Services (Trustees) Limited, which is the new name for Capita. The only material part of this affidavit is the following:-

'I say [Capita] did not receive notification that these proceedings or the claim to the two said investments were assigned to [Pepper]. Nor was [Capita] notified that Pepper assigned the proceedings or claim to Everyday.'

8. This averment was the only indication of which I am aware of any ground on which Capita would be resisting Everyday's motion, prior to the hearing of the application on the 27th of November 2020. Avestus takes a neutral position on the motion.
9. Counsel for Everyday essentially made three submissions:-
 - (i) On the question of notice, he relies upon the decision of Costello J. in *LSREF III Stone Investments Ltd. v. Morrissey* [2015] IEHC 603. In that case, at the hearing of an application for judgment the trial judge had to decide on the validity of the assignment of loans from IBRC (In Special Liquidation) to LSREF. It was argued on behalf of Mr. Morrissey that no date for this assignment was contained in the Notice of Assignment served upon him. Costello J.'s ruling on this argument was:-

"40. It was submitted that this meant that the plaintiff was not obliged to rely upon the document headed "*NOTICE OF ASSIGNMENT*". The defendant's objections to that document as an effective notice of the Assignment on the basis that it left the date of the Deed of Transfer blank, therefore, did not mean that there was, in fact, no proper notice of the assignment given to the defendant. The two letters, described by Mr. Johnston as the "*hello letter*" and "*goodbye letter*", each confirmed that the date of the Deed of Transfer was 11th July, 2014, and each constituted notice of the Assignment for the purpose of the Act. The defendant was, in fact, served with a redacted copy of the Deed of Assignment when he received Mr. Willis's affidavit of 8th August, 2014, and thus was in no doubt whatsoever that the date of the Deed of Assignment was 11th July, 2014. The plaintiff said that no better notice of the assignment could be given than furnishing a copy of the actual Deed of Assignment, as occurred in this case. If there could be any doubt as to whether or not the defendant received the emails from Mr. Mullarkey of Kavanagh Fennell forwarding the letters of 17th and 18th July, 2014, and the Notice of Assignment, this was overtaken by the service of Mr. Willis's

affidavit exhibiting those letters in addition to the Deed of Assignment. 41. The plaintiff points out that there is no necessity that notice of the assignment be given at any particular time. The only requirement is that it be given before the assignee seeks to sue on foot of the assignment. In *Guest on the Law of Assignment*, 2nd ed. (London: Sweet & Maxwell, 2015) at para. 2-25 the author states that the section does not prescribe any limit of time within which notice must be given. Provided the notice is given before the commencement of proceedings to recover the debt or thing in action, it maybe given at any time. In this case, the plaintiff was substituted as plaintiff in these proceedings by Order of Finlay Geoghegan J. on 10th November, 2014. At the very latest, the defendant had notice of the assignment by the time Mr. Black swore his affidavit on 29th August, 2014. It is submitted that the defendant, therefore, had notice of the assignment within the meaning of

the Act long before the plaintiff was a party to the proceedings. I accept that this is correct and I hold that the defendant had notice of the assignment within the meaning of the Act prior to the plaintiff being substituted as plaintiff in the proceedings. The fact that the document headed "NOTICE OF ASSIGNMENT" gave no date for the assignment does not mean that no proper notice of the assignment was given in this case as the plaintiff is entitled to rely upon the other documents which referred to above which clearly did identify the date of the assignment.

42. In relation to the absence of the date on the document headed "NOTICE OF ASSIGNMENT", the plaintiff submitted that the lack of a date in the document did not invalidate the document as a valid notice for the purposes of the Act. There is no actual requirement that the date of the actual assignment be given to the debtor. A notice of an assignment is only bad if it gives a date that predates the actual assignment. In *Van Lynn Developments Ltd.*, Denning M.R. stated at p. 613:-

"[i]t seems to me to be unnecessary that [the notice of assignment] should give the date of the assignment so long as it makes plain that there has in fact been an assignment so that the debtor knows to whom he has to pay the debt in the future... But the notice itself is good, even though it gives no date."

Clearly, this did not apply in this case. In any event as I have already held, the other letters and the Deed expressly give the correct date and they constitute notice of the assignment sufficient to comply with the requirements of the Act. The fact that they are not called 'notice of assignment' does not mean that they do not constitute perfectly valid notices of the assignment. I accept these submissions on behalf of the plaintiff as reflecting the law in relation to dating notices of assignments. Accordingly, the defendant's objection to the Notice of Assignment on this ground must be rejected.

43. There are no particular requirements in relation to service of notice of an assignment other than that the debtor receives it. Therefore, there is no requirement that Kavanagh Fennell had authority to accept service of the letters and documents constituting notice of the assignment. However, for the purpose of this judgment it is not necessary to rely upon the “*hello letter*” and “*goodbye letter*” addressed to the defendant and sent to Kavanagh Fennell or the emails from Kavanagh Fennell to the defendant forwarding the letters and the notice of assignment. The plaintiff pointed to the authority of Guest on the Law of Assignment at para. 2-27 where the author notes that there appears to be no reported case law dealing with whether “*notice in writing*” can validly be served electronically but expresses the opinion that notice given by email or other means of electronic communication capable of being reproduced in visible form would suffice as written notice. The plaintiff also relied upon para. 2-22 to the effect that notice of an assignment may be served upon a debtor’s solicitor. In this case, it clearly was served upon the defendant’s solicitor and I accept that this was sufficient service of notice of the Assignment as required by the Act. Therefore, it is not necessary to determine whether or not service of notice of an assignment upon the defendant at Kavanagh Fennell is sufficient. Therefore, this argument must also fail.”

I should say at this juncture that counsel for Capita did not engage with this submission at all; she neither disputed the relevance of the *Morrissey* decision nor suggested that any other authority supported an argument that the substitution application before me should fail for lack of notice. The failure to meet the Everyday submission on this point does not, of course, mean that counsel for Everyday is correct. I nonetheless find that the contents of Mr. Darwin’s affidavit do not provide any basis for refusing Everyday’s motion. In accordance with the judgment of Costello J., sufficient notice has been provided of the assignment from Stapleford to Everyday; this notice was given to Mr. Lavelle by correspondence in February 2020 and was (at the very latest) given to Capita by means of correspondence with its solicitors in August 2020.

(ii) The requirements to be met by Everyday in this application are set out in the judgment of Kelly J. in *IBRC v. Comer* [2014] IEHC 671. These principles, accepted by counsel for Capita, are to be found at paragraphs 43 and 44 of the judgment. Having noted at paragraph five of the judgment that such an application is not a trial of the proceedings and that therefore no adjudication on the validity or efficacy of the relevant legal instruments should be made at this point, Kelly J. went on to say:-

“43. In my view, the onus of proof on a procedural motion of this sort is very different to the onus of proof which is required at the trial. I do not believe that it would be either appropriate or indeed in the interests of justice that on a procedural motion of this sort, far reaching decisions concerning the

efficacy and validity of the underlying sale agreement or the assignment of a notice of that assignment should be made.

44. That would turn a procedural motion which, even under the rules is contemplated as one which can be made *ex parte*, into a sort of mini-trial of the action. That is not what is envisaged by the rules of court and is certainly not envisaged under the rules of the Commercial Division of the court."

I should say that the application before me was made in the Chancery List as opposed to the Commercial List, but I see absolutely no reason why the same approach should not apply.

(iii) On the basis of the rules set out in *Comer*, counsel went on to submit that Mr. McCudden's affidavit provides prima facie evidence that justifies the making of the order sought. In particular, he argues that the Loan Sale Deed provides for the purchase by Everyday from Stapleford of the Purchased Assets. The Purchased Assets are defined as including:-

"[...] any and all of [Stapleford's] rights, title, interest and benefit in the Loan Documents including any assets secured or to be secured by the Loan Documents [...]"

10. The Loan Documents are defined as:-

"[...] the loan documents, facility letters and any guarantees and indemnities, security documents relating to each Facility [...]"

11. 'Facilities' are the outstanding loans linked to the accounts 'to be purchased by [Everyday] pursuant to the Loan Sale Deed'; Mr. McCudden gives uncontradicted evidence that the loan facilities secured by the Security Deeds of Assignment were the loan facilities transferred by the Loan Sale Deed and the Deed.

12. Finally, counsel submits that the Deed (by which, at the request of Stapleford as beneficial owner, Pepper transferred the legal interest in the loans to Everyday) effects the assignment to Everyday of the loans 'subject to and with the benefit [...] of the related Loan Document [...]' As Loan Document is a defined term, and as it bears the same meaning in the Loan Sale Deed as in the Deed, Everyday have therefore acquired the legal and beneficial interest in the securities relating to the relevant facilities; the funds at issue in these proceedings are he submits among the assets so secured.

13. As I have mentioned, notwithstanding the affidavit of Mr. Darwin, counsel for Capita made no submission by reference to its contents; this makes one wonder why it was sworn in the first place. As I have also mentioned, counsel made some submissions which referred to the efficacy of the transfers prior to any acquisition by Everyday of an interest in Mr. Lavelle's loans and the associated security. For the reasons which I have given I do not think that such submissions relate to the motion before me. In any event, I think it inconsistent with the principles set out in *Comer* that I would decide the validity or efficacy of any such transactions. Counsel also submitted that there must be evidence that Everyday had acquired the rights of Anglo in respect of an October 2006 facility letter

with Mr. Lavelle; however, the claim by Stapleford to the funds is based on a suite of facility letters which expressly do not include the October 2006 arrangements. Paragraph 9 (ii) of Stapleford's Points of Claim in these proceedings plead that the October 2006 facility was 'replaced and superseded' by a facility letter of January 2007. Stapleford may be right or wrong in the case it makes in this regard, but in taking over Stapleford's claim to the funds it does not seem to me that Everyday must show the acquisition by it of a loan which does not underpin that claim.

14. Counsel for Capita referred to disparities between what is to be transferred under the Loan Sale Deed as opposed to the Deed. In particular, she relied upon the definition of 'Purchased Assets' in the Loan Sale Deed and argued that this is confined to five loans. She also submitted that there was either no evidence, or insufficient evidence, that Everyday had acquired the claim made by Stapleford in respect of the funds which are at the heart of these proceedings.
15. I do not feel that the claimed disparities between the Deed and the Loan Sale Deed have the significance contended for by counsel for Capita. In particular, I find that the submission by counsel for Everyday presents a coherent and plausible analysis as to the legal effect of the Deed and the Loan Sale Deed. I am conscious that, in accordance with *Comer*, I should not express any view on the efficacy or validity of either of these instruments. However, I am quite satisfied that Everyday has made out a sufficient case to justify making an order in the terms of paragraph 1 of the Notice of Motion. I will therefore make an Order replacing Stapleford with Everyday as the first claimant in this action.