

**THE HIGH COURT**

**[2023] IEHC 633**

**Record No. 2023 / 35 CA**

**Between/**

**MARS CAPITAL FINANCE IRELAND DAC**

**Plaintiff**

**and**

**CECIL WALSH AND NAOMI WALSH**

**Defendants**

**Judgment of Ms. Justice Emily Farrell (*ex tempore*) delivered on the 15<sup>th</sup> November 2023:**

1. This is an appeal against the refusal of the Circuit Court to grant leave to issue execution of an order for possession granted to EBS Mortgage Finance on 5<sup>th</sup> December 2017.
2. By notice of motion filed the 18<sup>th</sup> May 2022, application was made for two orders, namely an order pursuant to Order 22 r. 4 of the Circuit Court Rules (as amended) substituting the Applicant, Mars Capital Finance Ireland DAC, as Plaintiff in the proceedings and secondly, an Order pursuant to Order 36 r.10 and/or Order 36 r. 9 of the Circuit Court Rules (as amended) granting the applicant, Mars Capital Finance Ireland DAC, leave to issue execution in respect of the order for possession made by the Circuit Court on 5<sup>th</sup> December 2017. The application was grounded on the affidavit of Ronan Hopkins, of Mars Capital Finance Ireland DAC and supplemented by the affidavit of Hilda Mannix, solicitor.
3. By Order dated 15<sup>th</sup> September 2022, the County Registrar granted orders amending the title of the proceedings to read Mars Capital Finance Ireland DAC and directing that all further future proceedings be carried out between Mars Capital Finance Ireland DAC, as Plaintiff, and the Defendants. The application for relief sought at paragraph 2 of the notice of motion was heard by Her Honour Judge Alice Doyle on 16<sup>th</sup> February 2023 and was refused. There was no appearance by or on behalf of the Defendants before the County Registrar or Judge Doyle.
4. The sole issue on the appeal relates to the refusal to grant leave to issue execution.
5. At the hearing of this appeal, counsel on behalf of the Applicant stated that the application was being moved under Order 36 r. 10 and not r. 9.
6. It is not in dispute that the grant of leave to issue execution is discretionary or that the principles in *Smyth v. Tunney* [2004] IESC 24; [2004] 1 IR 512 apply by analogy to an application under Order 36 r.10. The Defendants rely on *ACC Bank plc v. Joyce & Ors* [2022] IEHC 92 and *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12

wherein it was held that unless a reason or explanation is given for the lapse of time, the jurisdiction to seek leave to issue execution is not engaged.

7. Reasons have been provided in the affidavit of Hilda Mannix for the lapse of time between the making of the Order for possession on 5<sup>th</sup> December 2017 (which was subject to a stay for six months) and the bringing of the application for leave to issue execution on 18<sup>th</sup> May 2022. The Defendants have not objected to the making of the order sought by the Applicant on the grounds of delay and no prejudice has been asserted.
8. On behalf of the Defendants, it was submitted that the order should be refused as it has not been established that Mars Capital Finance Ireland DAC, the Applicant, was entitled to issue execution.
9. The Applicant argued that this Court could not look behind the order made by the County Registrar amending the title of the proceedings and that, accordingly, the Defendants cannot challenge the appropriateness of Mars Capital Finance Ireland DAC as the applicant for leave to issue execution.
10. In *Mars Capital Ireland DAC v. Hunter* [2022] IEHC 353, Simons J. found that it was implicit from the order of the Circuit Court, which had substituted Mars Capital Ireland DAC as plaintiff, that the Court had been satisfied that Mars Capital Ireland DAC had succeeded to the interest in the order for possession. As in the instant case, the Defendant had not opposed the substitution of the plaintiff or amendment of the title of the proceedings. Simons J. found that the defendant was bound by the earlier order of the Circuit Court by virtue of the doctrine of *res judicata*. (para. 23) This issue was not raised before Simons J. in *Mars Capital Ireland v. Temple* [2023] IEHC 94, which was relied upon by the Defendants.
11. In contrast with *Hunter*, the order substituting the name of the plaintiff in this case was made by the County Registrar who transferred the application to issue execution to the Circuit Court.
12. Whether or not the title of the proceedings should be amended and whether the applicant should be substituted for the plaintiff is not in issue before me – that has been decided by the County Registrar and was not appealed.
13. Order 36 r. 10 provides:

*“If, at any time during the period of twelve years, any change has taken place, by death, assignment or otherwise, in the parties entitled or liable to execution, the party claiming to be so entitled may apply to the Court on notice for leave to issue execution, and the original decree or judgment may be amended so as to give effect to any order made by the Court on the application.”*
14. The application which came before the Circuit Court on 16<sup>th</sup> February 2023, and on appeal to this Court, is an application by Mars Capital Finance Ireland DAC as the party claiming to be entitled to the benefit of the order for possession made on 5<sup>th</sup> December 2017.

15. I do not accept, as a matter of principle, that the Order of the County Registrar had the effect of fettering the power of the Circuit Court, or this Court on appeal, to decide whether the newly substituted Plaintiff is entitled to execute the order of 5<sup>th</sup> December 2017. While the County Registrar had amended the title of the proceedings and ordered that all future proceedings be carried on between Mars Capital Finance Ireland DAC and the Defendant, the substance of the application under Order 36 r.10 was adjourned to the Circuit Court.
16. The County Registrar did not determine the question whether the Applicant, who claimed to be entitled to the benefit of the Order for possession made the 5<sup>th</sup> December 2017, was in fact so entitled.
17. Requiring the Applicant to establish, for the purposes of the application under Order 36 r.10, that it was entitled to execute the Order for possession does not amount to a collateral attack on the Order of the County Registrar.
18. Accordingly, it is necessary to determine whether any change which has occurred since the grant of the Order for possession is such that Mars Capital Finance Ireland DAC is entitled to issue execution of that Order.
19. By Order dated 5<sup>th</sup> December 2017, the Circuit Court granted an Order for possession to EBS Mortgage Finance against the Defendants in respect of an identified folio of the Register of Freeholders in the County of Wexford. It appears that an application will be required under the slip rule in respect of that order, and Counsel for the Defendants accepted that such an application could be made to the Circuit Court in the event that this Court finds that the Applicant's proofs are in order.
20. The charge, subject of these proceedings, was registered on 4<sup>th</sup> January 2010 in favour of EBS Building Society who was stated on the Folio to be the owner of the charge. On 30<sup>th</sup> June 2021 Mars Capital Finance Ireland DAC was registered as the owner of the charge. The Defendants accept that the Applicant owns the charge, but contend that it must establish that it owns the debt and that it has failed to do so.
21. In *Mars Capital Ireland v. Temple*, the appeal before the High Court was an appeal against an order for possession granted by the Circuit Court; it does not relate to an application for leave to issue execution. Simons J. adjourned the hearing of the appeal to plenary hearing as one of the central issues, for which there was insufficient evidence, was whether Mars Capital Ireland had succeeded to the debt, the subject of the application for possession. Simons J. held that the limited evidence before the court was, at best, ambiguous as to whether the debt was owed by the defendants to the plaintiff.
22. As the Order for possession was made in favour of EBS Mortgage Finance, it is not necessary or appropriate, to look behind that Order for possession, which Order is not the subject of this appeal. I am reinforced in this view by the *dictum* of Allen J. at para. 47 in *Irish Nationwide Building Society v. Heagney* wherein he stated: “*In the case of a change of entitlement or liability within six years of the judgment or order, the applicant need prove no more than that there has been such a change.*”
23. No evidence has been proffered by the Defendants to dispute the averments of Ronan Hopkins, a Manager for the Applicant, nor was an application made for cross-

examination of the deponent. At para. 8 he states that on 1<sup>st</sup> September 2020 the Facilities and the Charge, the subject of the within proceedings, were transferred and assigned by EBS Mortgage Finance to EBS DAC pursuant to section 58 of the Asset Covered Securities Act, 2001.

24. It is stated, at para. 9, that a loan book was sold by the Bank to the Applicant which included the loan facilities and charge which were the subject of these proceedings. He states:

*“On 30 April 2021 the Bank executed a Deed of Transfer (the “Transfer Deed”) whereby the Bank granted, conveyed, assigned, confirmed, transferred and assured all its rights, title, interest, estate, benefit and entitlement (past, present and future) in the outstanding loans advanced to the Defendants and all underlying loan documents, including the facilities, to the applicant (the “Transfer”). I beg to refer to a copy of the transfer deed and to the relevant extract from the schedule to the transfer deed confirming the inclusion of the defendants’ loan accounts ...*

*The Schedule to the Transfer Deed, as exhibited at RH3 above, identifies the loans which are the subject of the transfer. The account number column in the schedule remains unredacted and contains the defendants account numbers...”*

25. The account numbers are the same as the numbers on the “Goodbye Letter” and “Hello Letter” sent to the Defendants which are also exhibited.
26. It is argued on behalf of the Defendants that the Transfer Deed is the same as the deed of transfer considered by Simons J. in *Temple* and that this document does not establish that the Defendants’ debt had been transferred to the Applicant. It would appear from the judgment of Simons J. that an incomplete version of the transfer deed was before the court in that case. (para. 7). The transfer deed exhibited at “RH3”, which is 4 pages, appears to be complete. However, it must be read together with the Mortgage Sale Agreement dated 18<sup>th</sup> February 2021, which is not before the court. Recital (B) to the transfer deed provides that “*Terms defined in the Mortgage Sale Agreement shall have the same meanings in this deed, save where otherwise specified or where the context requires otherwise.*”
27. Paragraph 1.5 of the Transfer Deed states that “*all the estate, right, title and interest in the properties listed in the schedule hereto*” are transferred under the deed. The Schedule refers to the borrower ID, sub-borrower ID, sub-borrower names, facility ID and legal entity but the address of the property is not specified therein. This *may* be sufficient to identify the property as being the property, which is the subject of the order of possession, but that would depend on the contents of the Mortgage Sale Agreement, which is not before the court. There is no evidence before the Court to establish that the account numbers / facility ID specified in the Schedule to the Transfer Deed relate to the property the subject of the order for possession.
28. The supplemental affidavit sworn by Hilda Mannix, Solicitor includes an averment that, since the loan and mortgage the subject of the proceedings were transferred to the Applicant, the Defendants have not engaged and not made any payments towards the arrears and debt the subject of the proceedings.

29. I refuse the application as the evidence before the court does not establish an assignment in writing of the mortgage and right to the benefit of the order for possession in these proceedings. I do not exclude the possibility of a renewed application being made in the event that the Applicant can provide evidence which demonstrates that it is the entity entitled to issue execution of the Order for possession made the 5<sup>th</sup> December 2017.