

APPROVED

[2024] IEHC 625



THE HIGH COURT
CIRCUIT APPEAL

2019 332 CA

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC
TRADING AS PEPPER ASSET SERVICING

PLAINTIFF

AND

LIZ MOYNIHAN
(OTHERWISE ELIZABETH MOYNIHAN)

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 7 November 2024

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The order under appeal is an order directing the defendant to deliver up possession of a property to Pepper Finance Corporation (Ireland) DAC (“*Pepper Finance*”). The order of the Circuit Court (Her Honour Judge Linnane) is dated 15 July 2019.

NO REDACTION REQUIRED

2. The appeal ultimately came on for hearing before me on 24 October 2024. The appeal takes the form of a complete rehearing, with the parties remaining in the roles which they had occupied in front of the Circuit Court. Accordingly, notwithstanding that the defendant is the appellant, the plaintiff remains the moving party in the proceedings and bears the onus of establishing the “*proofs*” necessary to ground an application for an order for possession pursuant to section 62(7) of the Registration of Title Act 1964.
3. For the reasons explained below, the plaintiff has not yet established its proofs and the matter will have to be remitted to plenary hearing.

LEGISLATIVE FRAMEWORK

4. The application for an order for possession is made pursuant to section 62(7) of the Registration of Title Act 1964 (as applied by section 1 of the Land and Conveyancing Law Reform Act 2013). Pepper Finance, as moving party, must establish, first, that it is the owner of the registered charge, and, secondly, that the “*principal money*” in respect of a debt secured by the charge has become due and owing.
5. The Circuit Court Rules envisage that an application for an order for possession will normally be made on a summary basis: see Order 5B. However, the Circuit Court—and the High Court on appeal—enjoys a broad discretion to remit an application to plenary hearing.
6. The principles guiding the exercise of this discretion have been clarified by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381. Baker J., delivering the unanimous judgment, explained that there are a range of responses available to a court in an action for summary

judgment. At one end of the range are cases where a plaintiff establishes its claim on the affidavit evidence because the defendant is not able to persuade the judge either that the evidence is incomplete nor that there is a basis on which a credible defence exists. At the other end of the range are cases where a defendant either positively establishes a defence at law or on the merits, or, alternatively, persuades the judge that the plaintiff has not established its proofs.

7. Baker J. went on then to explain, at paragraph 80 of the reported judgment, that many cases fall between these two extremes:

“Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant by way of defence which is not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff’s evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument. In that instance the trial judge is constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing.”

8. The position was summarised as follows at paragraph 105 of the reported judgment:

“The jurisdiction is one vested by the CCR but may properly be said to be one that exists in any case heard on affidavit. It is perhaps the default position in any case where the affidavit evidence is evenly balanced, where there is a conflict on the affidavits between the parties which cannot be or has not been resolved by way of further affidavit, where the court considers that a matter raised on affidavit, particularly one raised in defence, might have such a bearing on the outcome that its credibility deserves to be fully tested, or where a judge considers that in the light of certain averments which are credible, but not dispositive, it would be either difficult or unfair to resolve the matter without giving both sides the opportunity to further advance that evidence or, where necessary, to test it. The adjudicative function is not a matter of box ticking or a purely logical engagement with a

checklist of proofs that must be met by a plaintiff. Certain evidential presumptions or burdens can make the task of adjudication at times appear almost effortless, but the fact remains that a judge met with evidence, whether contested or not, must weigh that evidence, assess its veracity, credibility, and importance for the purposes of proving those matters that are required to be established. In a case where the action is heard on affidavit, courts are vigilant to consider the option to adjourn the matter for plenary hearing. The vigilance derives from the fact that affidavit evidence of its nature is often in terms which have a tone of certainty which is not always found in oral testimony, particularly where that is cross-examined, and because the affidavits are often drafted by lawyers with a view to the legal test.”

9. I turn next to apply these principles to the circumstances of the present case.

(1). OWNERSHIP OF CHARGE

10. The first proof to be established by the moving party in an application under section 62(7) of the Registration of Title Act 1964 is that they are the registered owner of the charge. Here, Pepper Finance asserts that it is now the registered owner of a charge registered on Folio DN188124F, County Dublin. The lands are known as 124 Bunting Road, Walkinstown, Dublin 12.
11. The folio identifies the charge holder as GE Capital Woodchester Home Loans Ltd. The moving party has filed certificates from the Companies Registration Office which confirm the following: (i) GE Capital Woodchester Home Loans Ltd changed its name to Pepper Finance Corporation (Ireland) Ltd on 11 October 2012; and (ii) Pepper Finance Corporation (Ireland) Ltd converted to a designated activity company (“DAC”) on 29 October 2015.
12. Section 31 of the Registration of Title Act 1964 provides that the register shall be conclusive evidence of any right, privilege, appurtenance or burden appearing on the register. The Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352, [2019] 1 I.R. 385 held, *inter alia*, that the correctness of the register cannot be

challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and that the right to possession has arisen and become exercisable. This decision has since been approved of by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (cited above). If and insofar as a defendant wishes to challenge the correctness of the register, it is necessary for them to institute separate proceedings against the Property Registration Authority of Ireland.

(2). OWNERSHIP OF UNDERLYING DEBT

13. Having established that Pepper Finance is the registered charge holder, it is necessary next to examine whether the moving party has established the second essential proof, namely, that the “*principal money*” in respect of a debt secured by the charge has become due and owing.
14. The usual way in which a creditor establishes that the principal money secured by the instrument of charge has become due is to exhibit: (i) the loan agreement itself; (ii) the demand for repayment (if this is a prerequisite to the principal money becoming due and owing); and (iii) a statement of account which indicates that an event of default, which triggers the obligation to repay the principal money, has occurred and has not been remedied. There is then normally an affidavit confirming that the account is still in arrears as of the date the proceedings are issued. The exhibits in the present proceedings contain documentation of this type.

15. In the present case, the debt is said to arise under a loan agreement entered into between GE Capital Woodchester Home Loans Ltd and Liz Moynihan (the defendant) on 17 April 2008. As explained earlier, the lender has since changed its name and converted to a designated activity company. The lender is now known as Pepper Finance Corporation (Ireland) DAC.
16. The affidavit evidence establishes that the principal monies owing under the loan agreement are due. More specifically, the defendant failed to make the monthly payments as due and this event of default triggered an entitlement on the part of the lender to demand early repayment of the principal and accrued interest. A formal demand was made on 16 August 2016.
17. The distinguishing feature of the present case is that the beneficial interest in the underlying debt is held by an entity other than the plaintiff. More specifically, it appears that the beneficial interest in the underlying debt has been transferred to a company known as Windmill Funding Ltd. It further appears that the contractual intention had been that the legal interest would be held, temporarily, by the company now known as Pepper Finance Corporation (Ireland) DAC as a “bare trustee”.
18. Counsel on behalf of the plaintiff has cited the judgment of the High Court (Binchy J.) in *Pepper Finance Corporation (Ireland) v. Jenkins* [2018] IEHC 485 as authority for the proposition that a bare trustee is entitled to pursue an application for an order for possession. Counsel also cites *Pepper Finance Corporation (Ireland) v. Farrelly* [2022] IEHC 272 (Heslin J.), which cites *Jenkins* with approval. The difficulty in the present case, however, is that the evidential foundation for advancing this proposition has not been established.

It is not apparent, from the limited evidence which has been put before the court, that Pepper Finance necessarily retains legal ownership.

19. Pepper Finance has exhibited a heavily redacted deed entitled “*mortgage sale deed*” dated 28 September 2012. The mortgage sale deed appears to consist of 26 pages. Of these, the equivalent of approximately 18 pages have been redacted entirely. The redactions are not confined to the schedule of properties and security documents, i.e. information which might identify other borrowers. Rather, whole swathes of the operative clauses of the deed have been omitted. The table of contents of the deed indicates that there are 18 clauses. Of these, 15 have been redacted almost in their entirety.
20. In consequence, it is simply impossible for the court to interpret the deed or to determine its precise legal effect. It is not, for example, possible to identify the events which would trigger an obligation on the part of Pepper Finance to transfer the legal title in the underlying debt to the purchaser or its nominee. Still less is it possible for the court to know whether any of these (undisclosed) events might already have occurred. The court cannot be satisfied, therefore, on the basis of the heavily redacted version of the deed that the legal title to the underlying debt still remains with Pepper Finance.
21. If a party to litigation wishes to rely on a deed as establishing a particular proposition (here, that the ownership of the legal title remains with Pepper Finance), then it is necessary for that party to exhibit the deed in a form which is meaningful. It is not appropriate to exhibit a deed with more than three quarters of its contents obliterated. Nor is it appropriate to attempt to summarise in a few lines of an affidavit what is undoubtedly a complex commercial transaction.

22. In this latter connection, the following observations of the Court of Appeal in *Pepper Finance Corporation (Ireland) Ltd v. Macken* [2021] IECA 15 (at paragraph 12), albeit made in a different context, have some resonance:

“All members of this Court fully understand how, in the course of preparing affidavits seeking to provide reasonably clear explanations of complex transactions, details can be omitted and that judgments are necessarily made as to what it is, or is not, helpful to record on affidavit. Inevitably it may happen that with hindsight those judgments might have been made differently. However, in an application of this kind a partial explanation of a transaction – however complex it may be – should never be tendered, and the Court should be advised properly of all key elements thereof. [...]”

23. The foregoing observations were made in the context of an application to substitute a party, pursuant to Order 17 of the Rules of the Superior Courts, on the basis that there had been a transmission of the legal interest in the relevant debt as the result of the sale of the original party’s loan book. The position here is different in that the plaintiff contends that it had been the original lender (albeit under a different name) and continues to retain the legal title to the debt. Nevertheless in circumstances where the defendant has sought to challenge those assertions and the plaintiff, in reply, seeks to exhibit a specific deed in support, it is important that the deed not be so heavily redacted as to make it largely meaningless.
24. It should be reiterated that this is not a case where minor redactions have been made to a deed on the grounds that same are necessary to protect the privacy of third parties whose debts are said to have been encompassed as part of a global transfer of assets. Nor is it a case where it has been asserted, on a reasoned basis, that certain information has been redacted on the grounds of commercial sensitivity (cf. *Farrell v. Everyday Finance DAC* [2024] IECA 16). Rather, whole swathes of the operative part of the deed have been blanked out, without

any meaningful explanation or justification having been offered. The redactions are so extensive that this court cannot safely interpret the legal effect of the deed.

25. As matters currently stand, therefore, Pepper Finance cannot succeed in its application for an order for possession. That is not, however, an end of the matter. This court, exercising its appellate jurisdiction from the Circuit Court, has discretion pursuant to Order 5B of the Circuit Court Rules to direct that the matter be remitted to plenary hearing. The principles governing the exercise of this discretion have been set out authoritatively by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (cited above).
26. Whereas I am not satisfied that Pepper Finance has, as of yet, made out the proofs for an application for an order for possession, neither am I satisfied that the defendant has, as of yet, made out a defence on the basis that legal ownership of the charge and underlying debt has been transferred from Pepper Finance. The court cannot draw final conclusions, one way or the other, on the basis of the very limited evidence which has been put before the court by Pepper Finance. I have decided, therefore, that the interests of justice require that the matter be remitted to plenary hearing. This will allow the parties an opportunity to put in whatever further evidence they wish. The court can then adjudicate on the matter on the basis of a complete set of evidence.

CONCLUSION AND PROPOSED FORM OF ORDER

27. For the reasons explained herein, this appeal will be adjourned to plenary hearing pursuant to Order 5B of the Circuit Court Rules. The plenary hearing will be before the High Court. (See *Bank of Ireland Mortgage Bank v. Cody* at paragraphs 110 to 113 of the reported decision).

28. It is important to reiterate that this judgment says no more than that the defendant has demonstrated, on the basis of the limited materials before the court to date, that there are credible grounds for defending the proceedings. The judgment does not say that the potential defence is necessarily a strong one. Rather, the point is that the legal and factual issues raised by the defendant are sufficiently weighty to preclude the case being determined in a summary or peremptory manner. It will be for the trial judge to decide the case on the basis of oral evidence and such further documentation as may be directed to be discovered.
29. It should also be emphasised that this judgment does not say that it is impermissible for the legal owner of the underlying debt to apply for an order for possession merely because the legal owner is a bare trustee. Rather, the judgment goes no further than saying that the current state of the evidence does not necessarily establish that the plaintiff continues to hold the legal title.
30. The following timetable is proposed for the exchange of pleadings and the making of discovery:
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|------------------|----------------------------------------------------|
| 2 December 2024 | Plaintiff to deliver points of claim |
| 13 January 2025 | Defendant to deliver points of defence |
| 27 January 2025 | Any requests for voluntary discovery to be served |
| 24 February 2025 | Any motion for discovery to be issued by this date |
31. This matter will be listed before me on 21 November 2024 at 10.30 AM for further directions and to address the issue of costs.

Appearances

Shaula Connaughton-Deeny for the plaintiff instructed by RDJ LLP
The defendant appeared in person

