

THE HIGH COURT

[2023] IEHC 564

[2021/6360P]

BETWEEN

KIERAN MCKENNA

PLAINTIFF

AND

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY

COMPANY AND KEN FENNELL

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 9th day of October, 2023

Introduction

1. This is an application for an injunction by the plaintiff restraining the first and/or second named defendants from “selling and/or completing any sale entered into” in respect of a particular property consisting of farmlands in County Monaghan (“the property”). The key feature of this application is that, in fact, the receiver, (the second named defendant), has already entered into a contract of sale to sell the said property to a third party and therefore the substance of this application is to restrain the receiver completing this sale pending the determination of these proceedings.

Background to the current application

2. On or about 16th November, 2004, the plaintiff borrowed the sum of €220,000 from Irish Nationwide Building Society. Some months later, on 8th March, 2005, this loan was secured on the property when the plaintiff mortgaged the said property to Irish Nationwide

Building Society. The loan and mortgage were subsequently transferred to Irish Bank Resolution Corporation Ltd (“IBRC”) on or about 1st July, 2011.

3. The loan and mortgage were subsequently transferred to Shoreline Residential Ltd (“Shoreline”) by IBRC on or about 6th March, 2014.

4. On or about 8th July, 2015 the plaintiff defaulted on his loan and no payment of principal or interest on the said loan has been made since that time.

5. On or about 17th September, 2018, Shoreline appointed the second named defendant as Receiver over the said lands.

6. On 18th April, 2019, Shoreline transferred the loan and mortgage to Pepper Finance Corporation (Ireland) DAC, (“Pepper”) the first named defendant in these proceedings.

7. On 8th August, 2019, some four months later, the appointment of the second named defendant as Receiver, was novated from Shoreline to Pepper in an agreement entered into between Shoreline, Pepper and the receiver.

8. The current debt outstanding on the loan is approximately €276,550 and interest continues to accrue at €33 per day.

9. Attempts were made by the Receiver to sell the property in September 2019, November 2020, and December 2020, without success.

10. Around this time, the plaintiff appointed a Mr. Larry Shiels to act on his behalf and to negotiate with the defendants on his behalf in respect of his loan.

11. On 2nd February, 2021, Mr. Shiels, on behalf of the plaintiff, made an offer of €80,000 “in full and final settlement of this matter” payable within 90 days. This offer was rejected.

This offer was increased to €90,000 on 16th March, 2021 and was again increased to a sum of €120,000 on 9th July, 2021. (It is clear from the affidavit evidence that the plaintiff also mortgaged another of his properties – a residential house in another part of Monaghan. There

was some confusion therefore about the meaning of this offer. This will be dealt with later in this judgment).

12. These offers were rejected by Pepper and, on or about 28th July, 2021, the Receiver entered into a contract of sale to sell the property to a third party for the sum of €120,000.

13. The plaintiff's solicitors were informed of this on 7th September, 2021 by phone and on the 29th September, 2021 in writing.

14. On 18th November, 2021, the plaintiff issued his plenary summons in these proceedings.

15. However no application for an interlocutory injunction was brought at that time. Instead the plaintiff waited until 26th January, 2022 – some months later - to issue a notice of motion seeking the current injunctive relief. This notice of motion was grounded on the plaintiff's affidavit which was sworn on the 17th November, 2021 (i.e. one day before the plaintiff issued his plenary summons).

The legal principles governing the granting of interlocutory injunctions

16. The legal principles governing the granting of interlocutory injunctions were recently set out by the Supreme Court in *Merck Sharp and Dohme Corporation v. Clonmel Healthcare* [2019] IESC 65.

17. At paragraph 64 of his judgment, O'Donnell J (as he then was) stated as follows:

"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American

Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the

remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined.”

A fair question to be tried

18. The defendants submitted that the plaintiff had not even established that there was a fair question to be tried such as to entitle him to interlocutory relief. Indeed most of the submissions at the hearing of this matter focussed on the issue of whether the plaintiff had established a fair question to be tried

19. The plaintiff put forward a number of issues which, he submitted, were all fair issues to be tried. I will deal with each of these in turn.

The first issue - the “chain of title” argument

20. The plaintiff’s first argument was that the first defendant had no proper legal title to the loan and/or mortgage and he took issue with the “chain of title” of the first and second defendants.

21. This argument is also inextricably linked with his second argument which is that he never received proper notice of the assignment of the debt as is required under s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 (“The 1877 Act”). I will therefore deal with “chain of title” argument first and then the “notice” argument.

22. As set out earlier in this judgment, the plaintiff initially took out his loan with Irish Nationwide Building Society. Thereafter, there were a number of assignments/transfers of this loan and mortgage as follows:

- (a) the transfer from Irish Nationwide Building Society to IBRC;
- (b) the transfer from IBRC to Shoreline;
- (c) the transfer from Shoreline to Pepper.

23. The plaintiff has indicated in his legal submissions that he does not take any issue with the transfer of the loan and the mortgage from Irish Nationwide Building Society to IBRC.

The transfer from IBRC to Shoreline

24. However the plaintiff has challenged the transfer of (a) the loan and (b) the mortgage from IBRC to Shoreline.

25. However it appears that the plaintiff accepts the Global Deed of Transfer transferring a portfolio of loans from IBRC to Shoreline, and accepts that the plaintiff's loan was part of this portfolio of loans. However he contests the fact that any notice was given to him of this assignment and he argues that there was no valid legal assignment of the debt from IBRC to Shoreline because of this lack of notice (I will deal with the issue of notice below).

26. I am satisfied on the evidence before the Court that there was a valid transfer of the plaintiff's debt from IBRC to Shoreline.

The transfer from Shoreline to Pepper

27. The plaintiff also contests the valid assignment of his loan and his mortgage from Shoreline to Pepper.

28. The plaintiff again accepts that there was a global transfer of a portfolio of loans from Shoreline to Pepper (including his loan) as set out in a document entitled "Legal Title Transfer Deed" dated 18th April, 2019. However he again asserts that he never received notice of the assignment of the loan and/or of the mortgage and submits that there was therefore no proper legal assignment of the debt from Shoreline to Pepper. Again, the plaintiff seems to argue that the reason there is a gap in the "chain of title" is because he did not receive notice of the assignment from Shoreline to Pepper – not that the debt was not actually assigned from Shoreline to Pepper. I will deal with the issue of notice later in this judgment.

29. Having considered all the evidence before the court, I am satisfied that Pepper has established that it received a valid assignment of the debt from Shoreline and that it has a clear “chain of title” to prove that it is the lawful owner of the plaintiff’s debt. I am satisfied that the plaintiff has not made out a serious issue to be tried on this matter.

The second issue – no notice in writing to plaintiff of the assignment

(i) *The transfer from IBRC to Shoreline*

30. The fundamental point made by the plaintiff on this issue is that he was not given any notice of the assignment of the debt and/or of the mortgage from IBRC to Shoreline and, in those circumstances, he says that there was no valid legal assignment of the debt and/or the mortgage to Shoreline.

31. In response, counsel for the defendants relied on s.12 of the Irish Bank Resolution Corporation Act, 2013 (No. 2) which provides that the sale and transfer of any asset or liability by IBRC, to any person, shall take effect, notwithstanding any statutory provision or rule of law which requires that notice should be given to any person.

32. As this issue did not form part of the written legal submissions exchanged between the parties, counsel for the plaintiff sought time to consider the matter over the lunch break and in the afternoon, he raised a number of cases in which the constitutionality of s. 12 had been raised, but not definitively considered, by a court. The plaintiff indicated that this was a matter on which he would be making submissions at the trial of the action and that he would argue that s. 12 of the said Act was unconstitutional. Counsel for the defendants submitted that the statute enjoys a presumption of constitutionality.

Presumption of constitutionality

33. The question which then arises is how does a court consider the presumption of constitutionality in an application for an interlocutory injunction.

34. As is stated in Equity and the Law Trusts in Ireland (Delaney 4th edition at page 543):

“In Pesca Valentia, Kelly J. stated that it seemed to him that the mere existence of the presumption of constitutionality in favour of the impugned legislation did not mean that new or different rules should govern the application. Instead he was of the view that he must weigh the presumption of constitutionality in the balance when deciding the question of whether a serious issue to be tried had been established and also in deciding where the balance of convenience lay. Applying these principles to the facts of the case before him, Kelly J. concluded that the plaintiff had not established that there were any serious issues to be tried and said that in any event the balance of convenience would lie in favour of refusing the reliefs sought”.

“So it would appear that the courts are of the view that no special principles are to be applied to applications for interlocutory injunctions where issues relating to the presumption of constitutionality are involved. However it is also clear that at the very least this presumption must be weighed in the balance when deciding the question of whether a serious issue to be tried has been established.”

35. In the present case, s. 12 of the IBRC Act, 2013 enjoys a presumption of constitutionality, and in my view, this presumption must be given due weight in assessing whether the plaintiff has raised a fair issue to be tried. Having considered the plaintiff’s submissions on this matter, I do not believe that he has raised a serious issue to be tried of such a nature as to displace the presumption of constitutionality.

(ii) The transfer from Shoreline to Pepper

36. In addition, the plaintiff submitted that he had not received a valid notice in writing as required by s. 28(6) of the 1877 Act of the assignment from Shoreline to Pepper and therefore, Pepper did not have a proper legal assignment of the debt.

37. This argument was rejected by Pepper who submitted that proper notice in writing had been given to the plaintiff.

38. Counsel for the defendants pointed to the voluminous affidavit and exhibits of Mr. Seamus Dowling (the operations manager of Pepper) which set out all the documents not only relating to Pepper’s chain of title to the loans, but also in relation to correspondence with the plaintiff and in particular to the letter of the 23rd May, 2019 from Shoreline to the plaintiff informing the plaintiff that Shoreline had transferred the loan and the mortgage to Pepper (“the goodbye letter”) (see page 289 of that booklet).

39. Counsel for Pepper also pointed to a letter at page 293 of the booklet which was a letter from Pepper to the plaintiff dated 14th June, 2019 informing the plaintiff that Shoreline had transferred the plaintiff’s loan and mortgage to Pepper Finance from 18th April, 2019 (the “hello letter”).

40. Counsel for the plaintiff submitted in reply that the plaintiff had never received these letters.

41. However counsel for Pepper also relied on a letter dated 14 October, 2020 sent by Pepper’s solicitors to the plaintiff – which letter the plaintiff accepts he did receive. This letter stated as follows:

“Dear Sir,

We act on behalf of Pepper Finance Corporation (Ireland) Designated Activity Company (“Pepper”). We refer to the facility letter dated 16th November, 2004 entered into between Irish Nationwide Building Society (“the Society”) and Kieran McKenna (the borrower) together with the terms and conditions therein contained or thereby incorporated (the “loan agreement”). We refer also to the mortgage dated 8th March, 2005 between the Society and Kieran McKenna (the mortgage) over the property provided to the Society as security for the repayment of the loan facilities listed in and set out in the loan agreement.”

“By virtue of transfer order made in the High Court on 1st July, 2011 pursuant to s. 24 of the Credit Institutions (Realisation) Act, 2010, certain assets and liabilities of the Society were transferred to Anglo Irish Bank Corporation Ltd. By special resolution dated 3rd October, 2011 Anglo Irish Bank Corporation Ltd changed its name to Irish Bank Resolution Corporation Ltd (IBRC)...”

“Pursuant to a deed of transfer dated 6th June, 2014 entered into by IBRC, all rights, title, interest, benefits, liabilities, duties and obligations of IBRC in and to the Loan Agreement, the related loan facilities and the mortgage transferred to Shoreline Residential Ltd which subsequently converted to a Designated Activity Company on 22nd August, 2016 and is now called Shoreline Residential Designated Activity Company (“Shoreline DAC”). On 18th April, 2019, by way of a declaration of trust and other related deeds between Shoreline DAC and Pepper, certain rights, title, interests, benefits, liabilities, duties and obligations of Shoreline DAC in and to the Loan Agreement, the related loan facilities and the mortgage transferred to Pepper such that Pepper became legal title holder of the Loan Agreement, the related loan facilities and the mortgage with effect from 18th April, 2019.”

- 42.** Pepper submits that this letter informed the plaintiff:
- (a) that his loan and mortgage were transferred from Irish Nationwide Building Society to IBRC;
 - (b) that his loan and mortgage were transferred by IBRC to Shoreline; and
 - (c) that Shoreline then transferred the loan and mortgage to Pepper on 18th April, 2019.
- 43.** The question is therefore whether this letter constituted notice within the meaning of s. 28(6) of the 1877 Act.

Section 28(6) – express notice in writing

44. Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 provides as follows:

“(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.” (emphasis added)

45. In *AIB Mortgage Bank v. Thompson* [2017] IEHC 515 the High Court (Baker J.) considered the notification required by s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 and stated as follows (at para. 48 to 50 and para. 53 of her judgment):

“48. The authorities suggest that a court will look to the substance and not the form of a notice.

49. I consider that in order to be a valid notice under s. 28(6) the debtor must be given express notice in writing of an assignment of his debt to another, that other must be identified, and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that the assignment did assign the debt so that he may without acting at his peril pay the debt to the identified assignee. The absence of a date is not relevant, and this must be because s. 28(6) expressly provides in its terms that the date of the notice to the debtor is the effective date of the assignment for the purposes of the assignment at law.

50. The 1877 Act does not make provision for who is to give the notice in writing of the assignment.

[...]

53. While a notice does not have to be sent with the intention of constituting a statutory notice, a notice must be sufficiently clear as the legislation requires that the notice be express. This precludes the argument advanced by the plaintiff that it is sufficient that documents sent to a debtor by implication identify an assignment, and I do not consider that s. 28(6) leaves open an argument that a notice which impliedly identifies an assignment can be sufficient, or that a prior general consent performs the statutory function of a notice. A notice must be given, it need not be formal, it need not refer to the statute, but it must be an express notice of an assignment and not merely a claim to the debt by another party. The existence of a prior assignment ought to be implied. There is nothing in the statute to my mind which suggests that the notice must be contained in one document and for that reason the joinder of documents may be sufficient to constitute a notice of assignment.”

46. In that case, the High Court held that the correspondence sought to be relied upon by the assignee did not constitute adequate notice of the assignment.

47. By contrast, counsel for the defendants relied on a decision of the High Court (Simons J.) in *Promontoria (Oyster) DAC and Lynn* [2022] IEHC 1999 in which Simons J. held that the correspondence at issue in that case was sufficient to constitute express notice in writing for the purposes of s. 28(6) of the 1877 Act.

48. Simons J. noted (at para. 23 of his judgment), that the principal issue for determination in those proceedings was whether the statutory requirement to give “express notice in writing” to the debtor of the assignment of their debt had been complied with.

49. As Simons J. stated at para. 19:

“As appears, the section provides that an absolute assignment of a debt or other legal chose in action is ‘effectual in law’ if certain requirements are met. In particular, the assignee (i) will be entitled to pursue all legal remedies without the concurrence of the assignor; and (ii) will have the power to give a good discharge for the debt or legal chose in action. In practical terms, this means that the assignee can pursue proceedings in their own name, without having to join the assignor as a party; and that the debtor may make payments to the assignee safe in the knowledge that such payments go towards reducing the debt and that the assignor no longer has any interest in the debt.”

50. Having considered these authorities, I am of the view that this letter 14th October, 2020 (which the plaintiff accepts he received) is a notice in writing of the assignment of the debt as required by s. 28(6). The plaintiff has therefore been on notice since at least 14th October, 2020 of the assignment of the debt from IBRC to Shoreline and from Shoreline to Pepper.

51. I am satisfied therefore that all his arguments in relation to this issue of notice have no substance and do not constitute a serious issue to be tried in the context of this application for an injunction.

The issue of notice generally

52. However, even if the letter of 14 October, 2020 did not exist, and even if the plaintiff could establish that he did not receive notice of the assignment of his debt, it is difficult to see how this helps the plaintiff at all – let alone to see how it raises a fair issue to be tried.

53. The structure of the plaintiff’s argument on notice appears to be:

- (i) he never received notice of the assignment from Shoreline to Pepper;
- (ii) therefore there was no legal assignment of the debt from Shoreline to Pepper;
- (iii) therefore all Pepper has is an equitable assignment of the debt; and
- (iv) that is not sufficient to permit it to pursue the plaintiff for the debt.

54. In my view, this argument about notice is misconceived for a number of reasons.

55. A debt is a chose in action. A chose in action “means a thing recoverable by action as contrasted with a chose in possession which is a thing of which a person may have physical possession” (Halsbury Vol. 13, Fifth edition 2021, para.1).

56. A chose in action could be classified as a legal chose in action or an equitable chose in action. A legal chose in action (such as a debt) was one which was formerly only recoverable by an action in courts of common law. An equitable chose in action was one which was enforceable only in Courts of Equity or Courts of Chancery.

57. Historically speaking, the Courts of Common Law did not permit the assignment of choses in action (including debts) on the grounds that the right to bring an action was regarded as “a personal right incapable of transfer” (see Guest on Assignment, 4th edition, page 67). However the Courts of Equity did permit assignment of choses in action (including debts). In the case of an equitable chose in action, the Courts of Equity allowed an assignee to bring proceedings in his own name; in the case of legal choses in action, such actions had to be brought in the name of the legal owner of the chose ((i.e. the assignor) but if necessary the Courts of Equity would compel the assignor to join in the proceedings.

- 58.** This led to an anomaly whereby an assignee of a debt could not sue in the Courts of Common Law but could sue in the Courts of Equity.
- 59.** This anomaly was addressed in the UK by the Supreme Court of Judicature Act 1873 and in Ireland by the Supreme Court of Judicature (Ireland) Act 1877 which established a unified system of courts and also specifically provided for the assignment of debts and choses in action.
- 60.** Section 28(6) provided that any absolute right of assignment of a debt shall be deemed to be effectual in law – provided a number of conditions were fulfilled, of which express notice in writing being given to the debtor was one.
- 61.** It is clear therefore that, after the passing of the Judicature Act 1877, an assignee of a debt could sue in the unified court system – even if the debtor did not receive notice of the assignment and the equity rule prevailed.
- 62.** Section 28(6) of the 1877 Act, in effect, amended the common law rule and provided that the law would permit an assignee of a debt to enforce a debt provided the conditions set out in s. 28(6) were fulfilled (including that the debtor had been given express notice in writing of the assignment). However it left the issue of equitable assignments untouched. In substance, therefore, the Act now permitted the legal assignments of debts and continued the previous rule of equity on the equitable assignment of debts.
- 63.** This meant that an assignee of a debt could now sue in the new unified court both in respect of a legal assignment of a debt (if the conditions in s. 28(6) were fulfilled) and/or in respect of the equitable assignment of the debt if the conditions in s. 28(6) were not fulfilled.
- 64.** The significance of this analysis is that in the present case:
- (i) it is clear on the evidence before this court (i) that IBRC assigned the plaintiff's debt to Shoreline and (ii) that Shoreline assigned the plaintiff's debt to Pepper;

- (ii) Pepper therefore either had the legal assignment of the debt or the equitable assignment of the debt – depending on whether the s. 28(6) formalities are satisfied (e.g. notice in writing to the plaintiff);
- (iii) Pepper submits that the plaintiff did receive a valid express notice in writing by virtue of the letter of 14th October, 2020;
- (iv) thus, even if the plaintiff disputes that this is not a sufficient notice in writing, the only significance of the plaintiff winning this point is that he can claim that Pepper can only sue him as an equitable assignee of the debt rather than as the legal assignee of the debt.
- (v) however, even if the plaintiff is successful on this point (and in my view he is not because he did receive notice under s. 28(6).), nothing of any significance turns on it, because, in my view, after the 1877 Act, there is no difference in substance between a legal assignment of a debt or an equitable assignment of a debt. Pepper still has the right to sue the plaintiff whether it is the legal or the equitable assignee of the debt.

65. In other words, there is now no real difference either in substance or in procedure, between a legal and equitable assignment of a debt. Whether the assignee has the benefit of a legal or equitable assignment of the debt, he is still entitled to sue the debtor in the courts and it would appear therefore that nothing turns on whether the debtor is given notice.

66. As was stated in Wylie on Irish Land Law (6th edition 2020), at para. 13.11, when referring to the provisions of s. 28(6) of the 1877 Act:

“Under these, notice of writing of the assignment should be given to the borrower if it is to have legal (absolute) effect, but even if no notice is given, the assignment will operate in equity and be effective as between the assignor and assignee. The courts have taken the view that the standard practice of the transferor lender sending the

borrower a “goodbye” letter and the transferee sending a “hello” letter meets the notice requirements.”

67. Wylie also states at footnote 68 on page 643 in relation to the *AIB Mortgage Bank v. Thompson* that “*Baker J. took the view that this was sufficient to entitle the transferee to sue for the debt and that the traditional practice in such cases of joining in the assignor was now regarded as a mere formality which could be dispensed with unless there is a dispute.*”

68. These matters were also considered by the High Court in *Waldron v. Herring* [2013] IEHC 294, where Edwards J. when considering the validity of an assignment stated as follows:

“The validity of the purported assignment

The entitlement to pursue a cause of action constitutes a “chose in action”. The term chose in action is used to describe an intangible property right or the right to possession of something that can only be obtained or enforced through legal action. Choses in action were either legal or equitable, in so far as the law of Ireland is concerned, up until the enactment of the Supreme Court of Judicature (Ireland) Act 1877 (hereinafter “the Judicature Act”). Where the chose could be recovered only by an action at law, as a debt (whether arising from contract or tort), it was termed a legal chose in action; where the chose was recoverable only by a suit in equity, as a legacy or money held upon a trust, it was termed an equitable chose in action. Before the Judicature Act, a legal chose in action was (subject to just a few exceptions) not assignable, i.e., the assignee could not sue at law in his own name. As a result, an action on an assigned chose in action required to be brought at law in the name of the assignor, though the sum recovered belonged in equity to the assignee. In equity all choses in action were regarded as being assignable, except those altogether incapable of being assigned, and so in equity the assignee might have sued in his own

name, making the assignor a party as co-plaintiff or as defendant. The Judicature Act rendered the distinction between legal and equitable choses largely academic.

Common law courts and equity courts were fused together by the Judicature Act, and thereafter equitable rules (i.e. those developed in the equity courts) were said to prevail over common law rules. Even today, courts distinguish between common law and equitable rules. An assignment that fails to comply with statutory requirements is not necessarily invalid, for it may take effect as a perfectly good equitable assignment.

*Section 28(6) of the Judicature Act provides that an absolute assignment by the assignor of any debt or other legal chose in action can pass the legal right to the debt or chose in action to the assignee. Four main conditions require to be satisfied for the purposes of s. 28(6), as confirmed recently by the High Court in *O'Rourke v.**

Considine [2011] IEHC 191, (Unreported, High Court, Finlay Geoghegan J., 10th May, 2011):

- first, the assignment must be for a debt or other legal chose in action;*
- second, there must be “absolute assignment” meaning that the assignor must not retain an interest in the subject matter of the assignment. Thus, assignment of part of a debt, assignment by way of charge, and conditional assignments are not covered by s. 28(6) of the Judicature Act;*
- third, the assignment must be in writing by the assignor;*
- fourth, the debtor must be given express notice in writing of the assignment. A statutory assignment does not need valuable consideration (i.e. any form of payment) to be valid. The assignee can then sue the debtor in their own name, without joining the assignor as a party to the action.*

The Judicature Act did not abolish the “judge made” or equitable rules on assignment which, as stated above, can still be relied upon if the conditions for a statutory assignment are not met. Barron J. in Law Society of Ireland v. O’Malley [1999] 1 I.R. 162, at p. 169, stated that:- “An equitable assignment does not require any particular formula. Since its validity depends upon equitable principles, it is necessary to look to the intention of the assignor and whether what he did was in good faith.”

69. I am satisfied therefore that the plaintiff’s argument that he did not receive notice of the assignment, even if it were established as a fact, (which is not the case here) is not sufficiently strong that it raises a fair issue to be tried because the distinction between a legal chose in action and an equitable chose is now academic when that chose of action is a debt.

The third issue - Shoreline no right to appoint receiver

70. The plaintiff also sought to argue that if he did not receive any notice in writing as required by s. 28(6) of the 1877 Act, then Shoreline only had the benefit of an equitable assignment and therefore it had no lawful basis to appoint the second defendant as receiver.

71. The plaintiff’s submission appeared to be:

- (i) that he had not received proper notice under s. 28(6) of the 1877 Act;
- (ii) the assignment is then only an equitable assignment of the loan; and
- (iii) therefore the assignments as between (a) IBRC and Shoreline and (b) Shoreline and Pepper “take effect in equity only and as an equitable assignment”; and
- (iv) if Shoreline only has the benefit of an equitable assignment, then it has no lawful basis to appoint the second defendant as receiver and Shoreline would need to hold the legal title to the loan before it could appoint any receiver;

72. The plaintiff's submission on this issue are also, in my view, misconceived. First, it has to be emphasised that the power of Shoreline to appoint a receiver flows from the mortgage created as security over the property for the loan – not from the loan; secondly, the power to appoint a receiver in this case arose under s. 19(1)(ii) of the Conveyancing Act 1881 as incorporated into the mortgage and vested in the mortgagee or charge-holder; thirdly, at all material times, Shoreline, and then Pepper, were the registered owners of the relevant charges and this has not been contested by the plaintiff. It is clear therefore at all times that the power to appoint a receiver rested with Shoreline and this receivership was subsequently novated with Pepper.

73. As is also stated in Wylie, Irish Land Law (6th edition at page 643):

“Of course where the mortgage is a charge on registered land, the registration of the transferee as the new owner of the charge clearly confirms its entitlement to sue for the debt, as it can rely upon the conclusiveness of the register enshrined in s. 31(2) of the Registration of Title Act, 1964” (see Permanent TSB Plc v. Burns [2020] IEHC 24; Pepper Finance Corporation (Ireland) DAC v. Conway [2020] IEHC 35.”

74. I am satisfied therefore that the plaintiff has not raised a serious issue to be tried on this matter.

The fourth issue – the novation of the receivership

75. Counsel for the plaintiff also submitted that although Shoreline appointed the second defendant as receiver on 17th September, 2018 and although the plaintiff's loan had been transferred to the first defendant on 18th April, 2019, the appointment of the second defendant as receiver was only novated from Shoreline to Pepper on 8th August, 2019 (although stated to be effected from 18th April, 2019).

76. In these circumstances the plaintiff submitted that the novation of the receiver was invalid as a matter of law.

77. However this very point was considered by the Court of Appeal in *Healy v. McGreal* [2018] IECA 78 in which Irvine J. (as she then was) (giving the judgment of the unanimous court) stated at para. 33 of her judgment as follows:

“33. The essential point the plaintiffs make therefore is that, following the Loan Sale of the 28th March 2014, IBRC (in special liquidation) ceased to have any right or interest in the assets which it had transferred to Kenmare. Thus, it had no ability to execute the three Deeds of Novation or the Deed of Confirmation and Acknowledgement.

34. In light of her other findings in my view it matters not whether the trial judge was or was not in error insofar as she relied upon s. 12(1)(b) of the IBRC Act 2013 to override what she considered might be the effect of s. 58(9) of the Asset Covered Securities Act 2001. She had, as is clear from paras 81 and 82 of her judgment, in any event concluded that the Deeds of Novation were in fact matters only material to IBRC (in special liquidation) and Kenmare and did not affect the relationship between the receiver and the plaintiffs.

35. As was observed by the trial judge, Mr. McGreal had been appointed receiver prior to the Loan Sale to Kenmare. That receivership was valid and ongoing pursuant to the original deeds of Appointment. The fact that IBRC (in special liquidation) entered into the Loan Sale with Kenmare and was no longer a party to the loan did not affect the validity of the Receiver's appointment or the ongoing nature of the receivership. The only question arising as a result of the Loan Sale was to whom the Receiver would remit any sums recovered in the course of the receivership. However, that was a matter between the receiver, IBRC and Kenmare and had nothing to do with the plaintiffs. While the execution of the Deeds of Novation might have some potential bearing on when Kenmare succeeded to the position of IBRC in receivership

they could have no bearing at all on the question of the continuing validity of the Receiver's appointment over the secured assets.

[...]

37. Whilst strictly speaking unnecessary in light of my aforementioned findings, I feel I should nonetheless also state that I reject the plaintiffs' submission that the Deeds of Novation are invalid because there is no provision in the Mortgage Deeds providing for novation. I agree with the High Court judge that in circumstances where the Mortgage Deed provides for the appointment of a receiver with the power of sale it is axiomatic that the lender would be entitled to enter into a novation agreement."

78. It is clear therefore that this decision of the Court of Appeal covers precisely the argument which the plaintiff is making in this case.

79. Despite that, counsel for the plaintiff submitted that the decision of the Court of Appeal in *Healy v. McGreal* was wrongly decided for a variety of reasons which he set out in his supplemental legal submissions. Counsel for the defendant countered that this court is clearly bound by the judgment of the Court of Appeal in *Healy v. McGreal* and that any contention that *Healy v. McGreal* was wrongly decided by the Court of Appeal is bound to fail before the High Court.

80. I agree with the defendants' submission. This Court is bound by the decision of the Court of Appeal in *Healy v. McGreal* on this matter. As such, it is not open to the plaintiff to seek to persuade the High Court that the decision in *Healy v. McGreal* has been wrongly decided.

81. In the circumstances, I would conclude that the issue about the novation of the receivership and thereby the legality of the appointment of the receiver is not a serious question to be tried in this matter at this time for the purposes of the injunction.

The fifth issue – is there a block on the equity of redemption?

82. Counsel for the plaintiff further submitted that because his client had offered a sum of €120,000 for the property and, because the second defendant had entered into a contract for the sale of the property at the same price to another party, this, in substance, amounted to a block by Pepper on the plaintiff's equity of redemption.

83. Counsel for the defendants however submitted that this submission was without merit because if the plaintiff repaid the entirety of the loan, then he would of course have the equity of redemption. The defendants submitted however that at no time - including up to the hearing of this application for an interlocutory injunction - had the plaintiff sought to repay the entire loan to the defendants.

84. I agree with the defendants' submission on this point. In my view, the plaintiff's claim that the defendants have sought to block the plaintiff's equity of redemption is without substance and does not raise a fair question to be tried.

85. Counsel for the defendants also submitted that the plaintiff appeared to be suggesting that because he had made an offer for the loan, he had a right of first refusal and that the second defendant should have contracted with him in circumstances where he entered a contract of sale for the property for €120,000 to a third party.

86. However it is clear from the affidavit evidence that the plaintiff's offer for the farmlands (i.e. the property in dispute in this application) was for €120,000 "in full and final settlement". The defendants submit that the use of the phrase "in full and final settlement" meant - and was intended to mean - that the plaintiff was offering a sum of €120,000 to settle the entirety of his debt with Pepper (which debt is approximately €276,000). Pepper rejected this offer for a number of reasons - in particular because Pepper has a mortgage over another property belonging to the plaintiff which it has had valued in the sum of €110,000. It would therefore make no sense for Pepper to accept a sum of €120,000 in full and final settlement of

the entirety of the plaintiff's debt in circumstances where it could also obtain a further sum of €110,000 for the sale of the plaintiff's other property over which it also had security.

87. The plaintiff submitted that Pepper was at all times aware, (through agents retained by the plaintiff to negotiate on its behalf with the defendants) that his offer of €120,000 related only to the farmland property in dispute.

88. However the plaintiff made his offer of €120,000 in full and final settlement of his debt through his negotiator Mr. Laurance Shields. He knew therefore, or ought to have known, or must have known that this offer was meant to be in full and final settlement of his entire debt to Pepper Finance and therefore to release the security over both properties owned by the plaintiff. To argue otherwise now is simply disingenuous. If the plaintiff wanted to offer €120,000 for the farmland simpliciter he could have done so. He did not.

89. The plaintiff also made a related argument that a receiver had a duty to act in good faith towards him. However it is clear on the facts of this case, that the receiver did act in good faith towards the plaintiff and any argument to the contrary is a mere bald assertion. There was some confusing evidence given by the plaintiff about discussions with a purported "white knight" but in my view, these facts are not relevant to any of the issues which I have to decide in this application.

The sixth issue - the issue of corporate approval

90. Counsel for the plaintiff also submitted that there was no evidence that the various corporate approvals required by Shoreline to transfer the debt were in fact obtained.

However, counsel for the defendants submitted that they were, and pointed to Board minutes at which such decisions were approved, at a meeting of the board of directors of Shoreline held on 15th April, 2015. I agree with this submission.

91. In the circumstances I am of the view that the plaintiff has not raised a fair question to be tried on this issue.

Further evidence

92. It is also noteworthy that the plaintiff sought an adjournment of this matter when the matter had been called on for its adjourned hearing in order to put evidence before the court on affidavit that the third party was not proceeding with the contract to purchase the property. I allowed the plaintiff time within which to put this evidence before the court. In fact when the plaintiff filed a further supplemental affidavit dealing with this matter on 2nd June, 2023 he only stated as follows:

“Finally I also wish to say that I understand that the proposed purchaser for the lands – which are the subject matter of these proceedings – has no interest in completing any purported sale of the lands of the defendants. I say and believe this on the basis of speaking with my cousin who is known to friends of the proposed purchaser. As such I say and believe that there is no reality to this purported sale closing, or any real or substantial prejudice to the defendants, and indeed the defendants have singularly failed to set out any correspondence with the proposed purchaser which they have had (or not) since the institution of these proceedings”.

93. In my view this averment is extremely weak. It appears to be based upon hearsay upon hearsay i.e. on the basis of speaking with the plaintiff’s cousin “*who is known to friends of the proposed purchaser*”. He does not identify his cousin; he does not identify the so called “*friends of the proposed purchaser*”. No documentary evidence is provided to back up this assertion. It is a bald assertion based upon rumour and gossip.

94. By contrast, Mr. Ken Fennell, the receiver, swore a further affidavit in response to the above affidavit (dated 15th June, 2023) in which he states that he rejects the plaintiff’s averments in relation to the sale contract. He states:

“I have not received, whether directly or indirectly, any correspondence or communication from the purchaser to the effect suggested by the plaintiff in his most

recent affidavit or any request from the purchaser for the termination of the sale contract (or any like effect) and for completeness I note that nor has the first defendant. In particular no request has been received for return of the deposit in the amount of €12,000 paid by the purchaser”.

And at para. 6 he states:

“In the circumstances I am advised and believe that the sale contract continues in full force and effect as a legal valid and binding obligation”.

Overall assessment of whether there is a fair question to be tried

95. In the circumstances I have come to the conclusion that the plaintiff has not raised a fair question to be tried on any issue such as would justify an injunction being granted in this case.

The balance of justice/balance of convenience

96. I turn now to consider the balance of justice/balance of convenience. As set out in the *Merck* case, the first issue the court considers in relation to this matter is the adequacy of damages.

1. The adequacy of damages

97. I am satisfied that even if this case proceeds to trial, and the plaintiff is successful, that damages would be an adequate remedy.

98. The key feature in this application is that the plaintiff waited until after the receiver had entered into a contract of sale to sell the farm in dispute on 28th July, 2021, to an innocent third party, to bring this application.

99. If the plaintiff had brought an application to restrain the first and/or second defendants from selling the said farm before the second defendant had entered into a contract for sale with a third party, then the plaintiff’s application for an injunction might have been regarded more favourably by this court. Having said that, the plaintiff would also have faced

difficulties in establishing a fair question to be tried and also difficulties in satisfying the court in relation to his undertaking as to damages.

100. However he failed to bring this application in time and only brought an application some six months after the second defendant had entered into a contract for sale.

101. In those circumstances, it is in my view difficult, if not impossible, for the plaintiff to argue that the court should grant an injunction to restrain the completion of the sale of the land because damages would not be an adequate remedy. Whilst it is true that a court could set aside a contract and prevent a party from completing a sale, the court would have to be satisfied that there was significant evidence before the court to grant an injunction in such circumstances - for example evidence of fraud, sale at an obvious undervalue or patent illegality on the face of a contract. No such evidence has been provided here.

102. In the circumstances, I am of the view that the plaintiff has not established that damages would be an adequate remedy.

Other factors in the balance of justice

103. I turn now to consider other factors in the balance of justice.

104. Again, the first issue that I would give some weight to, is the fact that the receiver has already entered into a contract of sale with a third party purchaser. In my view, if the court were to grant an injunction to prevent the receiver from completing his sale to the third party purchaser, it would be interfering with a lawful contract entered into between the receiver and a purchaser. This could enable the purchaser to resile from the contract and could result in the receiver being unable to sell the lands for a considerable period of time or at a lesser price. Additionally counsel for the defendants have submitted that the receiver would also suffer reputational damage if he were unable to complete the contract with the purchaser as he had contracted to do.

105. I have also considered that if the plaintiff had alleged that the contract for sale was at an undervalue, that might be a ground to restrain a completion of the sale. However there is no allegation of sale at an undervalue in this case and nor could there be. The second defendant had entered into a contract of sale to sell the said lands at a price of €120,000; the plaintiff says that he had bid a sum of €120,000 for the land.

106. I have also considered, insofar as it is necessary to do so, the question of the constitutionality of s. 12 of the Irish Banking Resolution Corporation Act 2013. But in my view, this does not tilt the balance in any way in favour of the plaintiff.

The undertaking as to damages

107. The defendants also submit that although the plaintiff has given an undertaking as to damages in his first affidavit, this undertaking is illusory and is of no substance. I agree with this submission.

108. Mr. Fennell in his third affidavit avers that the balance outstanding on the loan as at 7th June, 2023 was €276,000 approximately and that interest continues to accrue on that loan at a rate of €33 approximately per day. This is not disputed by the plaintiff. The plaintiff has been in default on this loan for a number of years since in or about 2015. This is also not disputed by the plaintiff.

109. At the hearing, counsel for the plaintiff indicated to the court that his client was prepared to make a payment of €750 per month towards the outstanding debt. However the plaintiff has an obligation to repay the said debt in full and such an offer merely amounts to an offer to resume repayments on his contractual obligations to repay the debt. It does not come anywhere near providing proof to the court that the plaintiff is in a position to meet an undertaking as to damages if he obtains the injunction and fails at the full trial of the action.

110. In the circumstances I would conclude that the plaintiff is not in a position to satisfy his undertaking as to damages and that such an undertaking is illusory. On that basis alone I would refuse the plaintiff's application for an injunction.

The issue of delay

111. I am also of the view that the plaintiff has delayed considerably in moving his application for an interlocutory injunction and on that ground also his application for an injunction should be refused.

112. His delay in this regard can be examined both in relation to

(a) Delay before the signing of the contract and

(b) Delay since the signing of the contract.

113. In relation to the plaintiff's delay before the signing of the contract, the plaintiff has been in default since July 2015 and he knew from September 2018 that steps were being taken to enforce the charge over the relevant property by means of the appointment of a receiver. The property was put up for auction and was withdrawn from auction in September 2019 to facilitate negotiations with the plaintiff. These negotiations however were unsuccessful. The property was again offered for sale by auction in November 2020 and again in December 2020. However no bids were received. The property was offered for auction again on the 29th July, 2021; the plaintiff made offers for the property in February, March and July 2021 but these offers were to be in full and final settlement of his entire debt with the first named defendant and not simply an offer on the property alone. The plaintiff admits that he knew on or about 13th July, 2021 that the property was again up for sale.

114. In these circumstances the plaintiff could, at any stage from September 2019 and again in November/December 2020 and again before 28th July, 2021, have brought an application for an injunction to restrain the sale of the lands. However he did not do so.

115. The receiver then, as was his right, entered into a contract with a third party on 28th July, 2021.

116. In relation to the delay after the signing of the contract, the plaintiff's solicitors became aware on 7th September 2021 that the receiver had entered into a contract with a third party. This was confirmed in writing by the defendant's solicitors to the plaintiff's solicitors on 29th September 2021. No steps were taken in October or November or December to apply for an injunction. Whilst the plaintiff issued a plenary summons in November 2021, he did not, at the same time, bring an application for injunctive relief. Instead he waited until January 2022 before issuing a motion for an injunction and seeking the relief which he now seeks. In my view, this delay of approximately four months after the plaintiff became aware that the second defendant entered into a contract, coupled with the delays before the second defendant entered into a contract for sale are all matters which have to be considered in the balance of justice.

117. In my view, it would be unjust to the defendants - and indeed to the third party - to grant an injunction to the plaintiff in circumstances where the plaintiff has delayed for such a long period of time.

Conclusion

118. I am of the view that:

1. the plaintiff has not established a fair question to be tried;
2. damages are an adequate remedy;
3. the balance of justice is in favour of refusing the relief sought;
4. the plaintiff has delayed for too long in applying for injunctive relief;
5. the plaintiff's undertaking as to damages is illusory and could not be made good.

119. In the circumstances I will refuse the application for an injunction.

