THE HIGH COURT

[2023] IEHC 652

[Record No.] 2013 9648 P

PERMANENT TSB PLC

Plaintiff

-V-

FRANK SPILLANE & ANNETTE SPILLANE

Defendant

Judgment of Mr. Justice Dignam delivered on the 16th day of November 2023.

1. This is my judgment in respect of an application by Start Mortgages Designated Activity Company ("Start") to substitute Permanent TSB plc as sole plaintiff in these proceedings. The application is brought pursuant to Order 17 Rule 4 of the Rules of the Superior Courts which provides:

> *"4. Where by reason of death, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."*

2. The application is brought in the following circumstances. By Plenary Summons of the 10th September 2013 Permanent TSB, the current plaintiff, issued proceedings against the defendants. A Statement of Claim was delivered on the 27th June 2014 and a Defence was delivered on the 25th September 2015. An Amended Plenary Summons was issued on the 6th March 2017 and an Amended Statement of Claim was delivered on the 9th March 2017. An Amended Defence was delivered on the 4th April 2017. The claim that is made in these pleadings is a detailed one and the defence is similarly detailed. It is not necessary to deal with the claim and defence in any great detail in the context of this motion.

3. In summary, the claim that is made is that on the 27th September 2007 Permanent TSB issued a letter of approval to the first-named defendant approving a loan to him in the sum of €2,575,000. It was a condition of the loan that it would be used to refinance an existing loan that was believed by Permanent TSB to be between Mr. Spillane and Bank of Ireland and that it would be secured by a first charge over the lands in Folio 36448F County Cork, also known as no's 1-8 Mallabraka Cottages. On the 4th October 2007 Mr Spillane accepted the loan offer and on the 11th October 2007 drew down the monies and executed an Indenture of Mortgage Charge. He failed to make payments on foot of the loan and on the 25thJuly 2012 Permanent TSB obtained judgment against him in the sum of €2,684,687.29 plus costs. Mr. Spillane has not satisfied the judgment.

4. Permanent TSB claims that Mr. Spillane misrepresented to Permanent TSB that the Bank of Ireland loan was in his sole name and that he was the sole owner of the secured property when in fact the Bank of Ireland loan was to both Mr and Mrs Spillane, the property was owned by them jointly and the Bank of Ireland loan was charged on both of their interests in the property. The basis of the claim of misrepresentation is particularised in the Amended Statement of Claim but for the most part these particulars are not relevant to the Court's current exercise. One aspect of this claim is important to note however. It is pleaded that ownership of the property was registered in Mr Spillane's sole name from 11th March 1985 to 11th July 2007 and on that date the property was registered in the names of both Mr. Spillane and Mrs. Spillane but this was not notified to Permanent TSB. The charge in favour of Permanent TSB was registered in the Land Registry on the 17th April 2009 and is stated to apply to Mr. Spillane's interest in the property only.

5. It seems the monies were used to pay off the Bank of Ireland loan. It is claimed that in the circumstances monies which were advanced by Permanent TSB to Mr.

Spillane were therefore used to repay a loan with the Bank of Ireland in the name of both of the defendants and the charge in favour of the Bank of Ireland was discharged which means that Mrs. Spillane now enjoys an interest in the property unencumbered by the charge registered against the interest of Mr. Spillane. It is claimed as a result that Mrs. Spillane has been unjustly enriched at the expense of Permanent TSB "*in that her liability on the Bank of Ireland loan was extinguished and the Bank of Ireland charge on her interest in the property was discharged and she was left with an encumbered moiety of the property*", that she is bound by the charge in favour of Permanent TSB over the property and that she holds her legal and beneficial interest (if any) subject to that charge and holds it on trust for Permanent TSB.

6. The immediate background to this application is set out in the grounding affidavit of Ms. Eva McCarthy, litigation manager for Start. She deposes that Start has acquired the loan facility and mortgage security, the subject matter of the proceedings, from Permanent TSB by way of a Deed of Transfer, Conveyance and Assignment which was executed by Permanent TSB on 1st February 2019 whereby Permanent TSB "*transferred all its right, title, interest, estate, benefit and entitlement (past and present) in and under*" the loan referred to above to Start. She also deposes that on the same day Permanent TSB executed a Form 56 for the mortgage charge over the property and transferring to Start all its right, title, interest, estate, benefit and entitlement in the charge and the Form 56 was lodged with the Property Registration Authority. By the time Mrs. Spillane swore her replying affidavit the registration of this was complete and she exhibited the folio which recorded the transfer on the 27th March 2019. Permanent TSB notified the first-named defendant of the assignment to Start by letter of the 1st February 2009 and Start, by letter of the 7th February 2009, notified the first-named defendant of the transfer and that it had been completed on the 1st February 2009.

7. On that basis, it is claimed that Permanent TSB's right to recover on foot of the loan facility and to enforce the mortgage and the associated choses in action including this current cause of action have been transferred to Start and that it is appropriate that Start be substituted for Permanent TSB as the plaintiff. Permanent TSB consents to the making of this application by Start.

8. A particular feature of this case is that Mr. Spillane sadly died suddenly and unexpectedly on the 16th April 2022.

Legal Principles

9. The legal principles applicable to applications of this type under Order 17 rule 4 are well-established at this stage and in fact there was no real dispute between the parties as to the applicable principles.

Correct Procedure

10. In *Stapleford Finance Limited v Lavelle & Ors [2016] IECA 104* the Court of Appeal confirmed that Order 17 Rule 4 of the Rules may be relied upon for this type of application. Costello J said at paragraph 16 *"This Court is of the opinion that the learned High Court Judge was correct in her conclusion that the assignment amounted to a change in interest within the meaning of the rule."*

11. Simons J said in *Permanent TSB v Burns [2020] IEHC 24*:

> *"Secondly, it was held that the phrase "change … of interest" was not confined to an interest in land, but embraced an assignment of a chose in action. It was further held that there was no distinction in this regard between the assignment of a chose in action and the assignment of an existing cause of action. The Court of Appeal held that the legislative intent of the Supreme Court of Judicature Act (Ireland) 1877 would be defeated if it were not possible to substitute the assignee as a party.*
>
> > *"Since the Supreme Court of Judicature Act (Ireland) 1877 it has been possible legally to assign a chose in action. The intent of the statute is to do away with the formal necessity of joining the assignor in any proceedings brought by the assignee to enforce the chose in action. The legislative intent is defeated if the rules of court do not provide for of the substitution of the assignee of the chose in action as plaintiff in proceedings commenced by the assignor."*

12. Barniville J said in *AIB v McKeown [2020] IEHC 155* at paragraphs 4 and 55 of his judgment in respect of an application by Everyday Finance (this is the paragraph numbering in the copy of the judgment handed in to Court):

"54. It is now well established that the appropriate provision of the RSC under which an application of the type made by Everyday to substitute or add a party in circumstances where an event occurs after the commencement of the proceedings which causes a change of interest, is O. 17, r. 4 and not O. 15, r. 14. This is clear from the judgment of Baker J. in the High Court in Irish Bank Resolution Corporation Limited (In Special Liquidation) v. Lavelle [2015] IESC 321 ("Lavelle"). Having considered the relevant authorities, Baker J. held that O. 17, r. 4 permits an application to be made to add or substitute a party who has taken a legal assignment of a loan book from the original plaintiff in proceedings. The Court of Appeal upheld that judgment on appeal in Stapleford Finance Limited (As Substituted) v. Lavelle [2016] IECA 104. The Court of Appeal held that Baker J. was correct in her conclusion that the assignment in question amounted to a change in interest within the meaning of O. 17, r. 4. The Court of Appeal concluded that Baker J. was correct in holding that she had the power to substitute the relevant party as the sole plaintiff in the proceedings under that provision and that she had not erred in law in making the order under it.

55. I am satisfied, therefore, that the relevant provisions of the RSC under which to consider Everyday's application to be added as an additional plaintiff with AIB, in circumstances where the relevant facilities and guarantees were transferred or assigned to Everyday under the deed of trust and amendment deed, is O. 17, r.4."

Nature of the Application

13. In *Irish Bank Resolution Corporation v Comer [2014] IEHC 671*, Kelly J said at paragraphs 5 – 7 that:

"5. … it is, I think, important to indicate what this application is not and what it is*. First of all, this is not the trial of these proceedings. Second, on this application I am not called upon nor do I purport to in any way make any adjudication upon either the validity or efficacy of either the sale agreement which underpins this application nor indeed of the notice which was given to the defendants and which is put in evidence before me.*

6. Those matters, if they are in issue in the proceedings, will have to be dealt with at trial.

7. What is this application? It is an application brought pursuant to the relevant rules of court in which, as a result of circumstances which have occurred subsequent to the institution of the proceedings, it is sought to substitute one plaintiff for another. These are applications which occur on a fairly regular basis."

14. He also said at paragraph 43 and 44:

"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."

15. Barniville J said at paras 56 – 61 of *AIB v McKeown*:

*"**2) The nature of the application***

56. The Court of Appeal has made clear that an application for an order under O. 17, r. 4 is intended to be a simple, straightforward and purely procedural application. It is not intended to be in the nature of a "mini-trial".

57. In Irish Bank Resolution Corporation Limited v. Comer [2014] IEHC 671 ("Comer"), Kelly J. described a similar application to substitute a party for an existing party in the proceedings (in the case of the sale of a loan book and facilities), albeit made under O. 15, r. 14 RSC, as a "procedural motion" which should not be turned into "a sort of mini-trial of the action". That was not what was envisaged by the RSC, in general, or under the provisions of O. 63A, in particular (see para. 44).

58. The Court of Appeal reached the same conclusion in relation to a substitution application made under O. 17, r. 4 in Bank of Scotland PLC v. McDermott [2019] IECA 142 ("McDermott"). I will come back to the judgment in this case in a moment, when considering the question of the standard of proof to be applied. However, the judgment is also relevant in describing the nature of an application under O. 17, r. 4. Having noted that an application under that provision could be made ex parte, but had been made on notice in that case, Peart J. in delivering the judgment of the Court of Appeal then stated:

> *"I would consider that the very fact that such an application may be made on an ex parte basis is at least an indication that it is not contemplated that such a simple, straightforward, and perhaps formal application should give rise to the level of controversy that has attended upon the present application. Of course, it goes without saying, that the court must be satisfied by the affidavit evidence adduced by the applicant that it is entitled to be substituted. But it should not be seen as yet another opportunity for the other party to raise issues that relate more to the merit of the underlying proceedings, and to in that way open up an avenue for further litigation and consequent delay in the proceedings. In my view, the appellant has seized upon the respondent's application for substitution, having been put on notice of it, in order to further frustrate the efforts of the creditor bank, now Ennis, to take steps of enforcement against him on foot of the summary judgment obtained on the 29th July 2013, by raising grounds of objection that are devoid of merit*." (para. 31).

59. It seems to me that the same could be said for the present application and the defendants' attempts to raise issues by way of opposition to the application, which relate more to the merit of the underlying proceedings in which summary judgment was granted against them by the High Court and upheld by the Court of Appeal. The description of the nature of the application as being "simple, straightforward, and perhaps formal" is particularly apposite. That is how an application such as that made by Everyday should be seen. It should not be seen, or used, as an opportunity to ventilate issues relevant to the underlying and substantive dispute between the parties (particularly when the merits of the underlying dispute have already been determined by the High Court and by the Court of Appeal).

60. Having referred to what Kelly J. stated in Comer, the Court of Appeal in McDermott went on to state as follows:

> *"… such applications remain purely procedural in nature, and there can be no question of such an application becoming in the nature of a mini-trial." (para. 37).*

61. Everyday's application should, therefore, be dealt with as a simple, straightforward and formal application and should not be regarded as a mini-trial of contentious issues between the parties."

16. This view of the nature of an application under Order 17 Rule 4 seems to me to be reinforced by the fact that the rule provides that an order may be obtained *"**upon an allegation** of such change, or transmission of interest or liability…"* [emphasis added]

Standard of proof

17. The standard of proof on an application of this type has been considered in a number of cases and it is well-established that the normal position is that the applicant is only required to establish a prima facie case. Kelly J said at paragraphs 29 – 32 of *Comer*:

> *"29. I was referred to various decisions during the course of the submissions and in particular to the decision of Edwards J. in Waldron v. Herring [2013] IEHC 294. Edwards J. had to consider that provision in the context of an application such as this and appears in the course of the judgment to make a determination that the assignment was a valid one and that the relevant statutory provisions which I have just cited had been complied with. I am making no such determination here. It seems to me that questions concerning the efficacy or validity of the assignment or the efficacy or validity of the notice are not matters that I am required to adjudicate upon at this juncture.*
>
> *30. What I am asked to do is to consider a procedural application which, if it is granted, will have the effect of bringing to an end the entitlement of IBRC to further prosecute these proceedings. It will substitute for that entity, Launceston, who will take over the entitlement to prosecute the proceedings,*

subject to all of the imperfections that may have been present when the action was constituted as between IBRC and the defendants and subject also to proving at trial, that there has been a valid sale of the underlying assets, a valid assignment of the chose in action which is this action, and a valid notice given.

31. What I do have to satisfy myself about is whether there is prima facie evidence of that having occurred. In order to come within the relevant rule of court, there has to be evidence adduced which would justify the substitution of the existing plaintiff by Launceston.

32. That seems to me to be the standard of proof that has to be achieved..."

18. Kelly J concluded at paragraphs 43-45:

"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 minitrial 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.

45. In these circumstances, I am of the opinion that there has been made out a sufficient case to warrant the application succeeding and I propose to make the order which is sought."

19. Kelly J was dealing with an application under Order 15 of the Rules. However, it is clear that the same reasoning must apply to an application under Order 17 rule 4. Indeed, this is contemplated by Kelly J at paragraphs 36-38 of his judgment.

20. Meenan J in *Permanent TSB PLC Formerly Irish Life and Permanent PLC v Denis Doheny [2019] IEHC 414* adopted Kelly J's formulation in *Comer* that what the Court has to be satisfied of is that there is prima facie evidence that there has been a "*valid sale of*

the underlying assets, a valid assignment of the chose in action which is this action, and a valid notice given."

21. Simons J said in *Permanent TSB v Burns*:

> *"18. The leading judgment remains that of the High Court (Kelly J.) in Irish Bank Resolution Corporation v. Comer [2014] IEHC 671. The judgment was delivered in respect of an application by the purchaser under the sale of a bank's loan book to be substituted as plaintiff in existing proceedings. The sale was characterised as an assignment of a chose in action for the purposes of section 28 of the Supreme Court of Judicature Act (Ireland) 1877. Crucially, the application had been made prior to the substantive hearing of the proceedings. The High Court held that the legal test for such an interlocutory application is whether there is prima facie evidence that there has been (i) a valid sale of the underlying assets; (ii) a valid assignment of the chose in action; and (iii) a valid notice given. It was not necessary for the court to adjudicate, at that juncture of the proceedings, on the efficacy or validity of the assignment or the efficacy or validity of the notice. Those were matters to be determined at the substantive hearing."*

22. The higher standard of the balance of probabilities will apply where the substitution application is being made after judgment has been granted and where there would be no opportunity at trial to raise issues in relation to the proofs adduced in support of the application. In *Burns* Simons J said:

> *"19. The standard of proof to be met on an application to substitute a party which is made subsequent to the substantive hearing will be higher. This is because there will, by definition, be no further hearing at which these matters can be ventilated. Put shortly, the efficacy or validity of the assignment will have to be considered on the joinder application.*
>
> *20. This distinction is explained as follows by the Court of Appeal in McDermott v. Ennis Property Finance DAC [2019] IECA 142.*
>
> > *"37. Where, as in the present case a substitution application is made after judgment has been granted, and where therefore there is no opportunity at trial to raise any issues in relation to the proofs adduced in support of the application, it seems to me that the prima facie test referred to by Kelly J. in*

IBRC v. Comer is not the correct test. In such cases the correct test is that applicable in civil proceedings generally, namely on the balance of probabilities. The evidence will nonetheless be adduced in the normal way in such applications by affidavit, and if necessary any deponent may be cross-examined on their affidavit as provided for by the Rules of the Superior Courts. But such applications remain purely procedural in nature, and there can be no question of such an application becoming in the nature of a minitrial."

23. See also Barniville J in *AIB v McKeown* at paragraphs 72 and 73.

24. While there is a judgment in the background of this case, i.e. the judgment against Mr. Spillane from 2012, the issues raised in these proceedings are different and the defendants will have a full opportunity to deal with all relevant issues, including any issues in relation to the validity of the alleged transfer and therefore the standard of proof that applies is whether Start has established a prima facie case.

Evidence of Transfer

25. These proceedings arise directly from the loan arrangements between Permanent TSB and Mr. Spillane, i.e. the loan of the 4th October 2007, and the security that was given by him and thus the question that arises on this application is whether Start has established a prima facie case that the loan and security and the choses in action arising therefrom have been transferred to Start. As Simons J put it in *Burns*, the question is whether *"there is prima facie evidence that there has been (i) a valid sale of the underlying assets; (ii) a valid assignment of the chose in action; and (iii) a valid notice given."*

26. In this case a Deed of Transfer, Conveyance and Assignment between Permanent TSB and Start dated the 1st February 2019 has been exhibited. It provides, inter alia:

"BACKGROUND

1. By a mortgage sale agreement dated 31 July 2018 as amended by supplemental amendment agreements dated 28 August 2018, 15 November 2018, 30 November 2018 and most recently by a supplemental agreement dated 14 December 2018 ("the Mortgage Sale Agreement") the Seller agreed to

sell and the Buyer (amongst others) agreed to accept an absolute and unconditional assignment and/or transfer of the legal title to the Mortgage Assets, together with the Underlying Loans and certain contractual rights of the Seller relating to the other Finance Documents and all Ancillary Rights and Claims and in particular the Seller has agreed to sell and the Buyer agreed to purchase the security interests and the contractual rights of the Seller under the Finance Documents more particularly described in Schedule 1 hereto.

NOW IT IS HEREBY AGREED as follows:

…

1. In this Deed:

1.1 "Ancillary Rights and Claims" means (to the extent that the same are capable of being or permitted to be assigned by the Seller) all claims, suits, causes of action, judgments judgment mortgages, cautions, inhibitions and any other right of the Seller whether known or unknown, against any Obligor, or any of their respective affiliates, agents, representatives, contractors, advisors, or any other person that is (in each case exclusively and explicitly) based upon, arises out of or is related to assets referred to in the definition of Mortgage Assets or the Properties…

…

1.7 "Finance Documents" means the Security Documents, the Underlying Loan Agreements and the Title Deeds, certificates of title and Solicitors Undertakings in respect of the Properties as amended, extended, supplemented, varied, restated or replaced from time to time and each a "Finance Document";

1.8 "Mortgage Assets" means any and all of the Seller's rights, title and interest (past present and future) in and to:

1.8.1 the Security and the Security Documents together with any and all corresponding rights and benefits under any ancillary guarantee or security relating thereto;

1.8.2 the Finance Documents together with any and all corresponding rights and benefits under any ancillary guarantee, indemnity, lien, right of set of or other security relating thereto;

1.8.3 the principal amounts, accrued Interest and any other amounts outstanding as at the Cut-Off-Date or which become due after the Cut-Off-Date under or in connection with the Underlying Loan Agreements and other credit facilities advanced to the Borrowers under the terms of the Finance Documents;

1.8.4 all of the other commitments, advances, other utilisations, claims and other rights of the Seller including the Seller's participation under, in respect of or included in the Finance Documents together with any and all corresponding rights and benefits under any Finance Documents; and

1.8.5 the Ancillary Rights and Claims"

27. The schedule to the Deed refers to a facility letter of the 8th October 2007. This is not expressly referred to in the pleadings or in the affidavit but the letter of loan approval was dated the 27th September 2007 and this was accepted on the 4th October 2007 and the monies were drawn down on the 11th October. It is reasonable to conclude, certainly on a prima facie basis, that the facility letter was dated the 8th October 2007. The schedule also identifies a "*mortgage date unknown between (1) Frank Spillane and (2) The Bank*". While the date is not given, the mortgage is described as being in respect of no's 1-8 Mallabraka Cottages. It is reasonable to conclude on a prima facie basis that this refers to the relevant mortgage. In any event, and crucially, it was not suggested by the defendants that the Deed and schedule did not refer to the relevant facility letter and mortgage. Furthermore, the transfer from Permanent TSB to Start has been registered on the Folio and Start is now registered as the owner of the charge. When this substitution application was issued, registration had not yet been completed and Start was relying on the Form 56. Meenan J in *Permanent TSB v Doheny [2019] IEHC 414* said at paragraph 12 "*As mentioned, Form 56 has been lodged for registration with the Property Registration Authority under which the mortgage and charge will be transferred to Start. This Form is currently being processed. As the application before this Court is procedural in nature, I am satisfied that Start may be substituted as plaintiff at this stage in the proceedings notwithstanding the fact that they have not, at this stage, been registered as owner of the mortgage and charge. What is before the Court is not a substantive application for the enforcement of statutory rights conferred upon a charge under the Registration of Title Act 1964 or, indeed, the Land and Conveyancing Law Reform Act 2013."* In any event that registration process has now been completed. The

charge in favour of Permanent TSB (at Entry no.7) is registered at Entry no. 9 as having been transferred to Start (on the 8th October 2007). I return to the scope of the charge below.

28. Notice of the assignment was given by Permanent TSB to Mr. Spillane by letter of the 1st February 2019. It stated, inter alia:

> *"We wrote to you on 2 August 2018 to inform you that Permanent TSB…agreed to transfer…your Loan and related facility and offer letters, restructure arrangement, guarantees, mortgages or other security…to Start Mortgages Designated Activity Company…In that letter we told you that we would write to you again on the Transfer date or shortly afterwards to let you know that the Transfer has completed.*
>
> *We are now writing to confirm that the Transfer completed on 1 February 2019…*
>
> *By this letter, we notify you that, on the Transfer Date, we assigned, transferred and conveyed your Loan, the Loan Documents and all present and future rights relating to your Loan and the Loan Documents absolutely to Start."*

29. This "*Goodbye*" letter was followed by a "*Hello*" letter from Start to Mr. Spillane on the 7th February 2019. It stated, inter alia:

> *"We are writing to you in relation to your mortgage loan…which was transferred to us, from Permanent TSB…on 1st February 2019…following the sale of your loan to Start Mortgages DAC…We are pleased to welcome you to Start and look forward to working with you in relation to your Loan…*
>
> *…*
>
> *You will have received notification from Permanent TSB that your Loan was transferred to Start on 1st February 2019. As of the Transfer Date, Start became the new owner of your Loan.*
>
> *On the Transfer Date, all of the Permanent TSB's rights and obligations under your Loan were transferred to Start and all relevant details relating to your Loan were also transferred. These details will be used by Start for the continued management and administration of your Loan and for any related legal and regulatory purposes."*

30. No issue was taken about the contents of these letters by the defendants.

31. Against this backdrop, a number of specific points of opposition were raised on behalf of the defendant. These are all matters which can be raised at the substantive trial and full consideration of them risks turning this application into a mini-trial – which, as noted above, was cautioned against by Kelly J in *Comer*. I therefore consider them solely from the point of view of whether they mean that Start has not established a prima facie case that there has been a valid assignment, a valid sale of the underlying assets, a valid assignment of the cause in action which is this action, and a valid notice given notwithstanding the evidence set out above. The second-named defendant's affidavit joins issue with matters of fact which are solely relevant to the merits of the substantive proceedings (such as, for example, the claim that the first-named defendant made certain representations as to the ownership of the property, and when the property was registered in the defendants' joint names). I do not consider these.

Grounds of Opposition

32. It was accepted on behalf of the defendants that normally an application to substitute a plaintiff would be straightforward but it was argued that in the circumstances of this case the situation was more complicated. The points of opposition other than those which go to the merits of the underlying proceedings appear to be:

(i) The charge that was originally registered on the Folio in favour of Permanent TSB (then Irish Life and Permanent) at Entry 7 was stated to affect "*the interest of Frank Spillane in the property only".* The Form 56 Deed of Transfer could therefore only apply to a charge over Mr. Spillane's interest in the property and the schedule to the Form 56 is invalid because it does not make it clear that the transfer will only apply to Mr. Spillane's interest. Therefore, the Form 56 should be withdrawn before the application or substitution is made. Furthermore, the transfer of the original charge can not enlarge that charge;

(ii) No proper notice of the assignment of the loan or the chose in action was given to Mrs. Spillane as required by section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 and therefore no legal assignment to Start has occurred;

(iii) As Mr Spillane has passed away and the charge was registered against his interest only, the charge has expired or failed and there can not be an assignment. It is claimed that this is reinforced by the fact that Permanent TSB was informed in 2009 (including by the Property Registration Authority) that the charge affected Mr. Spillane's interest in the property only and would fail in the event of his death.

(iv) Because the first-named defendant is dead the proceedings will have to be reconstituted in the name of his personal representative but neither Permanent TSB nor Start have done that.

33. I am satisfied that none of these points have the effect that Start has not established a prima facie case. I propose to deal with each of them in turn.

Extent of the Charge

34. Entry No. 2 on the Folio dated the 11th July 2002 states that the defendants are full owners of the property. The original charge in question in these proceedings (i.e in favour of Permanent TSB) is registered at Entry No. 7 (dated the 17th April 2007) and states, inter alia:

> *"Charge for present and future advances repayable with interest. Irish Life & Permanent plc is owner of this charge.*
>
> ***This charge affects the interest of Frank Spillane in the property only****.*
>
> *Note: The ownership of this charge has been transferred. See Entry No. 9."*
> [Emphasis added]

35. The defendants relied on this to argue that the Form 56 was invalid because it was misleading because it says, inter alia, "*the seller, as the registered owner or the person entitled to be the registered owner, HEREBY TRANSFERS to the Buyer, the charges, particulars or which are set out in the attached Schedule*" and the Schedule did not make it clear that the charge was only over Mr. Spillane's interest in the property.

36. I see no basis for suggesting that this means Start has not established a prima facie case. Firstly, the Form 56 has been overtaken by the completion of the registration of the transfer of the charge. However, even if that were not the case, I am not satisfied

that it can be said with sufficient certainty that the Form 56 is misleading. The Schedule to the Form 56 contains a column headed "*Entry Number/Dealing Number"* and this column refers to Entry No. 7 on the Folio. As noted above, Entry No. 7 registers the Permanent TSB charge and expressly states that it applies to Mr. Spillane's interest only. Thus, by reference, the Schedule does make it clear that the Transfer is only a transfer of a charge over Mr. Spillane's interest. In any event, and perhaps more importantly, the registration process has been completed and the Folio registers at Entry No. 9 (dated the 27th March 2019) Start's ownership of the charge at Entry No. 7. As noted above, that is limited to Mr. Spillane's interest so even if the Form 56 was misleading or inaccurate in some way (and I am not satisfied that it was) the Folio itself accurately reflects the position. Section 31 of the 1964 Act states:

> *"31.—(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."*

37. There has been no application to rectify the register. Indeed, it is difficult to see what any such application could be in circumstances where the defendants are of the view that the Folio accurately reflects the position.

38. It was also submitted on behalf of the defendants that the transfer recorded on the register could not have enlarged the charge held by Start and therefore it continues to apply only to the interest of Frank Spillane. That is correct. A transfer can only act to effect a transfer of the existing charge, ie. the charge being transferred, and can not confer a different charge on the transferee. Counsel for Start made it clear that they were not asserting that it had the effect of enlarging the charge.

Notice of the assignment

39. It was accepted on behalf of the defendants that proper notice of the assignment had been given to Mr. Spillane. In light of the contents of the letters set out above, this could not be disputed.

40. It was submitted that no proper notice was given to Mrs. Spillane.

41. I am not convinced that the absence of notice to one of the defendants would in itself mean that a prima facie case for substitution had not been established. If there is a valid assignment so as to justify substitution in respect of one of the defendants then arguably that is sufficient. I do not need to decide this as I am satisfied that there is adequate evidence of notice to Mrs. Spillane for the purpose of establishing a prima facie case. That, of course, does not preclude the defendants from arguing at trial that a proper assignment has not been made on the basis of a failure to give proper notice.

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

> *"(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, lie 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."*

43. Section 28(6) was considered by Baker J in *AIB Mortgage Bank v Thompson [2017] IEHC 515*. She said at paragraphs 13-15:

> *"13. The common law recognises the right of a person to contract with a person of his or her choosing, and prior to the enactment of the Supreme Court of Judicature (Ireland) Act 1877 the common law did not recognise the right of an assignee of a debt or chose in action to sue the original debtor or obligor. At common law a debt was looked upon as a strictly personal obligation and although over time the common law recognised the right of anyone with a pecuniary interest in a debt to sue in the name of the creditor, the common law did not recognise the right of the assignee to sue in his own name: Fitzroy v. Cave [1905] 2 K.B. 364.*
>
> *14. An assignment may be valid under s. 28(6) as between assignor and assignee as it is an absolute assignment made by writing by the assignor. However, as between the assignee and the original debtor or obligor, the power to give a good discharge for the debt without the concurrence of the creditor vests in the assignee only and insofar as express notice in writing has been given to the debtor.*
>
> *15. The statutory provision enabling the legal assignment of debt without the concurrence of the debtor or obligor is a recognition of the reality that a right to sue on debt is an asset capable of the being assigned either for value or otherwise, and the Act created a statutory means by which an assignment is actionable by an assignee at common law. It does not however create a statutory right to sue at common law without proof of prior notice to the original obligor and evidence must be shown that the obligor was formally and in writing notified of the assignment."*

44. She went on at paragraph 27- 29 to say:

> *"**The purpose of s. 28(6)***
>
> *27. That a debtor be given notice of the assignment of a debt or chose in action is important for practical and legal reasons. A debtor must know to whom the debt is due, and from what date a debtor may with certainty pay a debt to an assignee.*
>
> *28. Section 28(6) identifies the date at which the assignment of a debt or chose in action becomes effectual in law to transfer or pass the legal right to such debt or chose in action and all legal remedies for enforcement. Thereafter, and*

following upon notice, the power to give a good discharge for the debt thereby vests in the assignee without concurrence of the assignor.

29. As I stated in Irish Bank Resolution Corporation (In Special Liquidation) v. Lavelle [2015] IEHC 321 at para. 12:

> *'An assignment of a debt or chose in action, thus, is made in writing under the hand of the assignor, and express notice in writing is to be given to the debtor. The effective date of assignment is the date of such notice.'* "

45. The requirements of notice under section 28(6) were considered by the Baker J in *AIB Mortgage Bank v Thompson*. Baker J was considering assignment of a debt but there is no reason why the same reasoning would not apply to assignment of the chose in action which is the cause of action. Baker J referred with approval to the judgment of Costello J in *LSREF III Stove Investments Limited v Morrissey [2015] IEHC 603* in which Costello J quoted from Widgery LJ's judgment in *Van Lynn Developments Ltd v Pelias Construction Company Ltd [1969]*, QB 607 where he said that no formality was required:

> *"I agree and would point out that the only formality required by the section is that express notice in writing be given to the debtor. The section does not speak of "a notice": it speaks of "notice". Accordingly, it is wrong to suppose that a separate document purposely prepared as a notice, and described as such, is necessary in order to satisfy the statute. The statute only requires that information relative to the assignment shall be conveyed to the debtor, and that it should be conveyed in writing.* "

46. Baker J confirmed that no particular form of notice is required. She went on to say at paras 48-53:

> "***Summary on formalities***
>
> *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 Act does not make provision for who is to give the notice in writing of the assignment.

…

52. Atkin J. in Denney, Gasquet and Metcalfe v. Conklin expressly rejected an argument that to be compliant with the section a notice had to expressly state that there had been an assignment, identify the name and address of the assignee and identify what precisely had been assigned. Atkin J., giving that judgment and the three judges giving the judgment in the Court of Appeal in Van Lynn Developments Ltd. v. Pelias Construction Co. Ltd., took the view, with which I agree, that the statute requires 'notice', and not 'a notice', and provided the written document contains the necessary particulars and records the fact of an assignment or assurance, it may be sufficient. The debtor is to be given information which tells him that an assignment has been made which sufficiently identifies the assignee and which identifies what, or what debt, has been assigned. I agree with the view taken by the Court of Appeal for England and Wales in Van Lynn Developments Ltd. v. Pelias Construction Co. Ltd. that it would be wrong to interpret the statutory requirements as imposing technical or procedural requirements which are not therein expressed. The test is in the circumstances of each case whether there was sufficient information to enable the debtor to know not merely that a third party claims to own his debt, and claims to have the right as a matter of law to give a discharge for that debt, but that that party has taken an assignment or assurance of that debt from the party with whom he or she originally contracted.

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

not 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 maybe sufficient to constitute a notice of assignment. Costello J. described the process of the sending of 'goodbye' and 'hello' letters by assignor and assignee to a debtor or obligor which taken together amount to an assignment and she had no doubt that the debtor had as a matter of fact sufficient notice for the purposes of her judgment in LSREF III Stone Investments Limited v. Morrissey."

47. In this case, by letter of the 30th July 2019 from the solicitors for Start to the solicitors acting for both defendants they stated:

"We refer to the above proceedings and to the loan subject of said proceedings which has transferred from Permanent TSB plc (formerly Irish Life and Permanent PLC) to Start Mortgages DAC by Deed of Transfer dated 1 February 2019.

Please note that an application will be made imminently and without further notice to your clients, in order to substitute Start Mortgages DAC in place of Permanent TSB plc (formerly Irish Life and Permanent PLC) as a party to the Proceedings in accordance with Order 17, Rule 4 of the Rules of the Superior Courts…"

48. By further letter of the 5th February 2021 Start's solicitors wrote, inter alia:

"As you will be aware, the loan facilities and related security interests the subject of these proceedings, have been acquired by Start Mortgages DAC.

We are instructed to make an application to substitute Start Mortgages DAC as the Plaintiff in this action. This application will be made, without further notice to you – your clients will not be required to incur any costs in relation to this application. We will revert to you in this regard under separate cover."

49. It seems to me that there is a prima facie case that the letter of the 30th July 2019 constitutes valid notice to Mrs. Spillane of the assignment. Indeed, I would, if it were necessary, be satisfied on the balance of probabilities that it constitutes notice to Mrs. Spillane. The fact that it was sent by Start's solicitors to the solicitor acting for Mrs. Spillane is not fatal. Baker J makes it clear that there is no provision in the 1877 Act

requiring that notice must be given by any person in particular. The letter identifies the loan in question by reference to the proceedings, in which the loan is described, identifies the party assigning the loan and the party to whom it was being assigned, the date of the transfer and the means by which that transfer was effected. It also notifies Mrs. Spillane that the cause of action has been assigned by informing her that in light of the transfer effected by the deed of the 1st of February 2019 an application would be made imminently to substitute Permanent TSB as plaintiff.

50. In my view that is sufficient to establish a prima facie case that valid notice was given. It is reinforced by the fact that the letter of the 5th February 2021 was also sent. Start also relies on the service of the motion papers as sufficient notice. I would have a concern whether the service of the substitution application papers itself could constitute notice of an assignment because that gives rise to a circular situation that would deprive a debtor from ever being able to argue that notice was not given. However, equally it must be borne in mind that the assignment only takes effect from the date of notice so while notice by way of motion papers might deprive the debtor of being able to argue that notice was not given, reliance by the applicant on the motion papers themselves would mean that the assignee only takes assignment from that date. In any event, I do not need to resolve these questions where I am satisfied that the letter of the 30th July 2019 is sufficient but if I had to decide that issue I would be satisfied that there is a prima facie case that the service of the motion papers constitutes notice.

51. I should also address a point which was made on behalf of the defendants which was that part of their claim is based on subrogation and as subrogation is not a cause of action it can not be assigned. As this only constitutes part of the claim it seems to me that this can not be fatal to Start's application as there is no bar to assignment of the other aspects of the claim.

Death of the first-named defendant

52. Essentially the original argument made on behalf of the defendants under this heading was that because the charge is over the interest of Mr. Spillane only it expired or failed upon his death and Mrs. Spillane became the full owner by survivorship and there is therefore no charge to be assigned.

53. There is a fundamental misconception at the heart of this argument. The argument is based on there not having been an assignment prior to Mr. Spillane's death. That is incorrect, at least on a prima facie basis. The assignment occurred by Deed of

Transfer of the 1st February 2019. The transfer was registered on the Folio on the 27th March 2019 and it seems to me that this is the date of transfer. However, even if we were to take the date of notice to Mrs. Spillane as being the date on which a valid assignment occurred on the basis that it was only then that notice had been given to both defendants, the assignment had occurred prior to the date of Mr. Spillane's unfortunate death on the 16th April 2022 because notice was given to Mrs Spillane on either the 30th July 2019, the 5th February 2021 or the 13th April 2022. Thus, in circumstances where I am satisfied that there is a prima facie argument that notice was given to Mrs. Spillane on the 13th April at the latest, there is a prima facie case that the charge was assigned prior to, on the defendants' case, the expiry of the charge.

54. In fact, towards the conclusion of his submissions Counsel for the defendants clarified that the argument based on Mr. Spillane's unfortunate death was that because the charge had expired due to Mr. Spillane's death there is no longer a charge which can be enforced (rather than assigned). It seems to me that the enforceability of the charge is a matter for the substantive trial and is not a matter to be determined on this type of application which is simply concerned with whether there is a prima facie case that Start has taken over Permanent TSB's interest. In any event, even if the charge itself is unenforceable, the other rights under the loan facility would appear to remain intact and to be prima facie enforceable against Mr. Spillane, or more particularly, his estate and against Mrs. Spillane. The point was made on behalf of the defendants that the proceedings will have to be reconstituted and neither Permanent TSB or Start have sought to do so. This can not be a bar to a substitution. If the plaintiff, whoever that may be after determination of the substitution application, does not appropriately reconstitute the proceedings, any point arising can be made by the defendants.

Conclusion

55. I am therefore satisfied that there is prima facie evidence of a valid sale of the underlying assets and a valid assignment of the chose in action which is this action (the Deed of the 1st February 2019 and the registration of Start as owner of the charge on the folio) and prima facie evidence that valid notice was given to both defendants. I am not satisfied that the need to reconstitute the proceedings in the name of Mr. Spillane's estate is a bar to a substitution application or to the Court making an order substituting Start to Permanent TSB.

56. I will therefore make an order in terms of the Notice of Motion.