

**APPROVED**

**[2023] IEHC 94**



**THE HIGH COURT  
CIRCUIT APPEAL**

2019 No. 563 CA

BETWEEN

**MARS CAPITAL FINANCE IRELAND DAC  
(IN SUBSTITUTION FOR EBS MORTGAGE FINANCE)**

PLAINTIFF

AND

**JOHN TEMPLE**

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 2 March 2023**

## **INTRODUCTION**

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The order under appeal is an order directing the defendant to deliver up possession of specified lands to EBS Mortgage Finance. The order of the Circuit Court is dated 11 December 2019. As of that date, an entity known as EBS Building Society had been the registered owner of a charge over the lands. The case made before the Circuit Court had been that the principal money under a

**NO REDACTION REQUIRED**

loan agreement entered into between EBS Building Society and the defendant in February 2007 had become due in circumstances where the defendant was more than three months in arrears.

2. The defendant filed an appeal against the judgment and order of the Circuit Court. Prior to the appeal coming on for hearing, there was a transmission in the ownership of the charge. The registered owner of the charge is now Mars Capital Finance Ireland DAC (“*Mars Capital*”). An *ex parte* application to substitute Mars Capital as plaintiff was made, in advance of the hearing of the appeal, on 21 November 2022.
3. The appeal ultimately came on for hearing before me on 16 February 2023. The appeal takes the form of a complete rehearing, with the parties remaining in the roles which they had occupied in front of the Circuit Court. Accordingly, notwithstanding that the defendant is the appellant, the plaintiff remains the moving party in the proceedings and bears the onus of establishing the “*proofs*” necessary to ground an application for an order for possession pursuant to Section 62(7) of the Registration of Title Act 1964.
4. The defendant seeks to resist the application for an order for possession on the basis that the affidavit evidence does not establish that the underlying debt has been transferred to Mars Capital. It is said to follow, therefore, that whereas Mars Capital is the registered owner of a charge on the relevant folio at the Land Registry, it is unable to establish that the principal money under a debt secured by that charge has become due.
5. For completeness, it should be recorded that two additional lines of defence have been advanced in the affidavit filed by the defendant in support of his appeal. Whereas these lines of defence have not formally been withdrawn, counsel for

the defendant did not press them at the hearing before me. It is unnecessary for me to address these lines of defence in circumstances where the proceedings are to be adjourned to plenary hearing. It will be a matter for the defendant to decide, with the benefit of legal advice, whether to include these lines of defence as part of his pleaded case.

#### **EVIDENCE RE: TRANSMISSION OF DEBT**

6. The application for an order for possession is advanced on the basis that the substituted plaintiff, Mars Capital, is now the owner of a debt owed by the defendant. More specifically, it is asserted that the defendant had entered into a loan agreement with EBS Building Society in February 2007, and that the debt has since been transferred to Mars Capital.
7. The only evidence currently before the court in respect of the supposed transfer of the debt is that set out in the affidavit grounding the application on 21 November 2022 to substitute Mars Capital as plaintiff in lieu of EBS Mortgage Finance. It is averred that EBS Mortgage Finance has, since the date of the Circuit Court order on 11 December 2019, sold the relevant loan, its related mortgage security and the benefit of all related matters, including the order for possession, to Mars Capital. A deed of transfer dated 30 April 2021 has been exhibited. This deed is between a number of companies within the AIB Group and EBS DAC (who are identified as the sellers) and Mars Capital Finance Ireland DAC (who is identified as the buyer). The exhibit consists of three pages containing what might be described as operative clauses. Thereafter, there are two additional pages which appear to be extracts from a schedule to the deed. These pages are heavily redacted and all that is legible is a series of

headings and a single entry which references, *inter alia*, the name of the defendant and the address of the property the subject of the charge. There is then a column which identifies the “*legal entity*” as EBS Mortgage Finance Ltd. There is nothing in the first three pages of the exhibit, i.e. the operative part of the deed, which makes any reference to, still less explains the legal effect of, the schedule. It may be, but this is only speculation, that certain crucial pages have been omitted from the redacted form of the document which Mars Capital has deigned to put before the court. The limited material before the court does not establish, even on a *prima facie* basis, that the defendant’s debt has been transferred to Mars Capital Finance Ireland DAC.

8. There is another potential shortcoming in the evidence in respect of the transfer of the debt. It appears that the debt may initially have been held by EBS Building Society rather than by the original plaintiff in the proceedings, namely, EBS Mortgage Finance. It is not apparent from the limited affidavit evidence how the debt is said to have been transferred between these two companies.

## **DISCUSSION AND DECISION**

9. The application for an order for possession is made pursuant to Section 62(7) of the Registration of Title Act 1964 (as applied by Section 1 of the Land and Conveyancing Law Reform Act 2013). The moving party must establish, first, that it is the owner of the registered charge, and, secondly, that the “*principal money*” in respect of a debt secured by that charge has become due and owing.
10. The Circuit Court Rules envisage that an application for an order for possession will normally be made on a summary basis: see Order 5B. However, the Circuit

Court—and the High Court on appeal—enjoys a broad discretion to remit an application to plenary hearing.

11. The principles guiding the exercise of this discretion have been clarified by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381. Baker J., delivering the unanimous judgment, explained that there are a range of responses available to a court in an action for summary judgment. At one end of the range are cases where a plaintiff establishes its claim on the affidavit evidence because the defendant is not able to persuade the judge either that the evidence is incomplete nor that there is a basis on which a credible defence exists. At the other end of the range are cases where a defendant either positively establishes a defence at law or on the merits, or, alternatively, persuades the judge that the plaintiff has not established its proofs.
12. Baker J. went on then to explain, at paragraph 80 of the reported judgment, that many cases fall between these two extremes:

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

13. I turn next to apply these principles to the circumstances of the present case. For the reasons elaborated upon below, I have concluded that the proceedings should be adjourned to plenary hearing. This is because it is not possible, on the basis of the limited affidavit evidence currently before the court, to determine whether

the moving party, Mars Capital, is the owner of the debt upon which the application for an order for possession is predicated. The evidence is, at best, ambiguous.

14. The most that the affidavit evidence establishes is that Mars Capital is the registered owner of a charge on the lands. A copy of the relevant folio has been exhibited and this identifies “*Mars Capital Finance Ireland DAC*” as the owner. It is also apparent from the folio that the charge had previously been held by EBS Building Society (as opposed to EBS Mortgage Finance).
15. Section 31 of the Registration of Title Act 1964 provides that the register shall be conclusive evidence of any right, privilege, appurtenance or burden appearing on the register. The Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352, [2019] 1 I.R. 385 held, *inter alia*, that the correctness of the register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and that the right to possession has arisen and become exercisable. This decision has since been approved of by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (cited above).
16. If and insofar as a defendant wishes to challenge the correctness of the register, it is necessary for them to institute separate proceedings against the Property Registration Authority of Ireland. As I understand matters, no such proceedings have yet been taken by the defendant. Accordingly, this court, for the purpose of the application for an order for possession, must treat Mars Capital Finance Ireland DAC as the registered owner of the charge.

17. The position in respect of the second element of the proofs for an application for an order for possession is more complicated. The usual way in which a creditor establishes that the principal money secured by the instrument of charge has become due is to exhibit: (i) the loan agreement itself; (ii) the demand for repayment (if this is a prerequisite to the principal money becoming due and owing); and (iii) a statement of account which indicates that an event of default, which triggers the obligation to repay the principal money, has occurred and has not been remedied. There is then normally an affidavit confirming that the account is still in arrears as of the date the proceedings are issued. The exhibits in the present proceedings contain documentation of this type.
18. The complicating factor is that the loan agreement was entered into by a *different entity* than that which is now the plaintiff in the proceedings. More specifically, the loan agreement was entered into by EBS Building Society. Typically, the way in which a subsequent purchaser of a debt establishes its ownership is to exhibit the relevant parts of the deed of transfer by which ownership of the debt is said to have been transmitted. As discussed under the previous heading, the redacted version of the deed of transfer which Mars Capital has chosen to put before the court does not establish that ownership of the debt has passed to it.
19. Matters are further complicated by the fact that there may possibly be a difficulty in relation to the transfer from EBS Building Society to EBS Mortgage Finance. The grounding affidavit does not adequately explain how this step in the chain of transfer occurred. There is a scheme of transfer which has been exhibited but no detailed submissions were made in relation to the legal effect of that. There is a further document exhibited, as part of the original application before the Circuit Court, in relation to a transaction in 2011. The precise purpose of this

transaction is unclear, but it does, perhaps surprisingly, appear to relate to a transfer from EBS Mortgage Finance to EBS Building Society. There would appear to be an argument, therefore, that the wrong entity within the EBS Group took the proceedings in the first instance. Even if this issue is resolved in favour of the plaintiff, there is an evidential deficit in respect of the onward transfer to Mars Capital.

20. The principal response made on behalf of Mars Capital to these difficulties is predicated upon it being the registered owner of the charge. Counsel observes, correctly insofar as it goes, that it is not open to the defendant to challenge the validity of this registration in these proceedings. Counsel then draws attention to the wording of the deed of charge of 15 June 2007 and suggests that, even without reference to the underlying loan agreement, the deed of charge itself is sufficient to allow Mars Capital to apply for an order for possession. This submission is predicated on an argument that the deed of charge itself identifies the debt. Counsel draws attention, in particular, to the coversheet of the deed of charge which expressly references the account number of the loan account and the amount of the principal sum. It is said that the court can proceed on the basis that Mars Capital, as charge holder, is entitled to enforce the debt.
21. With respect, the court should not have to speculate as to whether a particular debt is secured by a charge. The “*loan*” as defined under the deed of charge simply refers to a figure in euros. It does not refer to any account number. It is correct to say that there is an annotation on the front of the deed of charge which does refer to an account number, and that if one cross-references that to the statement of account one might deduct that the charge refers to a particular debt. The difficulty for Mars Capital, however, is that this annotation does not have



any particular legal status in the deed. It does not form part of the definition of the loan and, for all the court knows, may simply be something that was added for administrative purposes long after the deed had been executed.

22. I have concluded, therefore, that Mars Capital cannot rely solely on the deed of charge as evidencing that the debt owed by the defendant to EBS Building Society has been transferred to it. For the reasons already explained, the limited documentation which has been put forward in relation to the transaction on 30 April 2021 does not establish, even on a *prima facie* basis, that ownership of the defendant's debt has been transferred to Mars Capital.
23. As matters currently stand, therefore, Mars Capital cannot succeed in its application for an order for possession. That is not, however, an end of the matter. This court, exercising its appellate jurisdiction from the Circuit Court, has discretion pursuant to Order 5B of the Circuit Court Rules to direct that the matter be remitted to plenary hearing. The principles governing the exercise of this discretion have been set out authoritatively by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* (cited above).
24. Whereas I am not satisfied that Mars Capital has, as of yet, made out the proofs for an application for an order for possession, neither am I satisfied that the defendant has, as of yet, made out a defence on the basis that the debt has not been transferred to Mars Capital. It seems to me that the court cannot draw final conclusions, one way or the other, on the basis of the very limited evidence which has been put before the court by Mars Capital. I have decided, therefore, that the interests of justice require that the matter be remitted to plenary hearing. This will allow the parties an opportunity to put in whatever further evidence

they wish. The court can then adjudicate on the matter on the basis of a complete set of evidence.

### **RAISING NEW MATTERS ON APPEAL**

25. For completeness, it is necessary to address two procedural objections raised on behalf of Mars Capital as follows. First, objection was taken to the fact that the defendant sought to raise the issue of the substitution of Mars Capital as plaintiff without having first signalled an intention to do so by way of a replying affidavit. With respect, this objection is not well founded. Mars Capital, as the moving party in the proceedings, bears the onus of proof in relation to establishing that the principal money has become due and owing. As part of this, it is necessary to demonstrate the chain of transfers. A defendant is entitled to hold a plaintiff to its proofs and is not normally required to flag this in advance on affidavit. Indeed, parties are not to be encouraged to file affidavits consisting of *legal submission* rather than factual matters.
26. In some instances, a replying affidavit may be required for other reasons: for example, a defendant may be challenging some factual averments set out in the plaintiff's affidavits. No such considerations arise in the present case. Here, the point being made by the defendant is that the affidavit evidence does not establish that the debt has been transferred to Mars Capital. It is the deficiencies in the plaintiff's own evidence which are being relied upon.
27. The second procedural objection raised by Mars Capital is to the effect that it is not open to a party, on an appeal, to raise an issue which was not raised in the court below. Counsel cites in this regard the leading textbook, Dowling and Martin, *Civil Procedure in the Circuit Court* (Round Hall, 3rd Ed., 2018) at

paragraph 16-24 as authority for the proposition that an appellate court will not permit an appellant to raise, for the first time, an issue that was not heard and decided before the lower court, unless it considers that the issue raised is exceptional and in the interests of justice. The learned authors, in turn, rely on certain case law governing an appeal from the High Court to the Supreme Court.

28. It is doubtful whether this case law can be read across directly to an appeal from the Circuit Court to the High Court. This is because such an appeal is by way of a complete rehearing. It seems to me, therefore, that the strictures identified in that case law are not directly applicable. These strictures are predicated, in large part, on the constitutional framework governing appeals to the Supreme Court (and now the Court of Appeal). See, generally, *Lough Swilly Shellfish Growers Co-op Society Ltd v. Bradley* [2013] IESC 16, [2013] 1 I.R. 227.
29. It is not necessary, however, for me to form a concluded view in relation to this point for the purpose of disposing of the procedural objection in the present case. This is because even in the case of an appeal from the High Court to the Court of Appeal, the appellate court has a broad discretion to entertain new arguments. See, generally, *Lough Swilly Shellfish Growers Co-op Society Ltd v. Bradley* (cited above). Here, there has been a significant development since the order for possession was granted in the Circuit Court. More specifically, Mars Capital asserts—although this has not yet been proven—that it has succeeded to the original plaintiff's interest in the debt. This is a new issue and one which could not have been anticipated at the time of the hearing before the Circuit Court.
30. If and insofar as the defendant also raises questions as to which entity in the EBS Group had held the debt originally, it is correct to say that this is something

which could have been raised before the Circuit Court. However, it would be artificial to suggest that the High Court, in determining the question as to whether Mars Capital has since succeeded to the debt, should be precluded from tracing the chain of transfers back to the original loan agreement. Put otherwise, one of the central issues which will have to be determined in these proceedings is whether Mars Capital has succeeded to the debt. It would be contrary to the interests of justice were the High Court to be required to decide this issue in the blind, i.e. by having to disregard what may be an earlier break in the chain of transfers. Even if the general position is that a party should not be permitted to raise new issues for the first time on appeal to the High Court, this is a case where an exception is justified. The fair resolution of these proceedings demands that the High Court be entitled to rule upon the defence now asserted, by tracing the transfer of the debt back to the original loan agreement in February 2007.

### **CONCLUSION AND PROPOSED FORM OF ORDER**

31. For the reasons explained herein, this appeal will be adjourned to plenary hearing pursuant to Order 5B of the Circuit Court Rules.
32. This matter will be listed before me on 20 March 2023 for further directions. In particular, I will hear the parties on the following issues. First, whether Mars Capital wishes to apply to amend the Civil Bill. Secondly, whether it is necessary that the defendant issue a motion seeking to set aside the substitution order, or whether, alternatively, this can simply be dealt with as part of the overall hearing of the appeal. I will also hear the parties on whether or not discovery is required and on any other procedural issues that arise. As to costs,

my *provisional* view is that an order for costs should be made in favour of the defendant in respect of the appeal to date.

*Appearances*

Eoghan Casey for the plaintiff instructed by Edward Healy Solicitors LLP

Jason Shannon for the defendant instructed by Mulhall and Company Solicitors

Approved  
Gemma S. Mans