APPROVED **[2024] IEHC 742**

THE HIGH COURT
CIRCUIT APPEAL

2019 22 CA

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

TRACEY O REILLY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 6 December 2024

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The underlying proceedings were taken pursuant to section 62 of the Registration of Title Act 1964 (as applied by the Land and Conveyancing Law Reform Act 2013). In effect, the original plaintiff—and I use that term advisedly—had sought and obtained an order for possession in respect of a charge on registered land. The order for possession was made by the Circuit Court (Her Honour Judge Linnane). The defendant, Ms. O'Reilly, as is her

NO REDACTION REQUIRED

right, has brought an appeal to the High Court against the order of the Circuit Court.

2. Before the hearing of the appeal, however, there was an alleged change in the ownership of both the registered charge and the underlying debt secured upon that charge. The (alleged) transferee of the charge and the debt, Pepper Finance Corporation (Ireland) DAC, made a substitution application to the High Court (Ferriter J.) on the 6 March 2023. That application, as is proper, was made on an *ex parte* basis: that is what is provided for under Order 17, rule 4 of the Rules of the Superior Courts. However, as is standard practice, the order contained a proviso to the effect that the defendant be informed, by notice in writing, of the following:

   (a) That a copy of the affidavit and exhibits grounding the (substitution) application are available on request,

   (b) That an application may be made to court on notice to set aside the order,

   (c) That the defendant has an entitlement to contest the transfer of the loan and/or security involved to Pepper Finance Corporation (Ireland) DAC at the hearing of the action.

3. In other words, precisely because the application had been made *ex parte*, i.e. without hearing from the defendant, the order had built into it a number of important safeguards which allowed the defendant, if she so wished, to agitate the question of the validity of the transfer and the relevance of same to the proceedings.

4. The form of the order is that Pepper Finance Corporation (Ireland) DAC has effectively stepped into the shoes of, or has been substituted for, the original plaintiff, KBC Bank Ireland plc.

5. The first question which arises is whether that form of procedure is correct. The judgment of the Court of Appeal in *Irish Bank Resolution Corporation v. Halpin* [2014] IECA 3 appears to suggest that—at least in the context of an appeal from the High Court to the Court of Appeal—the proper order in circumstances where a transfer has occurred between the date of the first-instance decision and the hearing of the substantive appeal is that the transferee be joined as an *additional party*. In other words, rather than simply stepping into the shoes of the original plaintiff, it seems that the appropriate order is that the transferee is joined to the appeal proceedings as a second plaintiff. The rationale for that approach has been set out in the judgment of the Court of Appeal in *Halpin* as follows (at paragraph 23):

> "It follows from this analysis that what is sought to be upheld on the appeals are the High Court judgments of October 2012 and November 2013 in favour of IBRC as plaintiff in the proceedings. If it is sought to uphold those judgments then IBRC must remain a plaintiff in the proceedings. It is true that the judgments given by the High Court were expressly awarded in favour of the plaintiff. However, they were granted to IBRC as plaintiff by reason of it having established by factual evidence to the satisfaction of the High Court its entitlement to such judgment. If this Court were now to make the order of substitution as sought by Kenmare, its effect would be to replace Kenmare for IBRC as plaintiff in the proceedings and accordingly, permit Kenmare as plaintiff to be considered (subject to the outcome of the appeals) as entitled to have been granted judgment in its favour against Mr. Halpin in the High Court on the 4th October, 2012, and the 7th November, 2013. Kenmare had no entitlement to be granted judgment in its favour on those dates and does not contend otherwise."

6. That logic has since been applied by this court in a judgment that I delivered in a case entitled *Permanent TSB plc v. Morrissey* [2021] IEHC 18 in the context of an appeal from the Circuit Court to the High Court.

7. Accordingly, an issue arises as to whether the form of order made in the present appeal is correct in that it has released the original plaintiff. Counsel on behalf of the new party, Pepper Finance, has made an elaborate submission this morning as to there being a distinction in principle between an appeal from the Circuit Court to the High Court, on the one hand, and an appeal from the High Court to the Court of Appeal, on the other. This distinction is said to lie in the difference of approach adopted on each appeal. The point is made that an appeal from the Circuit Court to the High Court entails a *de novo* hearing. What occurred before the Circuit Court is largely irrelevant. The High Court hears the case and reaches its own conclusion in relation to the various matters that have been raised. The position is, as counsel fairly concedes, slightly more nuanced in that, for example, events which occurred before the Circuit Court may be relevant in relation to credibility or in relation to costs or in relation to the conduct of the litigation. These exceptions notwithstanding, however, counsel makes the point that a different type of appeal arises as between the High Court and the Court of Appeal in that that appeal is effectively an appeal on the record. Ordinarily, the Court of Appeal will only set aside a decision of the High Court if there is an error in principle identified.

8. In support of the proposition that there is such a distinction between the two types of appeal, counsel has, very helpfully, referred me to the judgment of the Supreme Court in *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48, [2015] 1 IR 516. In the course of his judgment, Clarke J. sets out, in particular, at paragraphs 101 and onwards, a discussion of the various types of appeal. The part that is most immediately relevant to this case is the discussion of a *de novo* appeal at paragraphs 103 and 104, and, in particular, the example given

by Clarke J. of an appeal from the Circuit Court to the High Court and how such an appeal operates.

9. Counsel suggests that those considerations mean that the decision of the Court of Appeal in *Halpin* does not apply to an appeal from the Circuit Court to the High Court. Counsel makes the point that the party who wishes to resist an appeal to the High Court does not need to affirm or uphold or justify the order of the Circuit Court. This is not a situation where there is a careful scrutiny or review of what the Circuit Court did and decided; rather, the matter is dealt with *de novo*. It is said that it follows, therefore, that it is not necessary or essential that the party who had acted as plaintiff in the Circuit Court hearing be party to the proceedings before the High Court by way of appeal.

10. These submissions were made carefully and there is some attractiveness to them. However, it is, potentially at least, difficult to reconcile these submissions with the judgment of the Court of Appeal in *Halpin*. As I read the judgment of the Court of Appeal, the concern there was that the making of an order of substitution mid-course an appeal, as it were, might appear to have the effect of giving retrospective judgment to the newly added party. That seems to be the import of what Finlay Geoghegan J. is saying at paragraph 23 of her decision. It is correct to say that the word "*judgment*" is used there, but it appears to me that it is at least arguable that what is meant there is "*judgment*" in a sense of a court order, rather than meaning a decision or the rationale underlying the decision. It seems to me, therefore, that it is at least arguable that the same logic applies to the Circuit Court appeal as it does to the High Court appeal. I accept, however, that the legal position is not clear-cut. I also note, without further comment, the pragmatic point made on behalf of Pepper

Finance that in some circumstances the original plaintiff will no longer be in existence. It may be, for example, that a company has been wound-up. It may also be the case that the debt or the loan the subject-matter of the proceedings has been transferred out of the control of the relevant company, and it has no practical interest in the outcome of the appeal proceedings. There are also considerations in relation to whether a party holds a banking licence, and it may be that the absence of a banking licence makes it difficult or legally suspect for such a party to engage in debt-enforcement litigation. Those are all potentially valid points and they tend to suggest that the legal test may be more nuanced than an undiscerning reading of the judgment in *Irish Bank Resolution Corporation v. Halpin* [2014] IECA 3 might suggest.

11. Having regard to these competing considerations, it seems to me that this is an appropriate case in which the High Court should exercise its discretion under section 38 of the Courts of Justice Act 1936 to state a case to the Court of Appeal. Section 38 has, of course, to be read now in light of the judgment of the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46, [2016] 1 IR 92 which indicates that the power to state a case is wider than the literal interpretation might suggest.

12. It seems to me that there is a significant point of law to be decided. It is one which is properly to be decided by the Court of Appeal. The High Court is, of course, bound by the judgment in *Halpin*. Whereas there might be some wriggle room in terms of an interpretation of *Halpin* which would allow for the distinction between Circuit Court appeals and High Court appeals to be made, it does stretch the position somewhat. I am satisfied, therefore, that it is better that this matter now come before the Court of Appeal, rather than the High

Court attempt to cut the Gordian knot by making its own decision in relation to the precise form that a change of party application under Order 17 RSC should take.

13. In summary, therefore, I propose to adjourn the appeal proceedings before me to allow this preliminary jurisdictional issue to be addressed. It is a jurisdictional issue because if it is the case that the substitution was improperly made and that Pepper Finance should, instead, have been joined as an additional party, rather than an outright substitute, then Pepper Finance would not, as a matter of law, have any standing to pursue these appeal proceedings in its sole name. It follows, therefore, that this issue must be determined first, and the balance of the appeal must await the outcome of that.

Appearances

Keith Rooney for the plaintiff instructed by Joynt and Crawford LLP
The defendant appeared as a litigant in person