



THE HIGH COURT

Record No.: 2023/277 SP

BETWEEN:

PEPPER FINANCE CORPORATION (IRELAND) DAC

Plaintiff

-and-

ROBERT FOLEY

Defendant

JUDGMENT of Mr Justice Rory Mulcahy delivered on 2 October 2024

**Introduction**

1. In these proceedings, the plaintiff (“**Pepper**”) seeks a declaration that the sum of €415,997.15 stands well charged on the defendant’s interests in the lands and premises comprised in Folios 36370F and 5996F of the Register of County Limerick by virtue of a judgment mortgage registered on those lands on or about 20 January 2016. Pepper also seeks an order for sale of the said lands in default of payment of that sum and other ancillary relief pursuant to section 117 of the Land and Conveyancing Law Reform Act 2009 (“**the 2009 Act**”).

2. The defendant (“**Mr Foley**”) raises a number of arguments by way of defence to Pepper’s claim, but his principal objection is a novel argument that Pepper is required to seek leave to issue execution of the judgment prior to seeking the well charging order.

## Factual Background

3. The background to the application is set out in the affidavit of Mr Niall O'Reilly, a senior manager of Pepper. Mr O'Reilly avers that by order of the Master of the High Court dated 23 June 2015, in proceedings entitled *Danske Bank A/S v David Maune and Robert Foley*, Record No. 2013/2880S, Danske Bank A/S was granted liberty to enter final judgment against Mr Foley in the sum of €415,997.15. In fact, as appears from the balance of these proceedings, the correct record number for the relevant proceedings was 2013/1981S. The record number quoted refers to unrelated proceedings.

4. Mr O'Reilly further avers that on 12 October 2015, an order of fieri facias issued from the Central Office against the defendants in the summary proceedings in the sum of €415,997.15. In accordance with the requirements of section 116 of the 2009 Act, on 20 January 2016, Danske Bank A/S ("**Danske**") registered a judgment mortgage against the defendant's interest in the lands and premises comprised in Folios 36370F and 59996F of the Register County Limerick (LK36370F and LK59996F), of which folios, Mr Foley was registered as full owner. Mr O'Reilly exhibits the order of fieri facias and the relevant folios, but neither the order of the Master nor the judgment order were produced.

5. None of the foregoing is disputed by Mr Foley in his replying affidavit notwithstanding the apparent error in the record number referenced by Mr O'Reilly and the failure to produce the underlying orders.

6. Mr O'Reilly then avers that on foot of an agreement described as a Debt Portfolio Sale and Purchase Deed – Secured Assets ("**the DSD**") entered into between Danske and Montepico Investment DAC ("**Montepico**") dated 2 July 2021 and further to the nomination by Montepico of Pepper as the party to whom the secured assets should be transferred, Danske and Pepper entered into a deed of assignment ("**the Deed of Assignment**") pursuant to which Danske transferred the secured assets to Pepper. Mr O'Reilly avers that it was a term of the Deed of Assignment that the secured assets would transfer pursuant to an Irish Property Transfer Deed. Danske and Pepper executed a Deed of Transfer on 9 September 2022 of, *inter alia*, the judgment mortgages the subject of these proceedings. Redacted versions of the DSD and the Deed of Transfer are exhibited by Mr O'Reilly. However, despite repeated references to the Deed of Assignment in his affidavit and its purported

inclusion as an exhibit, it was not included in the papers furnished to the court. Neither party identified the fact that the Deed of Assignment was not before the court at the hearing of these proceedings, its omission only became apparent when reviewing the papers for the purpose of preparing this judgment.

7. In the circumstances, queries were raised with both parties regarding the absence of the purported Deed of Assignment. The initial responses were somewhat confusing. The solicitors for the plaintiff's solicitor first contended that the Deed of Assignment had been omitted only from the papers furnished to the court, but had been supplied to the defendant. They subsequently clarified that there was in fact no Deed of Assignment and the references to same in the papers were a "drafting error". As it emerged, neither of these explanations was correct.

8. The defendant's solicitor, even more confusingly in light of the plaintiff's solicitor's "clarification", contended that the Deed of Assignment *had* been exhibited and that submissions had been made regarding the content thereof.

9. In light of the foregoing, I requested that the plaintiff furnish an affidavit explaining the situation and gave each party an opportunity to provide supplementary written submissions, restricted to addressing the content of that affidavit. Pepper provided an affidavit of Mr David Humphries, portfolio manager with Pepper, sworn on 10 September 2024. It did not provide any further submissions. Mr Foley provided brief written submissions on 30 September 2024.

10. Mr Humphreys' affidavit made clear that there *was* a Deed of Assignment dated 15 October 2021 but that, through a "clerical error", it was not included in the relevant exhibit. He exhibited an unredacted copy of same. In apparent anticipation of an argument that the plaintiff should not be entitled to rely on this new evidence, he made clear that it was Pepper's case that the Deed of Assignment was irrelevant, notwithstanding the apparent reliance on it in Mr O'Reilly's affidavit.

11. In his submissions, Mr Foley objected to the reliance on the Deed of Assignment on the basis that it had been executed by an attorney, repeating an objection he had made in relation to the DSD. He also objected to the reliance by Pepper on legal argument in Mr Humphreys' affidavit.

12. In the plaintiff's original affidavit, Mr O'Reilly explains that the judgment mortgage registered on Folios LK36370F and LK 59996F was registered on a subsidiary folio, Folio 115S of the Register County Limerick. He exhibits a copy of that folio which indicates that Pepper is the full owner.

13. Mr O'Reilly avers that Pepper's solicitor wrote to Mr Foley demanding that he discharge the judgment debt, failing which it would institute the within proceedings. He avers that no part of the judgment has been repaid and that the judgment sum remains due and owing. None of this is disputed by Mr Foley other than by his averment that he makes "*no admission of debt and that nothing in [his] affidavit is to be construed as an admission of debt*".

14. Pepper exhibited valuations of both folios dated 5 July 2022. Folio LK36370F is valued at €437,600. Folio LK59996F is valued at €405,700. These valuations were not disputed by Mr Foley.

### **The defences**

15. Mr Foley has raised a number of issues with Pepper's claim which, he contends, mean that Pepper is not entitled to the reliefs sought. As appears from his replying affidavit and the written and oral submissions made on his behalf, Mr Foley advances the following eight arguments.

16. First, he contends that an application to have a judgment mortgage declared well charged is a form of execution which, in the circumstances of this case, where there has been a change in ownership of the judgment mortgage, is required to be preceded by an application for leave to issue execution pursuant to Order 42, rule 24 of the Rules of the Superior Courts. Mr Foley appeared to be contending, therefore, that Pepper should have sought leave to issue execution either prior to having its ownership of the judgment mortgage registered by the Property Registration Authority ("**the PRA**") or prior to seeking well charging relief.

17. Second, he argues that Pepper has not established that it is the owner of the judgment mortgage.

18. Third, Mr Foley contends that in order to obtain well charging relief, the owner of the judgment mortgage must be entitled to execute the original judgment and that Pepper hasn't established its entitlement to do so, which he argues is a necessary proof in this application.

19. Fourth, he contends that he was not given prior notification of the assignment to Montepico or the transfer to Pepper, contrary to the requirements of section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877.

20. Fifth, it is suggested that the documents exhibited, having regard to the redactions therein, do not establish that Pepper acquired a valid transfer of Mr Foley's debt. He contends that proof of ownership of the underlying loan is also a necessary proof in this application.

21. Sixth, Mr Foley contends that there has been no sufficient explanation for the lapse of time since the original judgment such as to justify granting leave to issue execution (see, *Smyth v Tunney* [2004] 1 IR 512).

22. Seventh, he contends that there is no evidence that any of the parties who succeeded to Danske's interest held or hold a banking licence.

23. And finally, he argues that the contractual documents exhibited by Pepper have been executed by attorneys but other than in compliance with section 64 of the 2009 Act and/or section 21 of the Powers of Attorney Act 1996.

#### **Well charging order and order for sale**

24. Pepper relies on the conclusiveness of the register, and in particular the register recording its ownership of the judgment mortgage, to ground its claim for well charging relief. In *Doyle v Houston* [2020] IECA 86, the Court of Appeal (Costello J) upheld a decision of the High Court declaring judgment mortgages well charged on the defendant's

property. She explained that the court could not look behind the judgment mortgages registered on the folios at issue in those proceedings in light of section 31 of the Registration of Title Act 1964 which confirms that the register is conclusive evidence of the title of the owner of the land as appearing on the register:

*“55. The judgment mortgages, the subject of these proceedings, were registered by the PRA on the folio. Section 31 of the Registration of Title Act 1964 provides that:-*

*“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...”.*

*56. It follows that unless and until the entries of the judgment mortgages are cancelled this court cannot look behind the folio. Ms. Houston said that she applied to the PRA to vacate the entries but was informed that she must obtain an order of court. That was in 2017. To date, she has not obtained such an order. It follows that neither the High Court, nor this court could, or may, engage with her argument regarding the validity of the costs orders, or the validity of the judgment mortgages, and the appropriateness of the registration of same on the folio. To do so would be to seek to go behind the register, which is not possible in the circumstances of this case.”*

**25.** In addition to the foregoing, the plaintiff relies on the provisions of sections 116 and 117 of the Land and Conveyancing Law Reform Act 2009.

**26.** Section 116 of the 2009 Act provides as follows:

*(1) A creditor who has obtained a judgment against a person may apply to the Property Registration Authority to register a judgment mortgage against that person's estate or interest in land.*

*(2) A judgment mortgage shall be registered in the Registry of Deeds or Land Registry, as appropriate.*

*(3) For the avoidance of doubt it is and always has been the case that—*

*(a) there is no requirement to re-register a judgment mortgage in order to maintain its validity or enforceability against the land or a purchaser of the land,*

*(b) a judgment mortgage may be registered—*

*(i) notwithstanding that the judgment debtor has obtained an order of the court granting a stay of execution, unless the court orders otherwise,*

*(ii) against the interest of a beneficiary under a trust for sale of land.*

**27.** Section 117 of the 2009 Act states that:

*(1) Registration of a judgment mortgage under section 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under this section or section 31.*

*(2) On such an application the court may make—*

*(a) an order for the taking of an account of other incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,*

*(b) an order for the sale of the land, and where appropriate, the distribution of the proceeds of sale,*

*(c) such other order for enforcement of the judgment mortgage as the court thinks appropriate.*

### **The contractual documents**

**28.** In addition to its reliance on the register as conclusive evidence of its ownership of the relevant judgment mortgage, Pepper has relied on the DSD, the Deed of Assignment and

the Deed of Transfer. Pursuant to clause 3.1 of the DSD, the seller, Danske, agreed to sell, assign, transfer, convey and deliver absolutely and unconditionally to the purchaser, Montepico, “*or the purchaser’s loan servicer as nominee*”, the “purchased assets”. Clause 3.4 provides that the agreement transfers only those purchased assets which are secured assets.

**29.** “Purchased assets” are defined to include, *inter alia*, all sums of principal, interest or any other sum payable under the ‘Facilities’ and the ‘related security’. “Secured assets” are defined as “*those purchased assets which are secured by any right over interest in Irish land... or any other mortgage, charge (whether fixed or floating, legal or equitable), pledge, lien, assignment by way of security or other Encumbrance.*”

**30.** “Facilities” are defined to mean the debts listed in a Data Tape where such debts relate to the borrower connections listed in Schedule 1 to the DSD. The Data Tape is a reference to the contents of an online data site made available by Danske to Montepico in respect of the facilities. Mr O’Reilly avers that the only unredacted entry in Schedule 1 relates to the defendant’s loan accounts.

**31.** “Related security” is defined as meaning “*all Security Interests, of whatever kind, whenever arising and wheresoever located, granted to secure or securing any facility.*”

**32.** “Property Collateral” is defined as meaning any collateral comprising Property and which is subject to (or which is purported to be subject to) a mortgage, charge or other Security Interest under any Finance Agreement or any judgment mortgage.

**33.** In addition to the redactions in Schedule 1, certain of the contractual terms have been redacted in full or in part. Mr Foley argues that the redactions render it impossible to determine what has been transferred to Pepper.

**34.** Mr O’Reilly also exhibits a Deed of Transfer, Land Registry Form 56, dated 9 September 2021, pursuant to which Danske transferred to Pepper, as nominee of the purchaser, Montepico, the judgment mortgages listed in the schedule to that deed. The only redactions in this document are in the schedule, all entries being blacked out apart from the judgment mortgage registered over LK36370 and LK59996 the subject of these proceedings.



35. The Deed of Assignment, subsequently exhibited by Mr Humphries, is an agreement between Danske and Pepper (defined as “the parties”) and contains provisions referring to the transfer to Pepper, described as the Transferee, of certain assets. Recital B provides that, pursuant to clause 3 of the DSD, the Purchaser (Montepico) has nominated the Transferee (Pepper) as the party to whom the Secured Assets (as defined in the DSD) should be assigned. Recital C refers to Pepper accepting this nomination. Recital D of the Deed of Assignment refers to Danske wishing to effect an “*absolute, unconditional, and irrevocable assignment of the Secured Assets to the Purchaser*”.

36. Clause 2 of the Deed of Assignment then provides:

2.1 ***IT IS AGREED** that in consideration of the Seller and Purchaser accepting their respective rights and obligations pursuant to the DSD and payment of the Adjusted Purchase Price (as that term is defined in the DSD) by the Purchaser to the Seller in accordance with the provisions of the DSD, receipt of which is hereby acknowledged, and the Purchaser nominating the Transferee as the party to whom the Secured Assets should be transferred, conveyed and assigned and the Transferee accepting the nomination and the Purchaser directing the seller to transfer, convey and assign the Secured Assets to the Transferee, the Seller unconditionally, irrevocably and absolutely **GRANTS, CONVEYS, ASSIGNS, TRANSFERS** and **ASSURES** to the Purchaser, insofar as these are not otherwise granted, conveyed, assigned transferred and assured pursuant to the Irish Property Transfer Deeds, all such rights, title and interest as the Seller may have in and to the Secured Assets with effect from the Assignment Date.*

2.2 *The Parties agree that Secured Assets that are Property Collateral (as defined in the DSD) governed by the laws of Ireland will transfer pursuant to the relevant Irish Property Transfer Deed.*

2.3 *The Parties agree that Secured Assets that are Property Collateral (as defined in the DSD) governed by the laws of England and Wales or Northern Ireland will transfer pursuant to the relevant Property Transfer Deed.*

37. “Irish Property Transfer Deeds” are defined as meaning the transfer documents dated on or about the date of the Deed of Assignment set out in the First Schedule entered into by

the parties in respect of Property Collateral as defined in the DSD. Item 4 of the First Schedule of the Deed of Assignment lists a Deed of Transfer in respect of judgment mortgages over registered property dated on or about the date of the Deed of Assignment.

## Discussion

### *i. Necessity to seek leave to issue execution pursuant to Order 42 of the Rules of the Superior Courts*

**38.** As noted by Pepper, Mr Foley’s assertion that Pepper was required to seek leave to issue execution was unsupported by any authority. As appears from his submissions, it was also unsupported by any analysis of what execution, within the meaning of Order 42 of the Rules of the Superior Courts (“**the Rules**”), involves. Order 42, rule 3 provides that:

*3. A judgment for the recovery by or payment to any person of money may be enforced by execution order or by any other mode authorised by these Rules or by law.*

**39.** Rule 8 describes the execution orders which may issue from the High Court and the meaning of the term “issuing execution against” a party:

*8. In these Rules the term “**execution order**” shall include orders of fieri facias, sequestration and attachment and all subsequent orders that may issue for giving effect thereto. The term “issuing execution against any party” shall mean the issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case.*

**40.** Order 42 then sets out the steps which need to be taken in order to obtain an execution order. This involves the lodging of certain documents with the Central Office of the High Court. If the documents are in order, an execution order will issue from the Central Office, signed by a registrar, directing the relevant official, the sheriff if in Dublin or Cork, or the county registrar in all other counties, to execute the judgment in the manner commanded by the execution order. In the case of an order of fieri facias, the sheriff or county registrar is authorised to seize the defendant’s goods to the value of the judgment obtained.

**41.** Rule 20 provides that any execution order shall remain in force for a period of one year if not executed, but can be renewed by leave of the Court.

**42.** Rule 23 provides that “*as between the original parties to a judgment or order*”, execution may issue at any time within 6 years from the recovery of the judgment or date of the order. Rule 24, on which the defendant relies, provides as follows:

*24. In the following cases, viz.:*

*(a) where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;*

*(b) where a party is entitled to execution upon a judgment of assets in futuro;*

*(c) where a party is entitled to execution against any of the shareholders of a company upon a judgment recorded against such company, or against a public officer or other person representing such company; the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgment or order made in a matrimonial cause or matter, an order of fieri facias may be issued as of course upon an affidavit of service of the judgment or order and non-payment.*

**43.** If Pepper had been seeking an order of fieri facias, or other execution order, it is clear that it would have needed to make an application pursuant to Order 42, rule 24 seeking leave to issue execution. The original order of fieri facias has clearly lapsed and would require to be renewed. However, since there has been a change in the identity of the party entitled to execution, rule 24 would have required Pepper to seek leave to issue execution. Even if there had been no such change, more than six years have elapsed since the date of judgment and thus an application for leave to issue execution would have been necessitated.

**44.** However, the plaintiff is not seeking to issue execution and Pepper argued that Order 42, in particular rule 24, simply has no application in this case. I agree. An application to have a judgment mortgage declared well charged on a defendant's interest in a property is not an application for leave to execute a judgment within the meaning of Order 42. A declaration that a judgment mortgage is well charged on a person's interest in a property is no more than a declaration that the judgment mortgage was validly created and charges the debtor's interest in the property against which the judgment is registered with the judgment debt. It is in no way equivalent to an order of *fieri facias*. An order declaring a judgment mortgage well charged, in fact, has no automatic legal effect, though it does allow for consequential orders, such as an order for sale of the charged property in default of repayment of the sum charged. Importantly, any such sale is conducted under the supervision of the Examiner's Office. Mr Foley's argument under this heading is, accordingly, misconceived.

**45.** The argument, in any event, ignores the provisions of the 2009 Act, and in particular, section 117, which expressly provides the mechanism for enforcement of a judgment mortgage, replacing the provisions of the Judgment Mortgage (Ireland) Act 1850 for judgment mortgages created after 2009.

**46.** Nor, insofar as this may have been Mr Foley's real contention, was the registration of the judgment mortgage by Pepper a form of execution of the judgment. It has long been recognised that registration of a judgment mortgage is not a form of execution (see *Barnett v Bradley* (1890) 26 LR Ir 209, in which the court ruled that the registration of a judgment mortgage did not breach a stay on execution). That position has now been given statutory recognition in section 116(3)(b) of the 2009 Act. There is nothing in the scheme of the Rules or the 2009 Act which suggests that the transfer of an interest in a judgment mortgage should be regarded as execution of a judgment.

**47.** The defendant argued that the process of seeking leave to issue execution would allow for an enquiry into the sums currently owing on foot of the judgment mortgage. However, there is no suggestion in Mr Foley's affidavit that he, or the other defendant in the summary proceedings, has discharged any part of the judgment other than a bald contention that he does not admit the debt. The debt cannot be denied, it has crystallised in the judgment (see *Ulster Bank v Rattigan* [2023] IEHC 284 at para. 20). If there was a basis for contending

that something other than the judgment sum should be declared well charged by virtue of the judgment mortgage, it behoved Mr Foley to advance that argument in these proceedings. However, the only evidence is that of Mr O'Reilly to the effect that the entire sum is due and owing. In any event, Pepper seeks consequential orders, including an order that all necessary accounts and enquiries be taken. As with any sale, this process will be supervised by the Examiner's Office.

48. In circumstances where Pepper was not, as contended by Mr Foley, required to seek leave to issue execution, it follows that the requirement to provide a justification for the lapse of time prior to seeking execution in accordance with the principles identified in *Smyth v Tunney* does not arise. Accordingly, I reject the defendant's first and sixth arguments in defence of this application.

ii. *The plaintiff has not established that he is the owner of the judgment mortgage*

49. At first blush, this is a surprising argument for the defendant to advance. In light of the conclusiveness of the register, the fact that Pepper is now registered as owner of the judgment mortgage would appear to be a full answer to this ground of defence. However, Mr Foley's argument under this heading is not that the register is not *conclusive*, rather it is that the register is not *clear*. In this regard, he relies on the decision of the High Court (Simons J) in *Start Mortgages v Ramseyer* [2024] IEHC 329. That reliance is, unfortunately, entirely misplaced. The court in *Ramseyer* explained the difficulty with the plaintiff's reliance on the register in the specific circumstances of that case. In light of Mr Foley's argument here, it is worth setting out the court's assessment of this issue in *Ramseyer* in full:

*"11. The original charge in favour of the Governor and Company of the Bank of Scotland is clearly identified in each of the folios. In each instance, there is a subsequent entry which indicates that Bank of Scotland plc is the owner of the charge referred to at the earlier entry. In each instance, there is then a subsequent (third) entry which indicates that Start Mortgages Ltd is the owner of the charge registered at the entry number which refers to Bank of Scotland plc. The wording of this third entry makes no sense. This is because there is no "charge" at the second entry. Rather, the*

*second entry merely contains a cross-reference to the entry in respect of the original charge.*

*12. Counsel on behalf of the plaintiff, very properly, accepted that these discrepancies were “not ideal”, and that the register could not be regarded as “conclusive” on these matters.*

*13. It will be necessary to have the two folios amended. It is essential that the terms of each folio entry be precise and accurate. Section 31 of the Registration of Title Act 1964 provides that the register shall be conclusive evidence of any right, privilege, appurtenance or burden appearing on the register. The Court of Appeal in Tanager DAC v. Kane [2018] IECA 352, [2019] 1 I.R. 385 held, inter alia, that the correctness of the register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession is entitled to grant an order at the suit of the registered owner of the charge, or his or her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and that the right to possession has arisen and become exercisable. This decision has since been approved of by the Supreme Court in Bank of Ireland Mortgage Bank v. Cody (cited above). If and insofar as a defendant wishes to challenge the correctness of the register, it is necessary for them to institute separate proceedings against the Property Registration Authority of Ireland.*

*14. These strictures cut both ways. Just as a charge holder is entitled to rely on the express terms of the folio when seeking an order for possession, so too is the owner of the lands. Here, neither folio establishes in unequivocal terms that Start Mortgages DAC is the registered owner of the two charges originally granted in favour of the Governor and Company of the Bank of Scotland. If Start Mortgages wishes to pursue its claim for an order for possession, it will be necessary for Start Mortgages to apply to have the register corrected prior to the plenary hearing.”*

**50.** Thus, in *Ramseyer*, the register was not conclusive evidence of Start Mortgage’s ownership of the charge in question, because that ownership was not clear from the terms of the register itself, having regard to the manner in which the relevant entries on the register were phrased. No such ambiguity or uncertainty arises in this case.

**51.** The judgment mortgage was first registered on, *inter alia*, Folios LK36370F and LK59996F on 20 January 2016. Entry number 3, Part 4 of both folios is in almost identical terms. The reference number for both entries is D2016LR006967K. The full entry is as follows:

*A judgment mortgage in respect of a judgment obtained by DANSKE BANK A/S against DAVID MAUNE and ROBERT FOLEY on 23<sup>rd</sup> day of June 2015 in the High Court Record Number 2013/1981/S in a cause/matter/action of DANSKE A/S v DAVID MAUNE and ROBERT FOLEY against the interest of Robert Foley in the property.*

*Note: This judgment is also registered on folios LK4725, LK1484F, LK55835F, LK59996F and LK 62128F.*

*Note: The ownership of this charge has been transferred and is now registered on Folio LK115S*

**52.** The first note refers to the entry on Folio LK59996F. The only difference in the entry on Folio LK59996F is that, for obvious reasons, the first note cross references LK36370F instead of LK59996F.

**53.** Folio LK115S, referenced in the second note on both the aforementioned folios, contains the following entry:

*A judgment mortgage in respect of a judgment obtained by DANSKE BANK A/S against DAVID MAUNE and ROBERT FOLEY on 23<sup>rd</sup> day of June 2015 in the High Court Record Number 2013/1981/S in a cause/matter/action of DANSKE A/S v DAVID MAUNE and ROBERT FOLEY against the interest of Robert Foley in the property affecting the property shown coloured Blue as Plans D23WP, D23WQ & D23XB on the Registry Map, situate in the Townland of COWPARK, in the Barony of KENRY, in the Electoral Division of KILCORNAN; also affecting the property shown coloured Blue as Plan D23WK on the Registry Map, situate in the Townland of CALLOW, in the Barony of CONNELLO LOWER, in the Electoral Division of NANTINAN.*

*Note: This Judgment Mortgage is registered as a burden at Entry No. 3, Part 3 of Folio LK1484F, Entry No. 2, Part 3 of Folio LK4725 & Entry No. 4, Part 3 of Folios LF36370F & LK59996F*

**54.** The “Official Notes” to this entry consists of the reference number for the judgment mortgage entries on Folios LK36370F and LK59996F, D2016LR006967K. Folio LK115S identifies Pepper Finance Corporation (Ireland) Designated Activity Company as full owner.

**55.** As noted in *Ramseyer*, in *Tanager v Kane* [2018] IECA 352, the Court of Appeal confirmed that, by virtue of section 31 of the Registration of Title Act 1964, the register must be taken as conclusive evidence of the title of the registered owner of the lands. In the course of her judgment, Baker J observed that the register *might not*, however, be conclusive evidence of ownership of a charge:

*“36. It is important to note also that the Register does not necessarily identify the ownership of a charge registered upon a folio as ownership may, but does not require to be registered in a subsidiary Register maintained pursuant to s. 8(b)(i) of the 1964 Act and r. 186 of the Land Registration Rules 2012 to 2013 (“the Land Registration Rules”). Absent a subsidiary folio, the registration of a charge as a burden on a freehold or leasehold title is conclusive of the existence of the burden.”*

**56.** Although not stated in express terms, since that was not the issue before the court, it is clear from that judgment that where ownership of a charge *is* registered on a subsidiary folio, then that subsidiary folio constitutes conclusive evidence not just of the existence of the charge but also of its ownership. It is not permissible for the court to look behind such registration other than in the context of an application to rectify the register.

**57.** Pepper’s ownership of the judgment mortgage *has* been registered in a subsidiary folio. That provides conclusive evidence of Pepper’s ownership of the judgment mortgage. Having regard to the content of the relevant folio entries, it is beyond doubt that the judgment mortgage registered as a burden on Folios LK36370F and LK59996F is the same judgment mortgage registered on Folio LK115S of which Pepper is registered as the owner. Mr Foley did not offer any basis for contending otherwise other than to suggest that Pepper



was simply relying on a “*cross reference to the Danske Bank charges in another folio.*” This does not remotely reflect the state of the evidence. The contents of Folio LK115S must be accepted by the court as conclusive evidence of Pepper’s ownership of the judgment mortgage absent any application to rectify the register.

**58.** The defendant’s second argument is, therefore, rejected.

*iii. The plaintiff hasn’t established that it is the owner of the loan facility which gave rise to the judgment or is entitled to execute the original judgment*

**59.** The defendant’s third and fifth arguments can be dealt with together. At paragraph 4 of his written submissions, Mr Foley asserts that judgment mortgages are in a different class of charge than other charges on land which arise by consent of the parties. From this proposition, he draws the following inference, that “*the necessity to obtain well charging relief means ownership of the judgment mortgage simpliciter is not sufficient for relief and that the Plaintiff must be entitled to execute to original judgment.*”

**60.** Mr Foley contends that the exhibited documents do not establish that Pepper has acquired the necessary interest in the loan facility from Danske. He argues, therefore, that Pepper has not established that it is entitled to enforce the judgment the subject matter of the summary proceedings.

**61.** Pepper contends that it has established that it is the owner of the judgment mortgage and that that is sufficient to establish its ownership of the judgment. It argues that, in any event, it has established its ownership of the underlying loan. The plaintiff relies on the decision of the Court of Appeal (Binchy J) in *Ulster Bank v Quirke* [2022] IECA 283 (at para. 94(4)):

*“A loan, for as long as it remains unpaid, continues to exist even though the cause of action in respect of the loan has become merged in a judgment, and the assignee of the loan receives the benefit of the judgment through the assignment of the loan.”*

**62.** Proof that ownership of the loan had been transferred to Pepper would, therefore, be sufficient to establish that Pepper is entitled to the benefit of the judgment. But the argument advanced by Mr Foley is that proof that ownership of the *judgment mortgage* has been

transferred to Pepper does not establish that the benefit of the loan or the judgment giving rise to the judgment mortgage have been transferred. He argues that each must be proved in order to obtain well charging relief.

**63.** There are a number of provisions of the Land Registration Rules 2012 which are relevant to showing what the registration of a judgment mortgage establishes. Rule 110(1) states:

*110. (1) Application for registration of a judgment mortgage as a burden on registered property pursuant to Section 116 of the Act of 2009 shall be made in Form 60 and shall have endorsed a certificate that the judgment was obtained, signed by the proper officer of the relevant court.*

**64.** Thus, for a judgment mortgage to be registered, it must be accompanied by a certificate that the judgment was obtained.

**65.** Rule 111 provides that an application for registration of a judgment mortgage shall contain a statement that to the best of the applicant's knowledge and belief, the judgment debtor at the time of swearing the affidavit has an estate or interest in the lands contained in a specified folio of the register, or the defined part thereof to be affected by the registration.

**66.** Rule 112 requires that the registered owner of the lands be notified of the registration. The registered may apply to cancel the registration if they believe it to be invalid (Rule 113) and Rule 114 provides for the judgment mortgage being cancelled on production of evidence that the debt to which it relates has been discharged.

**67.** To register a judgment mortgage, therefore, a plaintiff must provide the necessary evidence of a judgment. If there is any difficulty with that registration, the owner of the folio over which the judgment is registered can seek to have it cancelled. Absent such an application, the registration is therefore conclusive evidence of the judgment and that the landowner's interest in the folio has been charged in the judgment sum.

**68.** Upon satisfaction of the judgment, the judgment mortgage can be cancelled. This requires an application to be made, and therefore a judgment mortgage remains registered on a property until that application is made. The conclusiveness of the register means that

as long as the judgment remains registered, it must be treated as remaining in force and that the judgment remains undischarged.

**69.** Thus the existence of a judgment mortgage registered against land is conclusive evidence that the owner of the judgment mortgage, the judgment mortgagee, owns a charge over the debtor's interest in the lands which charge secures the judgment debt. The owner of a charge is entitled to enforce it for the purpose of securing the sums charged. It is, therefore, not necessary to separately establish that the judgment mortgagee owns the original loan which led to judgment or the judgment which has since been registered as a judgment mortgage in an application for a well charging order.

**70.** This appears to follow from the provisions of section 117 of the 2009 Act which sets out what is the effect of a judgment mortgage. As stated in subsection (1) it charges "*the judgment debtor's estate or interest in the land with the judgment debt*". As a consequence, the judgment mortgagee can apply to the court for an order under s. 117(2). In light of the provisions of section 117, it is arguable that a well charging order should be regarded merely as a declaration that the entitlement to seek relief under section 117(2) has arisen.

**71.** In light of the foregoing, the focus of an application to have a judgment mortgage declared well charged must be on whether the party applying is the judgment mortgagee, *i.e.* the owner of the judgment mortgage. When seeking well charging relief based on a judgment mortgage, once ownership of the judgment mortgage has been established, the statutory entitlement to seek relief under section 117(2) is triggered.

**72.** In the circumstances, Pepper is entitled to rely on its ownership of the judgment mortgage as sufficient to establish its entitlement to a well charging order.

**73.** If proof of ownership of the judgment mortgage was not sufficient, I would have been minded to invite further submissions from the parties regarding whether the documents exhibited together with the affidavit evidence were sufficient to establish that Pepper had succeeded to Danske's interest in the loan and the judgment. Certainly, the evidence tends to suggest that Danske has transferred any interest it had in the defendant's loan, the judgment and the judgment mortgage to Pepper, as nominee of Montepico, but further clarification would have been required.

**74.** The DSD does not provide any evidence of a transfer of any interest to Pepper; this was an agreement made between Danske and Montepico. The DSD does, however, provide that the assets the subject of the agreement may be transferred by Danske to Montepico's nominee.

**75.** Moreover, although Mr O'Reilly avers that the unredacted entry in Schedule 1 of the DSD, a Connection ID number, relates to a particular loan account owned by the defendant, the only link between this averment, the Schedule and the loan which gave rise to the judgment is that the same loan account number is referenced in Mr O'Reilly's averment and at paragraph 4 of the Special Endorsement of Claim in the Summary Summons on foot of which judgment was obtained.

**76.** It is not, therefore, absolutely clear from the DSD, that the loan facility the subject matter of the summary proceedings was to be transferred pursuant to the DSD. Further detail establishing that the Connection ID number listed in Schedule 1 relates to the loan facility the subject of the judgment would have been required. Although Mr Foley complains that the redactions in the DSD render it impossible to determine what has been transferred to the plaintiff, it seems to me that any difficulty in interpreting the agreement lies in the omission of the relevant details from the Data Tape – showing the link between the Connection ID number and the loan facility – rather than in the redactions, which do not appear to relate to the relevant terms of the DSD for the purpose of determining this application.

**77.** In addition to the foregoing lacuna, the other documents exhibited, the Deed of Assignment and the Deed of Transfer, Land Registry Form 56, only purport to show the transfer of judgment mortgages to Pepper, not any loan facility and/or judgment.

**78.** Further evidence would, therefore, have been required to have established that the loan facility and/or the judgment had been transferred to Pepper, as nominee of Montepico, had ownership of the loan been a necessary proof for this application. However, for the reasons explained above, Pepper's ownership of the judgment mortgage is sufficient proof to obtain the well charging order and thus there is no necessity to invite further clarification. The defendant's third and fifth arguments are accordingly rejected.

iv. *No prior notification of assignment*

**79.** Mr Foley argues that there is a factual dispute regarding the question of whether he was notified of the assignment of his loan, as required by section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877. The requirements for the effective assignment of a loan are set out in the decision of the High Court (Finlay Geoghegan J) in *O'Rourke v Considine* [2011] IEHC 191 (at para. 18):

*“It was not in dispute between the parties that the assignment effected was a legal assignment complying with the requirements of s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, as it complied with the four conditions:*

- (a) The assignment was of a debt or other legal chose in action.*
- (b) The assignment was absolute and was not by way of charge only.*
- (c) It was in writing under the hand of the assignor.*
- (d) Express notice in writing thereof was given to the debtors.”*

**80.** Mr Foley argues that there is a dispute regarding whether he was given express notice in writing of the assignment of his loan to Pepper. He contends that that dispute cannot be resolved other than by cross-examination (see *RAS Medical v Royal College of Surgeons of Ireland* [2019] IESC 4, [2019] 1 IR 63). He argues, therefore, that Pepper’s application must be adjourned to plenary hearing.

**81.** Mr Foley is correct that, if there is a factual dispute on affidavit, the court cannot resolve it in summary proceedings but must allow for cross-examination. This proposition is, however, subject to some important qualifications. First, the court must be satisfied that there is a *bona fide* factual dispute. And second, the factual dispute must be relevant to an issue which it is necessary to resolve in the proceedings.

**82.** Pepper’s evidence on the question of notification is given in Mr O’Reilly’s affidavit. He avers that on 20 October 2021, Danske notified Mr Foley that it had transferred all legal rights, agreements and credit support relating to the facility and account the subject of the summary proceedings and any judgments obtained pursuant to that account to Pepper. He further avers that on 18 November 2021, Pepper wrote to Mr Foley in similar terms. These

types of letter are commonly referred to as “goodbye” and “hello” letters. Copies of both letters are exhibited. His affidavit does not contain a means of knowledge for these specific averments. However, paragraph 1 of the affidavit states that he makes the affidavit from facts within his own knowledge and from a diligent perusal of the plaintiff’s books and records in relation to the defendant.

**83.** In his replying affidavit, Mr Foley avers that he was not notified of the alleged agreement between Danske and Montepico “*before the alleged transfer*”, nor was he notified of the assignment from Danske to Pepper “*prior to its execution*”. At paragraph 7 of his affidavit, he avers that there was “*no prior notice*” of the acquisition of his loan as required by section 28(6) of the 1877 Act.

**84.** In the written and oral submissions, the parties addressed the issue of compliance with section 28(6) as turning on the question of whether Mr Foley’s denial of notification was a mere bald assertion such that Pepper’s evidence that the assignment was notified should be accepted. If that was the state of evidence, I would be inclined to conclude that this was a factual dispute which could only be resolved, even on the balance of probabilities, following cross-examination. As the defendant’s counsel asked rhetorically, what more could the defendant have done than aver that he did not receive the necessary notification?

**85.** However, on closer analysis, there is no dispute of fact. Even though Mr Foley’s averments are addressed to the question of compliance with section 28(6) of the 1877 Act, he does not aver that he was not notified of the assignment of his loan, rather he avers that he received no *prior* notification of the assignment. He has identified no requirement for *prior* notification. Notification, not prior notification, is what the 1877 Act necessitates in order for an absolute assignment of a debt to be legally effective as against a debtor. In relevant part, section 28(6) 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.*

**86.** In fact, as section 28(6) makes clear, the assignment only has legal effect against a debtor from the date of notice to the debtor. Since the assignment could not, in any event, have legal effect before it takes place, it is abundantly clear that section 28(6) contemplates notice being given *after* the date of assignment. That notification after assignment is sufficient is clear from the decision relied on by Mr Foley, *AIB v Thompson* [2017] IEHC 515.

**87.** In the circumstances, Mr Foley’s averments that he was not given prior notification of the assignment can have no bearing on Pepper’s application for well charging relief.

**88.** Even if there were a dispute of fact on this issue, it is not clear, in any event, what consequence could be said to flow from that for the purpose of this application. Pepper is not seeking any remedy by reference to the loan facility assigned to it by Danske, rather it relies on the judgment mortgage. As noted in *Ulster Bank v Rattigan* (at para. 17), the question of notification is “*not relevant to the narrow issue before the court in the present proceedings, namely whether the indebtedness pursuant to the guarantee is well charged on the Meath lands.*”

**89.** There is, accordingly, no factual dispute on any matter relevant to the determination of this application and, therefore, no basis to withhold relief by reference to the provisions of section 28(6) of the Supreme Court of Judicature Act 1877.

v. *No banking licence*

**90.** Similarly, although there is an assertion that Pepper does not hold a banking licence, it is not clear what consequence is said to flow from this allegation. Insofar as these proceedings concern an application to have a judgment mortgage declared well charged and orders for sale, no explanation of why Pepper required a banking licence in order to have taken any of the relevant steps for the purpose of obtaining that relief has been identified.

vi. *Signed by attorneys*

**91.** Mr Foley argues that the DSD and the Deed of Transfer of the judgment mortgage were executed by attorneys on behalf of Danske other than in compliance with the provisions of section 64 of the 2009 Act and/or section 21 of the Powers of Attorney Act 1996. Section 64 sets out the manner in which a deed must be executed to be effective as a deed.

**92.** Section 64(2)(b)(ii) of the 2009 Act requires that a deed executed after the commencement of the relevant part of the Act is a deed if, in the case of a company registered in the state, it is executed under the seal of the company in accordance with its Articles of Association. In the case of a foreign body corporate, section 64(2)(b)(iv) provides that the document must be executed in accordance with the legal requirements governing execution of a deed by a body corporate. I note that Rule 74(5) of the Land Registration Rules 2012 (the “**Land Registry Rules**”) provides as follows:

*(5) On a disposition made by a foreign body corporate where a certificate is lodged from a lawyer from the country in question or who has sufficient knowledge of the laws of the country in question, that the deed was executed in accordance with the legal requirements governing execution of the instrument in question by such a body corporate in the jurisdiction where it is incorporated, the Authority shall be entitled to assume that the deed was duly executed by the body corporate*

**93.** Mr Foley says that the DSD and Transfer were not executed under the seal of Danske and there is no proof, in accordance with section 21 of the Powers of Attorney Act 1996, of any power of attorney being given to those who executed the deeds on its behalf. Rule 55 of the Land Registry Rules requires that, where a deed is executed by an attorney, a copy of the power of attorney must be produced to the PRA.

**94.** No argument was advanced as to whether Danske, which appears to be an external company, with a registered office in the state, is a foreign body corporate within the meaning of section 64 of the Act. But, whether it is to be regarded as a company registered in the State or a foreign body corporate, the defendant faces the same difficulty with this argument as with many of the other grounds advanced above in respect of the deed transferring the judgment mortgage. The judgment mortgage has been registered by the PRA. The register provides conclusive evidence of Pepper’s ownership thereof. One might surmise that the



defendant's contention is that, if the transfer of the judgment mortgage wasn't properly executed, or if no power of attorney was produced, the transfer of the judgment mortgage to Pepper should not have been registered. But, if so, that is an argument for the PRA. Absent an application to rectify the registration, it is not for this court to look behind the content of the register.

### **Conclusion on application for well charging relief**

95. I am satisfied, therefore, that none of the arguments advanced by Mr Foley provides a basis for refusing Pepper the primary relief sought, a declaration that Mr Foley's interest in the lands comprised in Folios LK36370F and LK59996F stands well charged for the judgment debt, €415,997.15.

### **Power of Sale**

96. Although an order directing sale in default does not invariably follow from the decision that an interest in lands is well charged, it appears from the authorities that the burden rests on a defendant to show a reason why an order for sale should not be made. In *Flynn v Crean* [2019] IEHC 51, the High Court (Baker J) reviewed the relevant authorities, including those authorities which addressed the question of whether partition should be ordered in accordance with section 31 of the 2009 Act and where the property charged was the family home. She noted the following in relation to the burden of proof:

*“64. Laffoy J., albeit obiter, in Irwin v. Deasy, at para. 26, and Dunne J. in Drilfix v. Savage, at pp. 6 and 7, noted that an application under the Partition Act 1868 would require a defendant to show good reason why a court should not direct a sale of the property, and that the onus was on a defendant meeting such a claim to satisfy the court that a good reason existed for not ordering a sale.*

*65. Keane J. took the same approach [in Quinn's of Baltinglass Ltd v Smith [2017] IEHC 461] in regard to the commercial or non-family home folio by holding that, having regard to the fact that sufficient evidence was not adduced to him by the*

*defendant concerning his means, or the value of the lands, beyond the mere assertion that he was practically insolvent, and in the circumstances, Mr. Smith had not discharged the onus of establishing that there was good reason why the land should not be sold.”*

**97.** Baker J made clear that the practical and financial consequences of ordering a sale are relevant considerations, but that the mere fact that a sale may not release any funds for the judgment mortgagee was not a sufficient basis for refusing to make an order.

**98.** In this case, Mr Foley has not identified any basis upon which an order for sale might be refused. It appears from Pepper’s evidence that the value of the lands significantly exceeds the judgment sum and no impediment to a sale has been identified.

**99.** The only potentially relevant consideration that Mr Foley has identified is a delay in seeking the remedy sought, but there is no suggestion that the defendant has been prejudiced thereby.

**100.** In the circumstances, I propose making an order pursuant to section 117(2)(a) of the 2009 Act, requiring the taking of all necessary accounts and enquiries, and, in default of payment of the judgment debt within a period of time to be determined, an order pursuant to section 117(2)(b) of the 2009 Act, requiring the sale of the properties comprised in LK36370F and 59996F.

**101.** I will list the proceedings on Monday, 14 October 2024 at 2pm in the Chancery Special Summons list for the purpose of making final orders.

**Rory Mulcahy**  
**2 October 2024**