

THE HIGH COURT

[2024/44CA]

BETWEEN:

**PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY
COMPANY**

Respondent / Plaintiff

AND

PAUL MEREDITH AND SHARON MEREDITH

Appellants / Defendants

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 31st day of January, 2025

INTRODUCTION

1. This judgment is given in an appeal brought by the defendants against an order for possession made by the Circuit Court in February 2024 pursuant to the provisions of section 62(7) of the Registration of Title Act, 1964. For the purposes of this judgment, I will refer to the appellants as the defendants and the respondent as the plaintiff. The defendants represented themselves at the hearing of the appeal.

2. Following the hearing in the Circuit Court, the learned Circuit Court judge adjourned his ruling until the 21 February 2024, in order to allow time for the defendants to consider consulting a Personal Insolvency Practitioner, and to consider their position more generally. That adjournment was appealed by the defendants. While this appeal travelled with

the appeal against the order for possession, it was clarified at the hearing that the defendants only intended to pursue the appeal against the order for possession dated the 21 February 2024.

3. The appeal was heard by way of a *de novo* hearing as required by the relevant legislation. It is important to note that although this was a *de novo* hearing, the legislation confines the court's consideration to the matters that were put in evidence in the Circuit Court unless an application is made to admit further evidence, which did not occur in this case. The defendants did not dispute a number of core facts. Their arguments instead were directed to discrete issues which they considered should lead the court to refuse the plaintiff's application for summary relief and adjourn the proceedings to plenary hearing.

4. For the reasons set out in this judgment the court is not satisfied that the plaintiff has established its entitlement to the relief sought in this summary application, and accordingly the appeal will be allowed and the matter remitted to plenary hearing.

THE PLEADINGS AND EVIDENCE

5. The proceedings were commenced by way of a Civil Bill for Possession on the 9 November 2022. The plaintiff sought an order for the possession of the lands and premises comprised in Folio 133167F, more commonly known as 77 Ferrycarraig Road, Coolock, Dublin 5.

6. As set out in the Civil Bill for Possession, the defendants were offered a loan on terms set out in a letter of offer dated the 3 August 2007. The loan was offered by the plaintiff under its original name GE Capital Woodchester Home Loans Limited (*GE Capital*). The loan

offer was accepted by the defendants, and they drew down the sum of €200,000 on the 24 August 2007. The loan was secured by way of charge dated the 16 August 2007 in favour of the plaintiff, which was registered on the folio on the 16 November 2007.

7. The facts in the Civil Bill were verified and evidenced in an initial affidavit of Shane O’Connell dated the 28 October 2022. Mr. O’Connell is an official employed by the plaintiff. Mr. O’Connell exhibited the letter of loan offer with the signed acceptance. The relevant deed of charge was exhibited, and clause 8 of the charge provides for the plaintiff’s powers, including a power to take possession. Clause 9 of the deed set out the conditions under which the plaintiff was entitled to exercise its powers. Clause 9 confirms that the plaintiff was entitled to exercise its powers under the mortgage upon the occurrence of events of default, one of which was where “*default is made in payment of any monthly or other periodic payment or in payment of any other of the secured moneys...*”.

8. There was no dispute that the defendants defaulted in their agreed repayments. This was in any event clear from the exhibited statements which showed that as of the 20 April 2022 there were accumulated arrears of over €75,000. The plaintiff wrote letters demanding repayment of the debt in April 2022 and again in July 2022 making further demand for repayment or possession. As of the 18 October 2022, the total sum claimed as owing to the plaintiff by the defendants was €229,047.95.

9. Mr. O’Connell exhibited the relevant folio which shows that GE Capital was registered as owner of the charge on the 16 November 2007. As is clear from section 31 of the 1964 Act, and confirmed in the case law, the court may not look behind the folio and it constitutes conclusive evidence that the charge holder is the legal person identified in the folio.

10. Mr. O'Connell also explained and exhibited relevant documents that demonstrated that, on the 11 October 2012, GE Capital changed its name to Pepper Finance Corporation (Ireland) Limited, and that this entity later converted to a Designated Activity Company pursuant to the provisions of the Companies Act 2014. In that regard, Mr. O'Connell exhibited a CRO Form G1Q filed on the 1 October 2012, which shows that by special resolution the company changed its name. In addition, a CRO Form N2 was exhibited which shows that the company was re-registered as a Designated Activity Company. It follows that the change in the plaintiff's name did not involve any change to the legal personality of the plaintiff. To all intents and purposes, GE Capital and Pepper Finance Corporation (Ireland) DAC remained one and the same company. Accordingly, the plaintiff remains the registered owner of the charge at issue in this appeal.

11. Further affidavits were filed by the plaintiff over the course of the proceedings in order to update the position regarding the extent of the increasing arrears.

12. The first defendant swore a number of affidavits for the purposes of opposing the application in the Circuit Court. As noted above, the first defendant did not dispute the fact that he was a party to the loan agreement and charge, or that there were events of default.

13. In his first affidavit which was sworn on the 26 July 2023, the first defendant makes the points that (a) GE Capital was the registered charge holder and not the plaintiff, (b) that he believed that the mortgage was sold to a different entity and that plaintiff only held the legal title to the charge, and (c) that he was not put on notice of any assignment. As a result of the lack of notice, the first defendant asserted that he did not know to whom the debts were

due. The first defendant exhibited correspondence in which he demanded that the plaintiff clarify the question of ownership of the charge.

14. In his second affidavit, which was sworn on the 9 January 2024, the first defendant claims that the plaintiff did not own the charge. He sought to refer to an article in a journal which claimed that GE Capital sold its Irish residential mortgage portfolio to a special purpose vehicle. He claimed that the plaintiff did not own his loan. Finally, the first defendant swore an affidavit on the 12 January 2024 in which he claimed that the change in what was described as the “*legal infrastructure*” of the mortgage has changed the “*dynamics of our contract with the Plaintiff*”.

15. The plaintiff chose not to respond to the affidavits sworn by the first defendant. The plaintiff submitted that the issues were straightforward and fell to be determined by reference to the well-established principles set out in the case law relating to applications pursuant to section 62(7) of the 1964 Act.

THE ISSUES AND PRINCIPLES

16. The starting point for the analysis of the legal issues in this appeal is the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v Cody* [2021] IESC 26. In that judgment, Baker J. explained that section 62(7) of the 1964 provides for the summary disposal of an action seeking possession of registered land where the plaintiff establishes (a) that it is the owner of the registered charge, and (b) that the right to possession has arisen and has become exercisable. If those matters are proved by the plaintiff, the defendant then has an opportunity to seek to persuade the court that there is a stateable defence nonetheless.

17. In relation to proof of ownership of the registered charge, the Supreme Court confirmed the position set out by the Court of Appeal in *Tanager DAC v Kane* [2019] 1 IR 385, that the correctness of the register cannot be challenged by way of defence in summary possession proceedings. In this appeal, the plaintiff clearly is the registered charge holder.

18. The other essential proof for the plaintiff which must be addressed before the court considers any potential points of defence is that the right to possession has arisen and is exercisable. In this appeal, the plaintiff contends that the principal money has become due and owing due to the events of default. To that end, the plaintiff has proved that there was a loan agreement between the plaintiff and the defendants, the funds were drawn down, the account went into significant arrears, and, despite demands for repayment, the defendants did not remedy the situation. Having regard to the terms of the charge in this appeal, the contention is that the right to possession has arisen and was exercisable.

19. How should the court address the issues raised in evidence by the first defendant? The first defendant referred to his belief that the plaintiff had engaged in transactions concerning its mortgage portfolio which resulted in a change in ownership of the charge and the underlying debt. The evidence in that regard was sparse and somewhat speculative, and no documents other than the correspondence was exhibited. However, the exhibited correspondence showed that when the first defendant sought to have the plaintiff clarify the position there was no substantive reply, and, as noted above, the plaintiff chose not to address these matters by way of any replying affidavit.

20. As a result of the above, the defendants asserted that the plaintiff had not proved that it was entitled to the underlying debt when the demand for repayment was made, or, at

least, it was sufficiently unclear whether this was the case; and this required the case to be adjourned to plenary hearing.

21. The defendants asserted that their position was supported by a decision of Simons J. in *Pepper Finance Corporation (Ireland) DAC v Moynihan* [2024] IEHC 625, which was delivered on the 7 November 2024, shortly before this appeal was heard.

22. The *Moynihan* case was an appeal from an order for possession that had been granted by the Circuit Court pursuant to section 62(7) of the Registration of Title Act 1964. The High Court was satisfied that the plaintiff had proved that it was the owner of the charge. The question that arose related to the ownership of the underlying debt. As noted by Simons J. in that case, there was evidence that the principal monies under the loan agreement were due and owing and that this event of default triggered the lender's entitlement to demand repayment, and that a demand had been made. The difficulty identified was that, on the evidence in that case, the beneficial interest in the underlying debt was held by an entity other than the plaintiff.

23. The court in *Moynihan* had evidence supportive of the contention that one of the intentions underpinning the transactions was that the plaintiff was to hold the legal title to the charges and debt as a bare trustee. In itself, that may not have been fatal to the plaintiff's case, and the court referred to two decisions - *Pepper Finance Corporation (Ireland) DAC v Jenkins* [2018] IEHC 485 and *Pepper Finance Corporation (Ireland) DAC v Farrelly* [2022] IEHC 272 - which were authority for the proposition that a bare trustee was entitled to pursue an application for an order for possession. It can be noted that those cases also involved evidence of securitisation transactions and/or portfolio sales.

24. The difficulty in *Moynihan* was that on the evidence it was not apparent that Pepper Finance retained legal ownership; in turn, that difficulty was a function of the approach adopted by Pepper Finance to the presentation of heavily redacted transaction documents. Specifically, it appears that the documentation provided that in certain events Pepper Finance was obliged to transfer the legal title to another party, but those events could not be identified in the documentation in evidence, and therefore the court could not ascertain if those events had occurred.

25. The court noted that in that case a large number of redactions had been made and not properly explained. Hence it was not a case where the redactions could be found to have been made to protect privacy rights of third parties or to protect commercially sensitive information, which are viable justifications. Instead, as put by Simons J., “*whole swathes of the operative part of the deed have been blanked out, without any meaningful explanation or justification having been offered. The redactions are so extensive that this court cannot safely interpret the legal effect of the deed.*”

26. As pointed out on behalf of the plaintiff at the hearing of this appeal, *Moynihan* was concerned with redactions to documents that were in evidence in that case, and the impact of those redactions on the ability of the court to ascertain if a plaintiff was in a position to prove that it was entitled to a summary possession order. In this appeal, the plaintiff proffered no evidence whatsoever in relation to any securitisation processes or portfolio sales. In effect the argument was that as no documents were exhibited by the plaintiff relating to any transaction other than the underlying loan agreement and charge, there could be no issue in relation to redactions.

27. Instead, the plaintiff sought to rely on the decision of the Court of Appeal in *Pepper Finance Corporation (Ireland) DAC v Moloney* [2023] IECA 161. That judgment concerned an appeal from an order in the High Court in January 2022 refusing to grant Pepper Finance liberty to issue execution on foot of an order for possession that had been granted in October 2010. The respondent / defendant had sought to oppose the application on the basis that while the plaintiff remained on the folio as the owner of the registered charge, the plaintiff was not entitled to seek to enforce the charge in light of certain transactions that involved the sale of the beneficial interest in the underlying loan facilities and security. A number of issues were addressed that are not material to this appeal, but it can be noted that in *Moloney*, Pepper Finance adduced evidence of the transactions that gave rise to the issues agitated by the defendant.

28. The Court of Appeal focused on the question of the conclusiveness of the register. It noted that the holder of the legal title to the charge could seek to execute an order for possession. The Court found that a plaintiff will be entitled to execute an order for possession if it shows that, at the time of the making of the order for possession, he was and remained the registered owner of the charge.

29. In my view, the decision in *Moloney* clearly supports the position of the plaintiff that it has proved that it is owner of the registered charge; however, it does not address the question of how the court should dispose of this appeal. The issue in *Moloney* related to question of the entitlement to execution of an order granting possession; the logically anterior question of entitlement to a summary order for possession was not in issue. In particular, the Court of Appeal was not asked to address the implications of a transaction, or the evidence

presented in relation to that transaction, on the question of whether the power to seek possession had arisen and was exercisable.

DISCUSSION

30. It is entirely understandable that the defendants, particularly as litigants in person, would be perplexed that the plaintiff has been recorded as having provided evidence relating to a particular transaction or set of transactions in a number of publicly available decisions of the High Court and Court of Appeal but has not adverted to those matters in this case, despite the fact that ostensibly the same type of application was being made. Nonetheless, each case has to be addressed and determined by reference to the evidence adduced in that particular case. As noted by the Court of Appeal in *Moloney*, a litigant in one set of proceedings cannot rely on evidence of facts that are reported as having been given in other separate proceedings to which he was not a party. As such, it is not open to the defendants in this appeal to rely on *Moynihan*, or the other cases, as evidence of the fact that the plaintiff entered into particular transactions or of the nature of the transactions or their legal effect, where no evidence was adduced in respect of those transactions in this appeal.

31. However, that does not fully resolve the issue. These are adversarial proceedings, and each party is entitled to seek to adduce the evidence that they consider relevant to proving *or refuting* a particular factual proposition. I consider that while the court clearly is not entitled to draw on the evidence that was given in other cases to make findings of fact in this appeal, it is entitled to have some regard to the fact that the plaintiff gave the evidence in those other cases but not in this appeal, despite the fact that the defendants have endeavoured to put the transactions and their effect in issue. The question is whether the plaintiff can obtain the relief

that they seek where they have failed or refused to engage with issues raised by the defendants. One inference from the response of Pepper Finance to the matters raised by the first defendant in his affidavit and exhibited correspondence is that it has chosen deliberately not to place evidence in relation to that state of affairs before the court. I consider that this is a reasonable inference in the circumstances of this case.

32. As I have already noted, the evidence about the transactions from the first defendant was slim and had something of a speculative quality. Nevertheless, it raised an issue that could have been addressed by way of response from the plaintiff, and clearly evidence of the transactions was in the control of the plaintiff and not generally available. Hence, even though the evidence from the defendants was somewhat sparse, I consider that the plaintiff ought to have addressed the issues raised by clarifying the nature of the transactions referred to by the defendants. To be clear, it is not open to defendants merely to speculate that certain matters may have transpired and thereby suggest that a plaintiff has not discharged its burden of proof. A plaintiff is not expected to prove a series of negatives. However, here the first defendant has sworn an affidavit setting out his belief - and albeit sparsely the basis for that belief - that the plaintiff entered into transactions with identified parties which have the consequence - it is asserted - that they are not entitled to seek an order for possession on a summary basis. It may well be that if proper and adequate evidence of those transactions was before the court it would be possible to determine in a summary application that there is no substance to what the defendants are asserting. The plaintiff chose not to take that step. Consequently, the court cannot be satisfied at this point in time that the proofs required in an application of this type have been made out.

33. However, the defendants have not established a full defence to the underlying proceedings; this is a case where no final conclusions can be reached at this stage of the proceedings. On that basis, the court will make an order pursuant to Order 5B of the Circuit Court Rules to remit the proceedings for plenary hearing. That will allow the case to be determined on the basis of all the admissible evidence that the parties wish to adduce.

34. I will list the appeal before me at 10.30am on Thursday, the 27 February 2025 for final orders.