

BETWEEN

LAUNCESTON PROPERTY FINANCE LIMITED

PLAINTIFF

AND

FRANK BURKE AND LORNA BURKE

DEFENDANTS

**JUDGMENT of Mr. Justice Robert Eagar delivered on the 5th day of October, 2018.**

1. This is a judgment on an application by way of notice of motion dated the 11th December, 2017, to amend the proceedings from Launceston Property Finance Limited to Launceston Property Finance Designated Activity Company. The plaintiff sought the following orders: -

1. An order pursuant to Order 17 Rule 4 of the Rules of the Superior Courts that this Honourable Court to amend the title to the Proceedings from Launceston Property Finance to Launceston Property Finance Designated Activity Company;
2. Such further and other relief as may be necessary or appropriate; and
3. An Order providing for the costs of, the incidental to, this Application.

2. The matter was heard by this Court on the 20th July, 2018. The notice of motion is grounded on the affidavit of Donal O'Sullivan, Director of Launceston Property Finance DAC which sets out the background to the matter. The court is directed to the Order of the Supreme Court dated 27th July, 2017. The proceedings were an appeal of an Order for possession by McGovern J. in the High Court on the 25th March, 2010, which was appealed on or about 1st October, 2010.

3. Following the nationalisation of Irish Nationwide Building Society and Anglo Irish Bank in or around 2009, a new entity was formed in 2013 known as the Irish Bank Resolution Corporation (IBRC). Pursuant to the Irish Bank Resolution Corporation Act, 2013 that company was put into special liquidation in February, 2013.

4. The special liquidators of IBRC, being the owners of and having full legal title to the credit facilities the subject matter of the within proceedings, agreed to transfer and assign absolutely onto Launceston Property Finance Limited the entirety of IBRC's right and benefits in these and other such facilities. The Loan Sale Deed became effective on or about 28th March, 2014.

5. On the 23rd May, 2014, the Deed of Transfer was executed, whereby the entirety of the credit facilities concerning the defendants and the subject matter of the within proceedings were transferred to Launceston Property Finance Limited. The defendants were informed of the transfer on the 6th June, 2014. On the 26th June, 2014, Pepper Asset Financing wrote to the defendants informing them of their appointment by Launceston Property Finance Limited to provide portfolio and asset management services in regard to this facility.

6. On the 31st October, 2014, by order of the Supreme Court, Launceston Property Finance Limited was substituted for Anglo Irish Bank Corporation as plaintiff/respondent in the proceedings. The matter was heard before the Supreme Court on the 19th July, 2016. The appeal was dismissed and a final order made on the 27th July, 2017.

7. The plaintiff/respondent issued a motion before the High Court to renew the Order for Possession, dated 15th March, 2010. During this application to renew, it arose that the title had changed from Launceston Property Finance Limited to Launceston Property Finance Designated Activity Company by certificate of incorporation dated 29th September, 2016.

8. Paragraph 16 of the Companies Act, 2014 deals with the matters arising out of the requirements for companies to change from limited liability companies to designated activity companies following the passing of the act and the enactment of the Sections.

9. Section 63.2 provides that the effect of delivering the application in the correct form to the Registrar of Companies and the issuing of the cert of incorporation and by that virtue of this the company is therefore a designated activity company.

10. Section 63.9 of the Companies Act 2014

A certificate of incorporation issued on re-registration to a company under *subsection (6)* shall be conclusive evidence—

- (a) that the requirements of this Chapter as to re-registration and of matters precedent and
- (b) that the company is the type of company which is set out in the certificate, incidental thereto have been complied with; and

and, accordingly, without prejudice to *section 58 , Part 16* , on and from the issue of the certificate, shall apply to the company as a designated activity company.

Section 63.12

(12) The re-registration of an existing private company as a designated activity company pursuant to this Chapter shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status.

14. Counsel for the plaintiff submits that the plaintiff is entitled to the order amending the title from limited liability company to

designated activity company. The evidential train from Anglo Irish Bank to Launceston Property Finance Limited was proved in the Supreme Court by the order substituting to October, 2014 and thereafter the only evidential matter of material interest to the court is the certificate of incorporation. In light of that Section from the Companies Act, that is taken as being conclusive evidence that the matters precedent and incidental to the application such as the special resolution having taken place by members in line with the interpretation that a designated company formally traded as limited liability company.

15. The replying affidavit of Lorna Burke, dated 11th January, 2018, submits that it is incorrect for Mr O'Sullivan to aver that it "arose" during the application to renew the Order for Possession dated 15th March, 2010, that the plaintiff's title had changed from Launceston Property Finance Limited to Launceston Property Finance Designated Activity Company as the purported change in title is dated 29th September, 2016. It is submitted that no explanation has been given by Mr O'Sullivan as to why this motion is being brought at this stage, more than 14 months after the purported incorporation and why the application was not brought in the Supreme Court. The purported incorporation pre-dates the judgment of the Supreme Court of the 15th March, 2017, and the final order made on the 27th July, 2017. It is submitted that the fact such an application was not brought renders the judgment and order of the Supreme Court null and void, and the current motion an abuse of process as no such entity as the current plaintiff existed. The defendant states that such matters should be done in the Supreme Court.

16. The defendant states that it is not clear on what basis the plaintiff seeks to rely on Order 17, Rule 4 which sets out as follows:

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

17. The defendant's affidavit states that it is unclear whether the plaintiff is seeking to allege that the purported certificate of incorporation dated 29th September, 2016, is an "event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability" or constitutes a "person interested coming into existence after the commencement of the cause or matter".

18. Counsel on behalf of the defendant made certain arguments in relation to the issue of voluntary discovery which was decided by this Court on the 20th July, 2018 and I understand is the subject matter of an appeal to the Court of Appeal.

19. He also submitted that where the plaintiff seeks to substitute a party and execute an order the general standard of proof on the balance of probabilities is heightened however he did not point to any authority to assist him in this submission.

20. The court is satisfied that the provisions of the Companies Act, 2014, justifies the court in making an order amending the title of the proceedings from Launceston Property Finance to Launceston Property Finance Designated Activity Company.