

THE HIGH COURT

CIRCUIT APPEALS

2018 No. 240 C.A.

BETWEEN

IRISH NATIONWIDE BUILDING SOCIETY

PLAINTIFF

AND

ORLA McNULTY

MICHAEL IGOE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 April 2019.**INTRODUCTION**

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The legal effect of the order under appeal was to substitute Mars Capital Ireland Ltd. for Irish Nationwide Building Society as the plaintiff in the title of the proceedings.

2. The order under appeal is dated 19 June 2018, and was made pursuant to Order 22, rule 4 of the Rules of the Circuit Court. The order was made pursuant to a Notice of Motion issued on 22 March 2017. The reliefs sought in the Notice of Motion are, in fact, wider than those ultimately granted by the Circuit Court. First, the Notice of Motion sought to reflect the fact that Mars Capital Ireland Ltd. has been re-registered as a designated activity company or "DAC". It seems from the terms of the Circuit Court order, however, that the certificate of re-registration had not been exhibited in the grounding affidavit. This relief was accordingly refused by the Circuit Court.

3. The grounding affidavit had also made reference to the need to seek the leave of the Circuit Court to issue execution in circumstances where more than six years have now elapsed since the date on which the order for possession was first made. This relief was not sought in the Notice of Motion, and does not form part of this appeal.

4. I reference these matters because it appears that the Defendants' appeal is largely informed by a misunderstanding of the limited effect of the Circuit Court order. More particularly, the gravamen of the Defendants' appeal is that—given the history of the proceedings and, in particular, various negotiated settlements between the parties—it would be unfair to allow the order for possession to be pursued at this stage by a new party. As explained presently, these are matters which can be raised if and when the Plaintiff makes an application to extend time. They are not matters which arise at the stage of an application to add a party to the proceedings.

PROCEDURAL HISTORY

5. The within proceedings were issued on 28 September 2006. An order for possession was made against the Defendants by the County Registrar of the County of Longford on 5 November 2008. This order was then appealed by the Defendants to a Judge of the Circuit Court. It seems, however, that an agreement was subsequently reached between the parties whereby the Defendants would consent to an order for possession subject to a stay of six months. By order dated 10 November 2009, the Circuit Court (His Honour Judge Kennedy) struck out the appeal.

6. The next significant step which occurred in the proceedings was the issuing of a Notice of Motion by the Plaintiff on 22 March 2017. The principal relief sought was as follows.

"An Order pursuant to Order 22 Rule 4 of the Rules of the Circuit Court substituting Mars Capital Ireland Designated Activity Company as Plaintiff in the within proceedings by reason of the legal assignment of the interest of the said Plaintiff to Mars Capital Ireland Designated Activity Company over and in respect of the facilities and other obligations the subject of the within proceedings."

7. The application was grounded on an affidavit of a director of Mars Capital Ireland DAC, Mr. Morgan Sheehy, dated 25 September 2016. The affidavit sets out the series of transactions through which the loan facility and related security, the subject-matter of the proceedings, were transferred from Irish Nationwide Building Society to Anglo Irish Bank Corporation Ltd. (subsequently Irish Bank Resolution Corporation Ltd.), and, ultimately, by way of a loan sale deed dated 31 March 2014, to Sandalphon Mortgages Ltd. Mr. Sheehy also explains that the Register of Title at the Land Registry was amended so as to reflect that Mars Capital Ireland Ltd. is the holder of the charge in respect of the folio. The Form 56 (transfer of charge) has been exhibited, as has Folio 11497. It is stated thereon that on 26 June 2014, Mars Capital Ireland Ltd. is the owner of the charge registered at No. 4.

8. Mr. Sheehy further avers that on 10 April 2014, Sandalphon Mortgages Ltd. changed its name to Mars Capital Ireland Ltd. A Certificate of Incorporation on Change of Name dated 10 April 2014 has been exhibited as part of Mr. Sheehy's affidavit. Reference is also made to the fact that Mars Capital Ireland Ltd., a private company limited by shares, was then in the process of converting to a designated activity company. No Certificate of Incorporation on Conversion to a Designated Activity Company has been exhibited.

9. The application to the Circuit Court had been opposed by the Defendants. In this regard, an affidavit was sworn before the Circuit Court by Michael Igoe, the second named defendant, on 15 November 2016. In brief, Mr. Igoe relates the history of the property the subject of the loan facility and underlying security. In particular, Mr. Igoe recites the difficulties that arose in regard to boundaries, sewerage services, damage to property and consequential losses. Mr. Igoe also avers to certain planning law difficulties. Mr. Igoe explains that there are separate High Court proceedings seeking damages in respect of the property.

10. The grounds of opposition are summarised as follows in the final paragraph of Mr. Igoe's affidavit.

"12. As a speculative investor the caveat of the buyer beware must apply to Mars Capital. A well documented case history pre existed their acquisition of our distressed mortgage with Irish Nationwide Building Society and they must be

deemed to have had full knowledge of our particulars and unique circumstances of the financials involved. In view of the impending High Court litigation ref 2010/7795P and the contingencies involved I say Mars Capital must reconstitute proceedings in their entirety and recommence their action. A current valuation report undertaken by Sherry FitzGerald reflects the status that an agricultural value only applies to this property until substantial matters are determined by the High Court in February 2017. In recognition of the foregoing material facts Irish Nationwide Building Society did not execute their Order for Possession and I say it would be unfair and unjust to allow Mars Capital to pick up in a seamless transition and expedite execution of a lapsed order.

I request on equitable grounds that the Court opposes and rejects the Orders and relief under this motion.”

11. Having been adjourned from time to time, the Circuit Court (Her Honour Judge Flanagan) made the following orders on 19 June 2018.

“THE COURT DOTH ORDER

1. That Mars Capital Ireland Limited be substituted for Irish Nationwide Building Society as Plaintiff in the title of the proceedings.
2. That the Plaintiff be at liberty to re-serve the proceedings with the substitutions thereon on the Defendants within a period of 14 days of today’s date.
3. That there be no Order as to costs.”

12. The Defendants lodged an appeal against the order on 25 June 2018. The appeal came on for hearing before me on Tuesday, 2 April 2019. The Plaintiff was represented by Mr. Rudi Neuman, B.L. The Defendants appeared as litigants in person.

13. It seems that shortly before the appeal came on for hearing, the Defendants had—on 29 March 2019—purported to issue a Notice of Motion seeking discovery in support of the appeal from the Circuit Court. The motion had been made returnable for 29 April 2019. Counsel on behalf of the Plaintiff submitted that the appeal should not be adjourned pending the determination of the motion for discovery, and suggested that the issuing of same was a delaying tactic on the part of the Defendants. Counsel explained that the appeal had, in fact, previously been listed for hearing in February 2019 but had not been reached on that occasion. The appeal was next listed for hearing on 12 March 2019, but the matter was then adjourned to 2 April 2019. The Notice of Motion seeking discovery was only issued prior to the *third* of these hearing dates.

14. Rather than delay the hearing of the appeal, I asked both parties whether they were in a position to deal with the application for discovery as part of the hearing of the appeal. Both sides indicated that they were. Having heard submissions from both sides, I then refused the application for discovery for the following reasons.

15. These proceedings had come before the High Court by way of an appeal from the Circuit Court. The hearing before the Circuit Court had been on the basis of affidavit evidence only. Accordingly, the appeal is governed by section 37 of the Courts of Justice Act 1936 as follows.

“37.(1) An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom) by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given.

(2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal.”

16. It is clear from the terms of the application for discovery that the Defendants seek to conduct some sort of enquiry into the taxation status and residency of each corporate entity comprised in Mars Capital Ireland Ltd. Group. The Defendants also seek documentation in respect of the alleged deregistration and withdrawal of the charitable status by the Charities Regulator. The application for discovery is, in effect, a precursor to an application to adduce new evidence on the appeal.

17. I rejected this application for the following three reasons. First, the documentation sought by way of discovery is irrelevant to the issue now before the court. As discussed in more detail presently, the legal test to be applied by the court in an application of this type is whether there is a *prima facie* basis for substituting the new plaintiff on the basis of the transfer or assignment of assets. See *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671 (Kelly J.). The documents sought by way of discovery go well beyond anything that could be relevant to that legal test.

18. Secondly, and in any event, if the Defendants had wished to pursue an objection along the lines now mooted, then they should have done so at the time of the initial hearing before the Circuit Court. This is not evidence that is “new” or that could not have been discovered or disclosed at the relevant time.

19. Thirdly, it is clear from the affidavit filed on behalf of the Defendants by Mr. Igoe (summarised above) that the ground of objection being pursued before the Circuit Court related to the fairness or otherwise of allowing Mars Capital Ireland Ltd. to take over and enforce the order for possession in circumstances where the development of the property has, on the Defendants’ version, been beset with difficulties which explain the inability to make payments pursuant to the loan facility. There was no suggestion at the time of the hearing before the Circuit Court that there was any reason that Mars Capital Ireland Ltd. was an unsuitable successor.

20. In circumstances where I have refused the application for discovery and refused the implied application to adduce new evidence, the case falls to be determined by reference to the materials before the Circuit Court.

APPLICATION TO SUBSTITUTE MARS CAPITAL IRELAND AS PLAINTIFF

21. The application before the Circuit Court was made pursuant to Order 22, rule 4 of the Circuit Court Rules as follows.

“4. Where, by reason of the death, or bankruptcy, or any other event* occurring after the commencement of an action, proceeding 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 action, proceeding, 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.”

*Emphasis (italics) added.

22. Order 22, rule 4 is broadly similar to Order 17, rule 4 of the Rules of the Superior Courts. As explained by the learned authors of *Delany and McGrath on Civil Procedure* (Round Hall, Dublin, 4th ed., 2018), an application pursuant to Order 17, rule 4 is the appropriate procedure to adopt following the assignment of a loan or chose of action. See page 351/52 as follows (footnotes omitted).

“6–111 However, it would seem that the assignment of a loan or chose in action is an “event” within the meaning of Order 17, rule 4. This was the view of Peart J in *Irish Bank Resolution Corporation v O’Driscoll*, who commented that “[t]he event is clearly the purchase by it of the loan book referred to”. In *Irish Bank Resolution Corporation v Lavelle*, Baker J accepted the submission that the purpose and effect of Order 15, rule 14, is to fix the time at which an application to add, strike out or substitute a party may be made and said that it is not an empowering provision. She further held that Order 17, rule 4 permits an application to be made to add or substitute a party who has taken a legal assignment of a loan book from the original plaintiff. On the basis that there had been a change or transmission of the interests of the plaintiff in loan facilities, she made an order in that case pursuant to Order 17, rule 4, instead of Order 15, rule 14.

6–112 This conclusion was confirmed on appeal by the Court of Appeal in *Stapleford Finance Ltd v Lavelle*, which accepted the view put forward by the notice party that there was “no reason in principle why an ‘event’ within the meaning of the rule should mean an extraneous event, such as death, but not a private event, such as a contract for the sale of the loans”. The Court of Appeal also upheld the conclusion reached by Baker J in *Lavelle* that the assignment of the loan amounted to a change in interest within the meaning of Order 17, rule 4. Irvine J expressed the view that the legislative intent of s.12 of the Irish Bank Resolution Corporation Act 2013 would be defeated if the Rules did not permit the purchaser of the “cause of action or proceedings” to be substituted as plaintiff. She concluded that there was no valid reason why Order 17, rule 4 should be given the narrow construction put forward by the appellant and she held that Baker J had been correct in holding that she had power pursuant to that rule to substitute the respondents as the sole plaintiff in the proceedings before the court.”

23. These passages appear to me to represent an accurate statement of the law in this regard.

24. The legal test governing an application to join a party to proceedings on the basis of an assignment of a loan or chose in action has been set out by the High Court in *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671. The test is summarised as follows by Kelly J. (as he then was).

“30. What I am asked to do is to consider a procedural application which, if it is granted, will have the effect of bringing to an end the entitlement of IBRC to further prosecute these proceedings. It will substitute for that entity, Launceston, who will take over the entitlement to prosecute the proceedings, subject to all of the imperfections that may have been present when the action was constituted as between IBRC and the defendants and subject also to proving at trial, that there has been a valid sale of the underlying assets, a valid assignment of the chose in action which is this action, and a valid notice given.

31. What I do have to satisfy myself about is whether there is *prima facie* evidence of that having occurred. In order to come within the relevant rule of court, there has to be evidence adduced which would justify the substitution of the existing plaintiff by Launceston.

32. That seems to me to be the standard of proof that has to be achieved. Much of the argument which took place concerning the deployment of material, the entitlement to redact, the reasons for redaction, the entitlement of the defendant to see the original document in un-redacted form are all matters, which in my view, are for another day.”

25. The application in *Comer* had been made on the basis of Order 15, rule 14 of the Rules of the Superior Courts. Kelly J. does note, however, that Order 17, rule 4 could also arguably be applicable. The High Court (McDermott J.) has since confirmed in *Irish Bank Resolution Corporation v. Kennedy* [2016] IEHC 395 that similar principles apply to an application pursuant to Order 22, rule 4 of the Rules of the Circuit Court.

26. I am satisfied, on the basis of the affidavit of Morgan Sheehy, that there has been a *prima facie* demonstration of the transfer of the title of the loan facilities and underlying security. I attach particular weight in this regard to the fact that Mars Capital Ireland Ltd. has now been registered as the owner of the charge on Folio 11497 County Longford.

27. I also attach weight to the fact that “hello” and “goodbye” letters have been served on the Defendants, and that this complies with the requirement for notice in writing under section 28(6) of the Supreme Court Judicature (Ireland) Act 1877.

28. Finally, it may be worth reiterating the narrow focus of the application before the Circuit Court, and the limited effect of the order made. The effect of the Circuit Court order—now upheld by the High Court on appeal—is simply to substitute Mars Capital Ireland Ltd. as the plaintiff in the proceedings. This allows the proceedings to be continued in its name. Crucially, however, the order does not constitute the grant of leave to execute the order for possession of 5 November 2008. If and insofar as Mars Capital Ireland Ltd. wishes to enforce that order, then it will be necessary for it to apply to the Circuit Court. This application will have to be on notice to the Defendants, and they will have an opportunity to object to same. None of this has been predetermined by the decision of the High Court on this appeal.

29. (Counsel for the Plaintiff has indicated that an application pursuant to Order 36, rule 10 for leave to issue execution has, in fact, already issued and is listed for hearing before the Circuit Court in May 2019).

CONCLUSION

30. For the reasons set out above, I propose to make an order dismissing the Defendants’ appeal, and affirming the order of the Circuit Court of 19 June 2018.

