THE HIGH COURT

[2013 46 S.P]

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF

AND
MICHAEL MACKEN AND PATRICIA WATSON

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 15th day of June, 2018

1. In this judgment the court is asked to decide two issues. The first is whether the proceedings should be carried on between the defendants as continuing parties and Pepper Finance Corporation (Ireland) designated activity company ("Pepper") as a new party in substitution for Danske Bank A/S trading as Danske Bank ("Danske Bank") or as an additional plaintiff. The second issue is whether the order of Cross J. of the 2nd November, 2015 granting the plaintiff possession of the defendants' family home should be set aside under O. 36 r. 33 of the Rules of the Superior Courts.

Application to set aside the order of 2nd November, 2015
2. Order 36 r. 33 of the rule provides that:

> *"Any verdict or judgement obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem fit, upon an application made within six days after trial."*

3. In this case the plaintiff was seeking possession of the defendants' family home comprised in Folio 11582F County Roscommon and known as "Sorrento", Creagh, Beal na Mulla, Athlone, County Roscommon on foot of a charge registered on 11th December, 2009. Mr. Macken was representing himself and his wife. He had attended court on sixteen previous occasions. He was aware that the matter was listed for hearing on the 2nd November, 2015 but he became unwell while travelling to Dublin. His family doctor, Dr. John Corboy, swore an affidavit on the 7th November, 2017 confirming that Mr. Macken presented himself at his surgery at approximately 9.30 am in a very agitated state. He said that he conducted a full medical assessment and he diagnosed that Mr. Macken was suffering all of the symptoms of a panic attack. He medicated Mr. Macken (but does not give any details) and placed Mr. Macken in the front parlour of his house to allow him to calm down. He checked upon him regularly. Within an hour he was improved and more coherent. Mr. Macken wished to leave and to drive to Dublin to attend the High Court but Dr. Corboy advised him that he was not in a fit state to do so.

4. At 10.42 Mr. Macken emailed Ms. Laura Bolger, the solicitor acting on behalf of the plaintiff, stating:

> *"Laura*
>
> *I cannot make the court today because of a major personal issue. Can you please adjourn to when suits you even later this week?*
>
> *Thanks*
>
> *Michael."*

5. Ms. Bolger was on annual leave on the 2nd November, 2015 and had in place an automatic email reply system whereby any person who sent her an email on that day received an immediate and automatic reply confirming that she was out of the office on that day. She says that she has no record of having received Mr. Macken's email of 10.42 am and if it had been received then he ought to have received her automatic reply. He did not receive the reply and he assumed that she would adjourn the hearing of the application for possession listed for hearing that afternoon. He emailed her at 16.46.

> *"Laura*
>
> *Can you advise as to when the case is next up.*
>
> *Thanks*
>
> *Michael."*

6. Ms. Oonagh Fadden, solicitor, attended in court on the 2nd November, 2015 on behalf of the plaintiff at 2 pm. She confirmed that the defendants were called at the sitting of the court stage and there was no appearance by or on behalf of the defendants. The matter was left to the end of the list and at approximately 3.30 pm Cross J. heard the matter in the absence of the defendants and granted the plaintiff an order for possession. The transcript of the DAR was exhibited and it clear the the hearing was approximately ten minutes' duration.

7. The following morning at 9.24 Ms. Bolger emailed Mr. Macken stating that she had only seen his email of yesterday morning now and: -

> *"If you cannot attend court it is incumbent on you to have somebody attend on your behalf and seek an adjournment in the absence of agreement in respect of same.*
>
> *An order for possession was made yesterday by Judge Cross."*

8. Mr. Macken responded later that morning stating that he was stunned to receive the email.

> *"We have used email to serve and communicate with each other for over a year. On that basis I believe that the plaintiffs were aware of the situation.*
>
> *Therefore, I am requesting that you seek instructions from your client to agree to have the order of yesterday set*

aside.

Regards

Michael."

9. On the 5th November Ms. Bolger emailed Mr. Macken stating that unless there was an agreement to an adjournment parties should attend the court. She said she had requested her client's instruction in relation to consent to setting aside the orders but had not yet received instructions. She pointed out that of course he had a right to appeal any order made by the High Court.

10. Mr. Macken replied on the 6th November stating:

"Laura

Can we go in front of Judge Cross on Monday as I want to seek (1) leave to put in a motion to set aside (2) leave to extend the time for appeal till ten days after a decision on the motion to set aside.

Please respond asap."

11. Ms. Bolger replied on the afternoon of the 6th November stating that she was not sure what purpose would be served by appearing before Judge Cross and that Mr. Macken did not need to seek leave to issue a motion to set aside.

12. On the 6th November at 15.19 Mr. Macken emailed Ms. Bolger.

"So, for clarity further to our recent series of emails, I will be applying on Monday the 9th day of November, 2015 at 11 am or the first available opportunity to Judge Cross in Court 2 of the Four Courts for leave to issue a motion to set aside his orders made on Monday 2nd November, 2015 and to apply to direct his registrar not to perfect his orders until after my motion for set aside of the orders are determined.

I am putting you on notice in the event that you would like to have a presence there.

Furthermore, as a matter of courtesy to the honourable court and myself could you advise me by return whether you will attend or not on Monday."

13. Ms. Bolger replied that she would attend in court. The plaintiff did not consent to set aside the order of 2nd November, 2015 obtained in the absence of the defendants.

14. On the 9th November, 2015 Mr. Macken attended in the central office of the High Court and sought to issue a motion seeking to set aside the order of Cross J. of the 2nd November, 2015 pursuant to O. 36 r. 33. He was not permitted to issue the motion at the desk in the central office and he attended before the chief registrar of the High Court. The chief registrar considered his notice of motion and on the 11th November, 2015 the motion seeking leave to set aside the order of the 2nd November, 2015 was issued. It was grounded on Mr. Macken's affidavit sworn on the 10th November, 2015. In addition to exhibiting the email exchanges I have referred to above, it exhibited a letter from Dr. Corboy dated the 10th November, 2015 which simply provided:

"This is to confirm that this patient attended here at the surgery at Church Street, Clara, County Offaly on Monday, 2nd November, 2015."

15. The matter was mentioned to the President of the High Court who directed that the motion should be heard by Cross J. On the 7th December, 2015 Cross J. held that he was *functus officio* and he refused to entertain the application. Mr. Macken appealed this decision to the Court of Appeal and on the 5th April, 2017 the Court of Appeal came to the conclusion that Cross J. fell into error in failing to consider whether he should have exercised the discretion conferred by O. 36 r. 33 and in holding that he was entirely debarred by the *functus officio* doctrine from even considering Mr. Macken's application to have the order of the 2nd November, 2015 set aside. The court held that it would be a matter for the High Court to consider afresh the application pursuant to O. 36 r. 33 to have the judgment of the 2nd November, 2015 set aside and accordingly the matter was remitted to the High Court.

Is the application out of time?

16. Order 36 r. 33 requires that the application to set aside the judgment be brought within six days of the trial. The Court of Appeal proceeded on the basis that the motion issued on the 9th November, 2015 (the date on the notice of motion) and on that basis held that it had been brought within the time allowed under the rules. In fact, for the reasons I have explained, Mr. Macken was not permitted to issue the motion on the 9th November, 2015 and he was only permitted to issue it on the 11th November, 2015. I am satisfied that the court has power to extend the time, in appropriate cases, for the bringing of such a motion. In view of that fact and in view of the email exchange between Mr. Macken and Ms. Bolger I am quite satisfied that this is an appropriate case in which to extend the time for bringing the application. Mr. Macken tried to comply with the rules but was prevented from doing so by the officials in the central office. He was subsequently permitted to issue the motion so the delay cannot be laid at the door of the defendants. There was no conceivable prejudice suffered by the plaintiff by the fact that the motion issued on the 11th as opposed to the 9th November, 2015. Indeed, it was surprising that a timing point was even taken in the circumstances. As Hogan J. said in the Court of Appeal, Mr. Macken had acted with commendable speed.

17. Insofar as it is suggested that an order for a court to enlarge the time for an application under O. 36 r. 33 it must be satisfied that the defendant has a prima facie or arguable defence, the defendants in their many affidavits in defence of the application for possession satisfy any minimum threshold that might be required to be met before the court could exercise its discretion. There is no reason to refuse to extend the time for the bringing of this motion in circumstances of this case. The justice of the case clearly demands it.

The law in relation to setting aside decisions of the High Court

18. At para. 14 of the judgment of the Court of Appeal in these proceedings delivered on the 5th April, 2017 the court held that O. 36 r. 33 is designed:

"to deal with the special contingency of where a litigant, whether by reason of oversight or what amounts to force majeure, is prevented from actually attending court on the day in question. Every legal practitioner has had experience of where – whether through oversight, listing difficulties, transport failures, sudden indisposition or a medical or family

emergency – a litigant went unrepresented and judgment was entered against them in their absence. Order 36, r. 33 is designed to deal with these types of difficulties and to ensure that justice is fairly done as between the parties where events of this kind occur. In particular, it allows the trial judge to set aside the judgment (on terms, if needs be) and proceed to determine the matter where both sides are represented without the necessity for an actual appeal."

19. The court emphasised the difference between such a situation and a party who deliberately elects not to participate at a particular hearing. The court quoted with approval from the decision of Dunne J. in *Nolan v. Carrick* [2013] IEHC 523 where she explained:

> *"It seems to me that the purpose of O. 36, r. 33 of the Rules of the Superior Courts is not to deal with circumstances such as those which arose in this case. This is not a case of inadvertence, mistake or surprise. It is not the case that the defendant was unaware of the fact that the proceedings were in a list for hearing. As I have said, it appears that a deliberate decision was made by the defendant not to attend court. The defendant did not instruct a new solicitor to attend court, even for the purpose of renewing the application for an adjournment, nor did anyone else, such as a family member, attend court on behalf of the defendant. Therefore, it seems to me O. 36, r. 33 of the Rules of the Superior Courts, is not applicable to the facts of this case. Order 36, r. 33 is there to avail those parties who by accident or mistake or for some similar reason were not aware of the trial date and consequently suffered a judgment being given in their absence."*

20. In *Nolan v. Carrick* Dunne J. approved of a list of propositions set out in the decision of Shocked & Anor v. Goldschmidt & Anor [1994] Times (4th November, 1994), a decision of the Court of Appeal of England and Wales. These provide as follows:

> *"1. Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he would normally be bound that decision.*
>
> *2. Where judgment was given after a trial it was the explanation for the absence of the absent party that was most important: unless the absence was not deliberate but was due to accident or mistake, the court would be unlikely to allow a rehearing.*
>
> *3. Where the setting aside of judgment would entail a complete re-trial on matters of fact which had already been investigated by the court, the application would not be granted unless there were very strong reasons for doing so.*
>
> *4. The court would not consider setting aside a judgment regularly obtained unless the party applying enjoyed real prospects of success.*
>
> *5. Delay in applying to set aside was relevant, particularly if during the period of delay, the successful party had acted on the judgment, or third parties had acquired rights by reference to it.*
>
> *6. In considering justice between parties, the conduct of the person applying to set aside the judgment had to be considered; where he had failed to comply with orders of the court, the court would be less ready to exercise its discretion in his favour.*
>
> *7. A material consideration was whether the successful party would be prejudiced by the judgment being set aside, especially if he could not be protected against the financial consequences.*
>
> *8. There was a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither was short."*

Discussion

21. I apply these principles to this case. I accept the explanation given by Mr. Macken for his absence from court on the 2nd November, 2015. I completely agree with the observations of Hogan J. that every legal practitioner has had experience of a situation where a litigant went unrepresented and a judgment or order was entered against them in their absence. It is commonplace in those circumstances for colleagues to agree to vacate the order so obtained and to relist the matter for hearing. The defendants have at all times conducted themselves in a courteous and appropriate manner in court and I have not been informed that they had failed to comply with orders of the court. The absence of Mr. Macken was not contrived but, on the contrary, was very much against his will. The hearing in this case lasted approximately ten minutes and there is no real question of valuable court time being wantonly squandered. As this is an application heard on affidavit, there is no risk of injustice arising from a rehearing of oral evidence. As Hogan J. observed, Mr. Macken acted with commendable speed in bringing the application. It is notable that the plaintiff has not identified any prejudice which would have been suffered by it had it agreed to the order being set aside when it was requested so to do on the 3rd November, 2015. The matter could have been relisted for hearing on the 16th November with no prejudice being suffered by the plaintiff.

22. In argument it was submitted that the appropriate remedy which was available to the defendants was to appeal the order to the Court of Appeal and on this basis the court should refuse to make an order under O. 36 r. 33. I cannot agree. A party is limited to the arguments he or she can advance on appeal and is not so limited at an original hearing in the High Court. In circumstances where the judgment was obtained in the absence of any argument being made by the defendants, it is difficult to see how the defendants can raise argument on appeal if they are to be confined to arguments raised at the hearing in the High Court. Furthermore, it was accepted by the Court of Appeal that from Mr. Macken's perspective an appeal against the making of a judgment in undefended proceedings was less attractive than having the judgment set aside.

23. The discretion conferred on the court by O. 36 r. 33 is to be exercised so as to do justice between the parties. While there will be some prejudice to a party who has already obtained a judgment in his or her favour in having that judgement or order set aside, the very existence of the rule indicates that there may be circumstances where it would be unjust to the other party who has suffered a judgment against him or her in his or her absence to leave that party to his or her remedy of an appeal. In all the circumstances of this case I am quite satisfied that the justice of the case warrants the exercise of the court's discretion under O. 36 r. 33 to set aside the order obtained in the absence of the defendants on the 2nd November, 2015. It is frankly quite disheartening to see how the plaintiff has in effect sought to take advantage of Mr. Macken in the circumstances of his case and I deprecate the attitude of the plaintiff in this regard. The courts are very familiar with obstructive litigants who deliberately absent themselves and place every conceivable obstacle in the way of plaintiffs seeking to litigate matters regularly before the courts. It is understandable in those

circumstances that a party would be wary of accommodating a request by such a litigant to vacate an order validly obtained. However, this is very far from being such a case and it seems to me that had the defendants been represented and the barrister or solicitor been prevented from attending in court while travelling towards court, as occurred in the case of Mr. Macken, that his or her opposite number would not have sought to stand over a judgment or order obtained in their absence in those circumstances.

24. I was referred in argument to two decisions of the Supreme Court, *Greendale Developments Ltd* (No. 3) [2000] 2 I.R. 514 and L.P. v. M.P. [2002] 1 I.R. 219. These authorities were of little assistance as they were concerned with the finality of decisions after appeal and in each case there had been full participation by the parties at both the trial and the appeal. Different considerations apply to an application pursuant to O. 36 r. 33 than to an application to set aside a final order of an appellate court.

25. Finally, I was referred to the decision of *Bank of Scotland Plc v. McDermott* [2017] IEHC 77 where Barrett J. held that O. 36 r. 33 did not apply to an application brought by way of summary summons which is governed by O. 37 of the rules. He held that O. 36 was concerned with plenary trials and O. 37 with summary trials and there was no equivalent to r. 33 in O. 37 and therefore it was not open to a party to rely upon O. 36 r. 33 to set aside a judgment on foot of a summary summons.

26. That decision was not drawn to the attention of the Court of Appeal when the appeal was heard on the 23rd March, 2017. Therefore, the point was not considered. However, the court was aware that these were special summons proceedings heard upon affidavit and it did not doubt that an application could be brought under O. 36 r. 33 in respect of the order for possession made on foot of the special summons on the 2nd November, 2015. The order was to "*remit the matter to the High Court to consider and determine Mr. Macken's application under O. 36 r. 33 on its own merits*". It seems to me reasonable to conclude that had the Court of Appeal believed that this order could not apply to a special summons that it would not have made such an order because the order would have been moot. Therefore, insofar as there may be considered to be a conflict between the decision of Barrett J. in *Bank of Scotland v. McDermott* and the decision of the Court of Appeal in this case, I will follow the judgment and order of the Court of Appeal and I have approached the matter on the basis that O. 36 r. 33 is applicable to these special summons proceedings.

27. For the reasons outlined I order that the judgment of 2nd November, 2015 be set aside pursuant to O. 36 r. 33 and the matter should be relisted for hearing.

Application to substitute Pepper as a plaintiff
28. Pepper brought an application pursuant to O. 15 r. 14 and O. 17 r. 4 of the Rules seeking to be substituted as plaintiff in place of Danske Bank a/s trading as Danske Bank. Order 15 r. 14 provides:

> *"Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court at any time before trial by motion or at the trial of the action in a summary manner."*

29. Order 17 r. 4 provides:

> *"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, … it becomes necessary or desirable that any person not already a party should be made a party, …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, ..."*

30. It is clear that the application may be made at any time before trial by motion or at the trial of the action in a summary manner. In view of the fact that I have directed the order obtained on the 2nd November, 2015 should be set aside, this motion must be considered on the basis that a trial of the action will take place at a future date.

31. The courts regularly have to consider applications to substitute plaintiffs. In *Irish Bank Resolution Corporation Ltd v. Halpin* [2014] IECA 3 at para. 24 Finlay Geoghegan J. held that the applicant on the procedural application for substitution was only required to adduce evidence in a prima facie fashion of its entitlement by reason of the purported assignments to pursue the existing claim on the underlying facilities alleged to have been transferred to it against the defendants. The procedural substitution application did not determine the issue of the validity of the assignment from the plaintiff in this case, IBRC, to the assignee/applicant. The court expressly held that these were matters to be left over for the trial judge.

32. The court referred to the decision of Kelly J. in *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671. In that case, Kelly J. emphasised the fact that the court was not making any adjudication upon either the validity or efficacy of either the sale agreement which underpinned the application or of notice which was given to the defendants of the assignment of the facilities and underlying security in that case. The court had to be satisfied whether there was *prima facie* evidence of a sale and assignment having occurred and of a notice having been given such as would justify the substitution of the existing plaintiff by the applicant. At para. 36 he said:

> *"I do not think that the rule contemplates an elaborate argument of the type which I have had to deal with this afternoon. I think what it requires is that there should be put before the court sufficient evidence to justify the making of the order, leaving over to the trial of the action the question of whether that evidence put before the court in a prima facie fashion is sufficient to bring home the plaintiff's claim at trial."*

33. He continued on at para. 43:

> *"In my view, the onus of proof on a procedural motion of this sort is very different to the onus of proof which is required at the trial. I do not believe that it would be either appropriate or indeed in the interests of justice that on a procedural motion of this sort, far reaching decisions concerning the efficacy and validity of the underlying sale agreement or the assignment of a notice of that assignment should be made."*

The evidence
34. The application was grounded upon an affidavit by Cormac Ryan sworn on the 31st January, 2018. The application was based upon a loan portfolio sale and purchase deed dated 23rd October, 2017 between Danske Bank a/s trading as Danske Bank (as seller) ("Danske Bank") and Proteus Funding DAC (as purchaser) ("Proteus") and an associated data tape, a deed of assignment dated 15th December, 2017 between Danske Bank (as assignor), Pepper Finance Corporation (Ireland) DAC (as legal assignee) ("Pepper") and Proteus (as beneficial assignee), a form 56 deed of transfer dated the 15th December, 2017 from Danske Bank to Pepper and letters of notification to the defendants dated 18th October, 2017 and 18th December, 2017 respectively.

35. Clause 3 of the Loan Sale Deed provides:

> *"The seller, as legal and beneficial owner of the purchased assets, agrees to sell absolutely and unconditionally to the purchaser the purchased assets and the purchaser agrees to purchase the purchased assets free from all incumbrances, whereupon the purchaser shall assume the purchased obligations, such sale and purchase, to take effect on the closing date and in accordance with, and subject to, the terms and conditions of this deed and subject to the proviso that legal title to such assets shall be transferred to the Purchaser Nominee shall hold such assets on trust for the Purchaser (so that legal title shall be held by the Purchaser Nominee with beneficial title being transferred to and held by the purchaser."*

The Purchaser Nominee means Pepper trading as Pepper Assets Servicing *"and which entity the purchaser has nominated to be the transferee of the legal title (as bare trustee or otherwise) to the purchased assets on closing."*

36. The Purchased Assets mean any and all of the seller's rights, titles and interest in and to the Facilities and the Related Security and Security Documents. The facility means the loans listed in the tab entitled "loan" in the data tape where such loans relate to the borrowers referenced at schedule 1. Related Security means all security interest granted to secure any facility and any claim of the seller under any guarantee, indemnity, surety or other undertaking or commitment given in respect of any facility.

37. In passing, it should be noted that in clause 6.4.2 of the deed the purchaser agrees on or before the closing date to prepare applications to substitute itself (or as the case may be, the Purchaser Nominee) for the seller as plaintiff in any plaintiff litigation and it undertakes to file or procure that the Purchaser Nominee files substitution applications within fifteen business days following the closing date.

38. Schedule 1 to the Loan Sale Deed attaches an excel file which gives the connection identification for the defendants and the loan ID for the two loans the subject matter of the proceedings. On pp. 108 and 109 the deed appears to be executed by Danske Bank and Proteus. In the case of Danske Bank, it is signed and delivered by two individuals describing themselves as attorneys for Danske Bank a/s trading as Danske Bank and the deed is then witnessed by Rachel Keane, a solicitor. On behalf of Proteus the deed is executed and delivered as a deed by its lawfully appointed attorney Mr. Jarlath Canning and witnessed by Ms. Kate Donoghue.

39. Associated with the Loan Sale Deed are the data tape excel spreadsheets referred to in the Loan Sale Deed. Mr. Ryan exhibits the relevant extract which identifies the connection ID of the defendants, the two loan IDs, the address of the property, the land registry folio number and the fact that there is a legal mortgage.

40. By the Deed of Assignment dated the 15th December, 2017 the recitals record:

> *"A. The assignor and the beneficial assignee entered into a loan portfolio sale and purchase deed…on 3rd October, 2017.*
>
> *B. Pursuant to the terms of the loan portfolio sale and purchase deed, the assignor and the beneficial assignee agreed that, on the closing date, the assignor would transfer, assign and convey the purchased assets to the legal assignee, whereupon the legal assignee would hold the legal title to the purchased assets on trust and for the benefit of the beneficial assignee.*
>
> *C. Now in pursuance of the loan portfolio sale and purchase deed, the assignor wishes to effect*
>
> > *(i) An absolute, unconditional and irrevocable assignment of the legal title to the purchased assets to the legal assignee; and*
> >
> > *(ii) An absolute, unconditional and irrevocable assignment of the beneficial titled to the purchased assets to the beneficial assignee."*

41. Danske Bank is the assignor. Pepper is a legal assignee and Proteus is the beneficial assignee. Purchased Assets has the meaning given to that term in the Loan Sale Deed.

42. The operative part of the deed is clause 2 which provides:

> *"In consideration of the payment of the adjusted purchase price by the beneficial assignee to the assignor in accordance with the loan portfolio sale and purchase deed, receipt of which payment is hereby acknowledged and further to the terms of the loan portfolio sale and purchase deed wherein the beneficial assignee and the assignor agreed that legal title to the purchased assets would be transferred to the legal assignee on trust for the beneficial assignee:*
>
> *2.1.1 The assignor unconditionally, irrevocably and absolutely grants, conveys, assigns, transfers and assures to the legal assignee, insofar as these are not otherwise granted, conveyed, assigned, transferred and assured pursuant to the Irish property transfer deeds, the non Irish property transfer deeds and the life policy assignment, all such legal rights title interests as the assignor may have in and to the purchased assets with effect from the assignment date; and*
>
> *2.1.2 The assignor unconditionally, irrevocably and absolutely grants, conveys, assigns, transfers and assures to the beneficial assignee all such beneficial rights title and interest as the assignor may have in and to the purchased assets with effect from the assignment date.*
>
> *2.2 The parties agree that the legal and beneficial title and interest in all purchased assets shall be transferred or assumed under this deed except to the extent they are transferred or assumed pursuant to the Irish property transfer deeds, the non Irish property transfer deeds or the life policy assignment."*

The deed is executed by Danske Bank in the same manner in which the Loan Sale Deed was executed, Pepper executed the deed as legal assignee by the signatory of a director/authorised person and its secretary. The execution is not witnessed. Proteus executes the deed of assignment as by its lawfully appointed attorney Gareth Roe and his signature is not witnessed.

43. The deed of assignment in schedule 1 refers to a deed of transfer form 56 in respect of registered charges entered into between the assignor and the legal assignee. The executed version of the deed of assignment of this document is redacted in the schedule to the deed of assignment. Separately, Mr. Ryan exhibits the form 56 transfer of charges dated 15th December, 2017. The deed is

unredacted and the schedule to the deed of transfer identifies the folio and burden no. the subject of the transfer. The folio is 11582F County Roscommon which is the number of the folio identified in the data tape in respect of which an order for possession is sought in these proceedings.

44. I set out the provisions of the documents in detail to illustrate that they show that if they are valid and effective documents there has been a sale of the loans and associated securities of the defendant by Danske Bank to Proteus and that the parties agreed that the legal interest in the loans and associated securities was to be transferred to Pepper and that Proteus was to be the beneficial owner of the facilities and associated security.

45. By letters dated the 18th October, 2017 Pepper wrote to the defendants for and on behalf of Danske Bank in relation to the two loans secured on the defendants' family home as follows:

> *"As you are aware, we, Pepper Assets Servicing act on behalf of Danske Bank a/s (the "bank") to provide customer and administration services in respect of your account. We are writing to advise you that the bank will shortly be entering into an agreement to transfer a loan portfolio which includes your account(s) to Pepper Finance Corporation (Ireland) DAC (the "new lender")".*

The letter continued:

> *"All obligations remain due and owing to Danske until the transfer date. After the transfer date all obligations will be owing to the new lender…*
>
> *Pepper Finance Corporation (Ireland) DAC will be the new lender in respect of your accounts(s) (sic) from the transfer date and your obligations in respect of your account(s) will be owing to them from that date. Pepper Finance Corporation (Ireland) DAC will hold the benefit of your account(s) on trust for the benefit of Proteus Funding DAC (the "beneficiary").*

46. On the 18th December, 2017 Danske Bank SA wrote to each of the defendants in the following terms:

> *"Danske Bank a/s ("Danske") has, with effect from 15 December, 2017, transferred all legal rights and agreements relating to the account(s) list below.*
>
> *95191320065579 & 95191320065587*
>
> *(The accounts) to Pepper Finance Corporation (Ireland) DAC ("Pepper").*
>
> *1. Notice of transfer*
>
> *The purpose of this letter is to give you information regarding the transfer of the account(s).*
>
> *All agreements that you have with Danske relating to the accounts were transferred and assigned to Pepper on 15th December, 2017, including any collateral and/or guarantees which you have provided in favour of Danske…*
>
> *From 15th December, 2017, Pepper holds the benefit of the account(s) and finance agreements on trust for Proteus Funding DAC, or such other beneficiary of such trust from time to time ("the beneficiary")".*

47. On its face, this notice appears to comply with what is required by s. 28 (6) of the Supreme Court Judicature (Ireland) Act, 1877.

48. In his very comprehensive submissions to the court both in writing and orally, Mr. Macken challenged almost every aspect of the evidence adduced by Pepper in support of its application to be substituted as plaintiff in place of Danske Bank. He challenged whether or not any of the parties had validly executed either the Loan Sale Deed, the Deed of Assignment or the transfer. He argued that there was an inconsistency and lack of clarity in the evidence regarding the roles of Pepper and Proteus. He argued that there was no evidence that the loans and mortgages granted by himself and his wife to Danske Bank's predecessor in title had in fact been assigned under the deed of assignment. He questioned whether the document presented to the court had been tampered with on the basis that internal pagination ceased to appear on crucial pages. He challenged the validity of the notices of 18th October, 2017 and 18th December, 2017 on the basis that documents purporting to be written by Pepper were headed by Danske Bank logos and appeared to be on Danske Bank headed notepaper.

49. These are precisely the issues which Kelly J. indicated in *IBRC v. Comer* should not be adjudicated upon by the court on an application to substitute a plaintiff for the existing plaintiff. I am satisfied that the applicant, Pepper, has adduced evidence on a *prima facia* basis that there was a sale and assignment and transfer of the loans and security by Danske Bank to Pepper as legal assignee and transferee. The defendants were notified by Danske Bank of the assignment of their loans to Pepper on the 18th December, 2017. On this basis I conclude that the applicant is entitled to be substituted as plaintiff in these proceedings in place of Danske Bank AS trading as Danske Bank and is authorised to continue the proceedings as plaintiff.

50. In so holding I wish to emphasise that I am making no judgment on the validity or efficacy of any of the documentation relied upon by Pepper in this application. I am making no judgment on the arguments advanced by Mr. Macken on behalf of the defendants in relation to the alleged flaws in the documents or the alleged inconsistency in the averments of Mr. Ryan in his grounding affidavit. I have expressly refrained from any such analysis as it is not appropriate for the court at this stage to engage in the substance of these arguments. Once I am satisfied that the court is justified in substituting Pepper as plaintiff that is as far as I am required to go in the assessment of the evidence.

51. I therefore make an order substituting Pepper Finance Corporation (Ireland) Designated Activity Company as a new party in substitution for Danske Bank a/s trading as Danske Bank.