

THE HIGH COURT

[2015 177 C.A.]

BETWEEN

KBC BANK IRELAND PLC.

PLAINTIFF/RESPONDENT

AND

KEVIN WOODS

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Eagar delivered on the 13th day of March, 2017

1. This is an appeal from the defendant/appellant against an order of Judge Flanagan in Roscommon Circuit Court granting the plaintiff/respondent possession from the defendant of the premises forming part of folio 25535F in County Roscommon, as described in the schedule of the deed of transfer dated June 2007 and made between Michael Woods and Kevin Woods. The premises are situated at Corey, Kilmore, Carrick on Shannon, Co. Roscommon and are now wholly comprised in folio 34177F of the Register of Free-Holders in the County of Roscommon.

2. The pertinent legal issues involve whether the interest of IIB Homeloans Ltd. was registered as a charge on the mortgage transferred to KBC Bank Ireland plc.

Submissions of Plaintiff/Respondent

3. It seems common case that IIB Homeloans Ltd. advanced to the defendant the sum of €284,000.00 on the 5th January, 2007 and duly registered the mortgage in the Land Registry on the 3rd February, 2009. It is also not in dispute that the defendant has, since the 1st November, 2011, periodically defaulted in the payment of monies to be paid to the plaintiff (the Bank/IIB Homeloans Ltd.) and subsequently to the plaintiff. The plaintiff is now seeking to exercise its power of sale pursuant to S.I. 125 of 2009. The plaintiff encloses an approval by the Minister for Finance on the 26th February 2009 to the transfer of the mortgage from KBC Mortgage Bank to KBC Bank Ireland plc.

4. The S.I. 125 of 2009 cites as follows:-

"Central Bank Act 1971 (approval of scheme of KBC Mortgage Bank and KBC Bank Ireland Plc.) Order 2009 whereas:

"(a) KBC Mortgage Bank (in the following Order referred to as the "Transferor") is a private unlimited company with a share capital incorporated in Ireland under the Companies Acts 1963 to 2006 (no. 129761) on 4 March 1988 under the name Ayrson Limited. On 31 January 1989, it changed its name to Irish Life Homeloans Limited. On 6 December 1999, it changed its name to IIB Homeloans Limited. On 24 October 2008, it changed its name to KBC Mortgage Bank. The Transferor carries on a banking business in Ireland from its registered office at Sandwith Street, Dublin 2 and is the holder of a licence in relation thereto granted on 24 October 2008 under Section 9 of the Central Bank Act 1971.

(b) KBC Bank Ireland plc. (in the following Order referred to as the "Transferee") is a public limited company incorporated in Ireland under the Companies Acts 1963 to 2006 (no. 40537) on 14 February 1973 under the name Irish Inter-Continental Holdings Limited. On 25 April 1973, it changed its name to Irish Intercontinental Bank Limited. On 10 January 2000, it changed its name to IIB Bank Limited. On 29 March 2006, it re-registered as a public limited company under the name IIB Bank plc. On 24 October 2008, it changed its name to KBC Bank Ireland plc. The Transferee carries on a banking business in Ireland from its registered office at Sandwith Street, Dublin 2 and is the holder of a licence in relation thereto granted on 17 May 1973 under Section 9 of the Central Bank Act 1971.

AND WHEREAS on 26 February 2009 the Transferor and the Transferee submitted to the Minister for Finance for his approval the Scheme for transfer (in the following Order as referred to as the "Scheme") made by the Transferor and the Transferee on 26 February 2009.

NOW I, BRIAN LENIHAN, Minister for Finance after consultation with the Central Bank and Financial Services Authority of Ireland and, in respect of Articles 4 to 10 of this Order, at the request of the Transferor and Transferee, hereby, in exercise of the powers conferred on me by section 33 of the Central Bank Act 1971 (No. 24 of 1971), order as follows:

[The relevant portions of the Scheme are contained in paragraph 8(1) which states:-]

(1) Subject to para. (2), on the transfer date –

(a) any contract of guarantee, indemnity, letters of credit or other contract or suretyship, loan agreement, facility agreement or facility letter, lease, hire purchase agreement, deposit agreement, charge, mortgage, assignment, pledge, swap, option, forward, future or other derivative contract, bond, warrant, foreign exchange contract or any other contract, agreement or instrument of the type described in Schedule 1 to the Agreement undertaken or entered into by the Transferor with any person in the course of or incidental to the business in force or in effect immediately before the Transfer Date shall be transferred or assigned or deemed to have been transferred or assigned to the Transferee and shall become from that date a contract, agreement or instrument between the Transferee and that person with the same rights and subject to the same obligations and incidents (including rights of set-off) as would have been applicable thereto if such contract, agreement or instrument between the Transferor and such person had continued and any order, instruction, direction, mandate or authority given, whether before or after that date, by that person in relation to any such contract, agreement or instrument and subsisting at the Transfer Date shall apply and have effect after the transfer of the such contract, agreement or instrument to the Transferee as aforesaid and all monies which at the Transfer Date are or may be or become payable to the Transferor pursuant thereto and the proceeds of any claims, awards and judgements which at the Transfer Date are or may be or become receivable or received by the Transferor pursuant thereto and all other

rights and benefits whatsoever accruing to the Transferor under or by virtue of any such contract, agreement or instrument shall become due and payable by that person to the Transferee instead of the Transferor."

5. This scheme of arrangement was approved by the Minister for Finance ("the Minister") on the 3rd April, 2009. The plaintiff/respondent argues that as the Minister approved the scheme in accordance with s. 33 of the Central Bank Act 1971 ("1971 Act") s. 35 of which provides in respect of such transfers affected pursuant to s. 33 that *inter alia* any security (including by definition any mortgages or charges) held by the transferor connected with the business agreed to be transferred, shall be transferred or deemed to be transferred on the transfer date and be held and be available to the transferee as a security for the payment of the related debts and liabilities of the transfer.

6. Counsel also argued that pursuant to s. 36(a) the transferee shall, in relation to any security transferred or deemed to have been transferred to the transferee in accordance with or by virtue of the provisions of s. 35 of this Act the following provisions shall have effect:-

"(a) the transfer of any such security effected or deemed to be effected by section 35 of this Act shall not require registration under or in pursuance of the Registration of Deeds Act, 1707, the pre-Union Irish statute 33 Geo. 2, c. 14 (Ir.), the Registration of Title Act, 1964, or s. 99 of the Companies Act, 1963, but shall operate for the purposes of those Acts as if it were made by deed duly registered on the transfer date under or in pursuance of whichever of those Acts may be applicable thereto."

Thus the plaintiff/respondents states that KBC Bank plc. did not have to take the steps of actually registering its interest in the folio having regard to the provisions of ss. 35 and 36 of the 1971 Act.

The Case Made by the Defendant/Appellant

7. Counsel for the defendant/appellant referred to s. 62(2) of the Registration of Title Act 1964 ("1964 Act") which provides that until the transferee is registered as the owner of the charge, that instrument shall not shall not confer on the transferee any interest in the charge. He referred to a decision of the Supreme Court in the case of *Tom Kavanagh & Bank of Scotland Plc. v. Patrick McLaughlin & Roseann McLaughlin* [2015] IESC 27.

8. The judgment of Laffoy J. was delivered on the 19th March, 2015 which related to Bank of Scotland taking over the interest of Bank of Scotland (Ireland) in the discussion section of her judgment Laffoy J. said at para. 21:-

"There is no doubt that, when the cross-border merger of BOSI [Bank of Scotland (Ireland)] and BOS [Bank of Scotland] took effect just before midnight on 31st December 2010 following the order of the Scottish Court of Session made on 10th December, 2010 by Lord Glennie approving the completion of the merger, the securities held by BOSI over the McLaughlins' property, including the security over 40 Kerry Mount Rise, the title to which is registered, passed to BOS. Thereafter BOSI ceased to exist. It is significant that the sequence was that the transfer took place by operation of law first and then BOSI ceased to exist. However, the issue in these proceedings is whether, having regard to the provisions of Irish law, given that the lex situs applies, BOS could enforce the securities in question without further action."

At para. 27 Laffoy J. said:

"Bearing in mind that the only issue which was determined in the High Court and, consequently, the only issue which arises on the appeal, in relation to enforcement of the securities given by the McLaughlins to BOSI which are now vested in BOS is whether BOS was entitled to appoint the Receiver, it is appropriate to consider that issue first by reference to the narrow argument advanced on behalf of BOS and the Receiver, namely, that BOS had a contractual entitlement to appoint a receiver independently of the provisions of the Act of 1964. ... Accordingly, I am satisfied that the fact that BOS is not registered on the relevant folio as the owner of the 2006 Charge did not prevent it appointing the Receiver as Receiver over the registered property secured by that charge. ... It does not address how the Receiver might make title to the registered property the subject of the 2006 Charge, if he decided to sell that property, nor does it address whether BOS could effectively exercise its power of sale and give good title to a purchaser without being registered as owner of the charge."

Laffoy J. referred in her judgment to the legislative provisions which had been enacted for the transfer of securities in the context of the transfer of business between the lending institutions in accordance with the 1971 Act which "deals with transfers between licensed banks". She said the combined effect of ss. 35 and 36 of that Act is that the transfer is effected by operation of law and in the case of a charge over a registered land the transferee is expressly relieved as the statutory obligation under the 1964 Act to become registered as the owner of the charge.

9. Counsel on behalf of the plaintiff/respondent submitted that the Bank of Scotland plc. in the *Kavanagh & Another v. McLaughlin & Another* judgment was not in a position to avail of the above mentioned provisions of the Act of 1971 (ss. 33, 35 and 36) as the transfer to it from Bank of Scotland (Ireland) Ltd. was not effected pursuant to the scheme available under the 1971 Act. Rather the said transfer was effected pursuant to the European Communities (Cross Border Mergers) Regulations 2008. The Regulations did not contain provisions equivalent to ss. 35 and 36 of the Act of 1971.

The Court's Judgment

10. The Court has considered the legal arguments in relation to this matter. The Court notes that first of all S.I. 125 of 2009, provides for the approval of the Minister for a scheme of transfer. It is clear to the Court that the transfer involving KBC Mortgage Bank (formerly IIB Home Ltd., IIB Homeloans on reregistration as an unlimited company) and KBC Mortgage Bank Company transferred the charge to the plaintiff company pursuant to both the statutory instrument and ss. 35 and 36 of the Central Bank Act 1971.

11. The Court is satisfied that the transfer of the charge obtained by IIB Homeloans Ltd. was transferred to KBC Bank Ireland Plc. pursuant to a scheme agreed by the Minister for Finance and which had the effect of not requiring a formal registration of the charge by way of operation of law pursuant to ss. 35 and 36 of the Central Bank Act 1971.

12. The Court distinguishes the judgment in the Supreme Court of Laffoy J. in the above *Bank of Scotland* case (previously cited) Bank of Scotland plc. were not in a position to avail of the provisions of the Central Bank Act 1971, the subject of the transferrals to it from Bank of Scotland (Ireland) Ltd. was not effected pursuant to the scheme available under the Act of 1971.

13. In those circumstances the Court dismisses the appeal of the defendant and the plaintiff is entitled to exercise its power of sale pursuant to clause 11 of the mortgage.

