

BETWEEN

PERMANENT TSB PLC FORMERLY
IRISH LIFE AND PERMANENT PLC

PLAINTIFF

AND

DENIS DOHENY

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 6th day of June, 2019**Introduction**

1. The application before the Court is of a type which is frequently made in the Common Law *Ex Parte* List. In the instant case, proceedings were initiated by the above named financial institution seeking a claim for possession of two properties which were the subject of an indenture of mortgage and charge, dated 2 October 2007, made by the defendant in favour of Irish Life and Permanent Plc.

2. On 1 February 2019 the loan secured by the said mortgage was transferred pursuant to a deed of transfer to Start Mortgages Designated Activity Company ("Start"). Start seeks an Order that it be substituted in place of the above named plaintiff. This application, made on an *ex parte* basis, is grounded on an affidavit of Ms. Eva McCarthy, litigation manager at Start.

3. The Court has been asked to give a ruling on a number of issues that arise within the instant application, issues which will also arise in other applications of a similar nature. These issues are:

(i) Whether it is permissible for the within application to be brought on an *ex parte* basis pursuant to O. 17, r. 4 of the Rules of the Superior Courts 1986, as amended ("RSC");

(ii) The proofs required for such an application;

(iii) Whether the application can be made, in the context of a mortgage suit, whilst registration of the transfer is pending within the Property Registration Authority; and

(iv) In the event of the Order sought being granted, what steps should be taken to protect the interests of the defendant(s).

Order 17, rule 4 RSC

4. Order 17, r. 4 RSC 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...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"

5. This provision has been considered on a number of occasions in recent years. I refer firstly to *IBRC v. Comer* [2014] IEHC 671, it should be noted, however, that in that case the defendant had been put on notice. In *Comer*, Kelly J. (as he was then) stated:

"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."

6. In *Stapleford Finance Limited v. Lavelle and Others* [2016] IECA 104 the Court of Appeal confirmed that O. 17, r. 4 RSC may be relied upon for an application such as this. In giving the judgment of the court, Costello J. stated:

"16. This Court is of the opinion that the learned High Court Judge was correct in her conclusion that the assignment amounted to a change in interest within the meaning of the rule."

7. I am therefore satisfied that the moving party in this application is entitled to rely on the provisions of O. 17, r. 4 RSC to substitute one plaintiff for another. This is merely a procedural step in the proceedings and does not in any way prejudice the entitlement of the defendant to either apply to have this *ex parte* Order set aside or to contest the validity of the transfer in the course of the proceedings.

8. I note the procedure adopted in relation to such applications in the Circuit Court and the submission that the relevant provision in the corresponding Circuit Court Rules is O. 22, r. 4 which is virtually identical to O. 17, r. 4 RSC. The practice in the Circuit Court however is that applications, such as this, are made on notice to the defendant. Though I am of the view that the application can be made *ex parte*, I have to make the point that what is before me is not an appeal from a Circuit Court order.

Proofs necessary for the application

9. I refer again to the passage quoted from Kelly J. (as he then was) in Comer. The Court has to be satisfied that there is *prima facie* evidence 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.*"

10. The affidavit of Ms. McCarthy, grounding this application, exhibits the following documents:

(i) The deed of transfer on foot of which the above named plaintiff transferred the loan(s) of the defendant to Start. This document is heavily redacted so that any information relating to other borrowers or guarantors who were not parties to these proceedings are not identified;

(ii) The "goodbye letter", sent by the above named plaintiff to the defendant, which stated *inter alia*:

"[B]y this letter, we notify you that, on the transfer date, we assigned, transferred and conveyed your loan, the loan documents and all present and future rights relating to your loan and the loan documents absolutely to Start";

(iii) The "hello letter" whereby Start wrote to the defendant reminding him of the transfer and informing him, *inter alia*, that Start would be his new point of contact in respect of the facility; and

(iv) Form 56 under which the mortgage and charge was transferred to Start.

11. I am satisfied that Start, in exhibiting the above documentation, has established the *prima facie* evidence necessary for the Court to grant the Orders sought. It is desirable that a letter would be exhibited, as has been done in this application, from the solicitors instructed by Start addressed to the defendant's solicitors informing them this application will be made, without further notice, in accordance with O. 17, r. 4 RSC.

Form 56

12. As mentioned, Form 56 has been lodged for registration with the Property Registration Authority under which the mortgage and charge will be transferred to Start. This Form is currently being processed. As the application before this Court is procedural in nature, I am satisfied that Start may be substituted as plaintiff at this stage in the proceedings notwithstanding the fact that they have not, at this stage, been registered as owner of the mortgage and charge. What is before the Court is not a substantive application for the enforcement of statutory rights conferred upon a charge under the Registration of Title Act 1964 or, indeed, the Land and Conveyancing Law Reform Act 2013.

Position of the defendant

13. While I have held that this is a procedural application and one that may be made *ex parte*, it is nonetheless important that the rights of the defendant be safeguarded. Though the Order substituting Start for the named plaintiff is an amendment that would normally require re-service of the proceedings on the defendant, I am satisfied that the position of the defendant can be protected by taking the following steps:

(i) A copy of the Order substituting Start for the presently named plaintiff be served on the defendant; and

(ii) That the defendant be informed by notice in writing of the following:

(a) That a copy of the affidavit and exhibits grounding this application are available on request;

(b) Informing the defendant that he may make an application to Court, on notice, to set aside this Order;

(c) Informing the defendant of his entitlement to contest the said transfer to Start at the hearing of the action.

Conclusion

14. By reason of the foregoing, I will grant an Order pursuant to O. 17, r. 4 RSC that the within proceedings shall be carried on as between the defendant, as a continuing party, and Start Mortgages Designated Activity Company as a new party in substitution for Permanent TSB Plc. I will further direct that a copy of this Order together with a notice, as referred to at para. 13 above, be served on the defendant.