



**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 54

**Finlay Geoghegan J.  
Peart J.  
Binchy J.**

**Appeal No: 2015 No. 225**

**BETWEEN:**

**BANK OF SCOTLAND PLC.**

**PLAINTIFF/RESPONDENT**

**- AND -**

**PATRICK O'CONNOR**

**RESPONDENT/APPELLANT**

**Appeal No. 2015 No. 226**

**BETWEEN:**

**PATRICK O'CONNOR**

**PLAINTIFF/APPELLANT**

**AND**

**BANK OF SCOTLAND PLC., MICHAEL COTTER, AND LUKE CHARLTON, TRADING AS ERNST & YOUNG, MICHAEL COTTER TRADING AS ERNST & YOUNG, JAMES RIORDAN AND DARREN O'KEEFFE TRADING AS JAMES RIORDAN & PARTNERS, AND JAMES RIORDAN AND DARREN O'KEEFFE TRADING AS M.J.HORGAN & SONS**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of the Court delivered by Ms Justice Finlay Geoghegan on the 1st day of March 2017**

1. This is a judgment to which all members of the Court have contributed. It is the second judgment given in the above appeals and relates to a motion issued by the appellant on 3rd March, 2016 which on its face was issued in both appeals. However the primary relief sought in the motion in relation to the *locus standi* of Bank of Scotland p.l.c. ("BOS") to continue as respondent arises only in the first appeal (2015/225) in which judgment was given in favour of BOS against the appellant in the High Court in the sum of €7,683,999.96 ("judgment proceedings").

2. This judgment is supplemental to the judgment of the Court delivered by Peart J. on 10th February, 2017 (the "first judgment") in both appeals. As appears from that judgment in the High Court both proceedings were heard together. Further, in the High Court the only basis upon which the appellant sought to resist judgment was on the basis of the claims made in the separate proceedings in which he is the plaintiff against BOS and others.

3. As appears from para. 2 of the first judgment the appellant accepted that if he failed on his second appeal in the proceedings in which he is the plaintiff it followed that his first appeal also failed and the judgment granted by the High Court in favour of BOS stood. That was the judgment of the Court.

4. Upon delivery of the first judgment, the appellant queried whether the Court had included in its judgment its decision on a motion issued by the appellant on 3rd March 2016 which upon its return date of 15th April, 2016 had been adjourned to the hearing of the appeal. It was not expressly dealt with in the judgment and hence this supplemental judgment.

5. In the course of the appeal hearing submissions were made by both sides in relation to the issue raised by the motion of the *locus standi* of BOS to continue to act as respondent to the appellant's appeal in the judgment proceedings. The factual basis for the appellant's contention that it was not so entitled is not in dispute nor is his entitlement to raise the issue by motion in the appeal.

6. Judgment was given in the High Court in favour of BOS against the appellant on 6th March, 2015. By letter of 26th August, 2015 the appellant was informed by BOS that it had agreed to sell his facilities, guarantees and security rights to Feniton Property Finance Limited ("Feniton"). He was informed that he would be told in due course the date upon which the sale would take effect. He was subsequently informed by letter of 26th October that the sale would occur on 20th November, 2015 and that from that date "amounts owing in respect of your Facilities will be owed to the Buyer [Feniton] and the Facility Documents will be with the Buyer." Furthermore he was told that the Buyer had appointed Pepper Finance Corporation (Ireland) Limited trading as Pepper Asset Servicing ("Pepper") to provide portfolio and asset management on its behalf. On 23rd November, 2015 Pepper wrote to the appellant indicating that it would be the point of contact and in effect collect all payments previously due to BOS and now due to Feniton.

7. The appellant's submission was straightforward. He submitted that as BOS in 2016 has no further interest in the loans in respect of which judgment was granted in its favour by the High Court it has no standing to defend his appeal against the judgment.

8. BOS in response accepted that in 2016 it had no further interest in the loans or any right to enforce the High Court judgment against the appellant. It did not put before the Court any of the documents relating to the sale of the appellant's loans. Notwithstanding it submitted in part in reliance upon the judgment of the Court of Appeal (delivered by Finlay Geoghegan J.) in *Irish Bank Resolution Corporation v. Patrick Halpin* [2014] IECA 3 it is entitled to remain as the respondent and defend the appeal. Counsel for BOS also submitted that it had the benefit of an order for costs in the High Court which it was entitled to defend.

9. In *IBRC v. Halpin* the application was to substitute Kenmare Property Finance Limited (Kenmare) for IBRC on two appeals in analogous circumstances where Kenmare subsequent to judgments being granted in favour of IBRC in the High Court had purchased its interest in the relevant loans granted to the defendant, Mr. Halpin. Similarly Kenmare had no interest in the facilities or cause of action at the date of the High Court judgments but subsequent thereto became the person entitled to the benefit of the underlying facilities to the proceedings and the High Court judgments.

10. The Court of Appeal refused the application for substitution and explained its reasons in paras. 22 and 23:

"22. On each appeal, this Court will only be concerned with the facts as they existed and the evidence before the High Court on the 4th October, 2012 and the 7th November, 2012, respectively. The determination which must be made by this Court on appeal is whether or not IBRC was entitled to judgment against Mr. Halpin on each of the respective dates on the basis of the evidence then before the High Court. The events upon which Kenmare rely in its application to be substituted for IBRC as plaintiff only occurred in March and May 2014. It is not suggested on its behalf that the events upon which it now relies give it any entitlement to be considered either in October 2012, or November 2013, as entitled to judgment against Mr. Halpin. What it asserts is that if Mr. Halpin fails in either or both of his appeals, it is entitled by way of the assignment which took place in May 2014, to the benefit of the 2012 and 2013 judgments obtained by IBRC against Mr. Halpin.

23. It follows from this analysis that what is sought to be upheld on the appeals are the High Court judgments of October 2012 and November 2013 in favour of IBRC as plaintiff in the proceedings. If it is sought to uphold those judgments then IBRC must remain a plaintiff in the proceedings. It is true that the judgments given by the High Court were expressly awarded in favour of the plaintiff. However, they were granted to IBRC as plaintiff by reason of it having established by factual evidence to the satisfaction of the High Court its entitlement to such judgment. If this Court were now to make the order of substitution as sought by Kenmare, its effect would be to replace Kenmare for IBRC as plaintiff in the proceedings and accordingly, permit Kenmare as plaintiff to be considered (subject to the outcome of the appeals) as entitled to have been granted judgment in its favour against Mr. Halpin in the High Court on the 4th October, 2012, and the 7th November, 2013. Kenmare had no entitlement to be granted judgment in its favour on those dates and does not contend otherwise."

11. Similarly on the facts of these appeals, insofar as the appeal in the judgment proceedings is concerned BOS must and is entitled to remain as a respondent to the appeal as what is sought to be upheld is the determination of the High Court that as of 6th March 2015, BOS was entitled to judgment against the appellant. On the facts before the Court set out in the affidavits in the motion BOS did not agree to sell the loans to Feniton until after 6th March 2015. BOS also has the benefit of an order for costs of the High Court judgment proceedings which it was entitled to seek to uphold on appeal.

12. It is also relevant to note that in these appeals the only basis of the appeal in the judgment proceedings was the appellant's appeal in the second proceedings which he brought against BOS and others. His submission was that the claims which he was making against BOS in those proceedings were such that BOS was not entitled to obtain judgment against him in the judgment proceedings in March, 2015. It was not and could not be suggested that BOS did not remain the proper party as a defendant and respondent to that appeal. There was no separate issue in the appeal in the judgment proceedings.

13. For those reasons the Court was satisfied that BOS did continue to have *locus standi* to continue as the respondent in the appeal in the judgment proceedings. The appeal against judgment of 6th March 2015 has been dismissed by the Court's first judgment.

14. It is important to stress that the question as to the person who is now entitled to seek to enforce the High Court judgment against the appellant is not determined by this judgment. Any future application by reason of the sale of the loans of the appellant would be to the High Court and different issues may arise.

15. There was one other issue raised by the notice of motion which did not form part of the substantive appeal and was referred to in submissions during the hearing of the appeal. It related to a contention that four mortgages granted by the appellant to BOS or Band of Scotland (Ireland) limited had not been executed by BOS or BOSI and should be declared void. It could not be relevant to the judgment proceedings, but evidence of one mortgage granted by the appellant to BOSI in 2002 was given in the second proceedings in which he was a plaintiff.

16. It is not addressed in the first judgment delivered on 10th February, 2017 as it was not an issue before the High Court. As appears from that judgment the appellant agreed with the trial judge the issues which were for determination in the High Court. The appellant was not entitled by a motion issued in the appeals in March, 2016 to seek to raise an additional challenge to the validity of security granted by him to BOSI for the facilities which had been the subject matter of the proceedings in the High Court. For that reason alone any relevant relief in the motion must be dismissed.

17. Notwithstanding, as the appellant is not legally represented, it may be appropriate to record as submitted by counsel for the respondents that in any event the legal position is well settled to the effect that a deed of mortgage or charge does not require to be executed by the mortgagee or chargee to be valid and enforceable: *Camiveo Limited v. Dunnes Stores* [2015] IESC 43, per Clarke J. at para. 4.3.

18. For these reasons the decision of the Court is to dismiss the appellant's motion.