THE HIGH COURT

[Record No. 2018 No. 14 C.A.]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

BYRON JENKINS AND ADRIENNE JENKINS

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 23rd day of July, 2018.

1. In these proceedings the plaintiff seeks an order for possession of the lands and premises comprised in Folio 28449F of the Register of County Kildare, which lands and premises comprise the family home of the defendants. The proceedings come before this Court by way of appeal from the Circuit Court which dismissed the plaintiff's claim.

2. In any case the matter came on for hearing before this Court, after a number of adjournments on 10th July, 2018. Up to this point in time, the defendants had been representing themselves. However, the proceedings having been adjourned upon their application to enable them to retain legal representation, they were represented at the hearing of this appeal by solicitors and counsel, which was of considerable assistance.

3. Even before they had secured representation however, the defendants had not put in dispute the key facts giving rise to these proceedings. Those are that in June, 2008 they accepted a loan from GE Capital Woodchester Home Loans Ltd ("GE"). The loan was in the sum of €350,000.00 and was drawn down on 16th July, 2008. They completed a mortgage and charge in favour of GE on 18th July, 2008, which was registered in the Land Registry on 29th July, 2008. They started to fall into arrears with repayment of their loan very soon afterwards. The first default of repayment occurred in or around 16th November, 2008. As of 29th June, 2017, there were arrears of mortgage repayments due by the defendants in the sum €326,749.22, and the total sum outstanding in respect of their loan was €599,698.37.

4. The parties exchanged no less than eight substantive affidavits to which there were quite voluminous exhibits. In these affidavits, the defendants did not dispute any of the material facts, but raised a number of legal grounds in opposition to the plaintiff's claim. At the hearing of this appeal however, all bar one of these grounds were abandoned and this decision is concerned with one net point of law which I will set out presently. First however, it is helpful to elaborate a little bit on the factual background.

5. GE was sold to Pepper Netherlands Holding Cooperatie U.A. ("Pepper Netherlands") with effect from 28th September, 2012. On 11th October, 2012, GE changed its name to Pepper Finance Corporation (Ireland) Ltd., and this name change was notified to the defendants by letter dated 25th October, 2012. Accordingly, these proceedings were issued in the name of Pepper Finance Corporation (Ireland) Ltd. as plaintiff, rather than in the name of GE. A certificate of incorporation on change of name issued from the Companies Registration Office on 11th October, 2012. Subsequently, the plaintiff was designated as a designated activity company pursuant to the Companies Act 2014 and the plaintiff is now Pepper Finance Corporation (Ireland) DAC.

6. On 10th October, 2012 the plaintiff, still then known as GE, wrote to the defendants informing them that the sale of GE to Pepper Netherlands had completed on 28th September, 2012. This followed on from a previous letter of June, 2012 whereby the defendants had been informed that an agreement for sale of GE to Pepper Netherlands had been signed. In the same letter, the defendants were informed that GE was to be renamed Pepper Finance Corporation (Ireland) Ltd., and that they would be informed when the name change had been completed. The letter of 10th October, 2012 also stated that "completion of the sale means that the lender on your mortgage loan, Home Loans [i.e. the plaintiff], is now owned by Pepper". On 25th October, 2012, the plaintiff wrote on a letterhead bearing the title "Pepper" to the defendants informing them of the name change of the plaintiff from GE Capital Woodchester Home Loans Ltd. to Pepper Finance Corporation (Ireland) Ltd. The effect of all of this correspondence was to inform the defendants that the entity which held their home loan had been sold and had subsequently changed its name. Importantly however, this correspondence does not say or suggest that the defendants' loan with the plaintiff had been sold.

7. Also on 28th September, 2012, the plaintiff entered into a document called a mortgage sale deed with three other parties, namely Windmill Funding Ltd. ("Windmill"), Pepper Netherlands and TMF Trustee Ltd. Pursuant to this agreement, the plaintiff agreed, *inter alia*, to sell the mortgage loans described therein, and including that of the defendants. The mortgage sale deed provides, at Clause 2.3 thereof:-

> "The seller [the plaintiff] hereby confirms and acknowledges that on and following Completion and until perfection in accordance with Clause 5 of this deed, it will hold legal title to the Mortgage Loans sold hereunder together with the Related Security and the benefit of the Relevant Insurance Policies as bare Trustee for the Issuer [Pepper Netherlands] (or, following enforcement of security created pursuant to the Deed of Charge, for the Note Trustee [TMF Trustee Ltd.])."

Clause 5.1 of the mortgage sale deed provides:-

> "The sale and purchase of the Mortgage Loans and their Related Security provided for hereunder shall be perfected by the seller as soon as possible following a demand by the Issuer or Note Trustee which may be in any circumstances …"

8. In an affidavit dated 16th August, 2017, Ms. Caroline Loftus, Senior Operations Manager of the plaintiff, deposes that the loans, (and their associated security) are the subject of a securitisation transaction whereby the plaintiff retains legal title as bare trustee unless and until perfection in accordance with Clause 5.1 of the mortgage sale deed occurs. She avers that as of the date of that affidavit, neither the Issuer nor the Note Trustee had served a demand in accordance with Clause 5.1 and as such the plaintiff retains legal title to the defendants' loan and its related security as bare trustee for the Issuer pursuant to the securitisation transaction provided for in Clause 2.3.

9. So, it is apparent that the defendants' loan was securitised to a third party, Windmill. Consent to such securitisation of their loan and related security was given in advance by the defendants upon acceptance of the letter of loan offer in the first instance, and

also subsequently in the deed of mortgage and charge completed by them in favour of the plaintiff. None of this is controversial to the extent that the defendants acknowledge that the plaintiff was entitled to securitise their loan. They acknowledged at a very early stage in these proceedings that securitisation is common banking practice. However, notwithstanding this acknowledgement, the defendants argued that the effect of this transaction was that their loan had been sold to Windmill, and accordingly the plaintiff no longer had any interest in their loan such as to entitle it to issue these proceedings against the defendants to recover the loan or to enforce the security given by the defendants in respect of the loan. While, as I indicated above, the defendants raised a number of points along the way in the defence of these proceedings, this is the sole surviving point. But it is expressed somewhat differently by their counsel, Mr. McEntagart, S.C.. He acknowledges that the mortgage sale deed does not comprise an outright sale of the entire interest of the plaintiff in the defendants' mortgage. He accepts that the plaintiff has retained the legal estate in the defendants' loan and related security, pending perfection of the transaction in accordance with Clause 5.1 of the mortgage sale deed, although the beneficial interest in those assets has been transferred to Windmill. It is Mr. McEntagart's contention however that even though the plaintiff has retained the legal estate in the defendants' loan and related security, it was necessary for the plaintiff either to have Windmill join in the proceedings as co-plaintiff, as the owner of the equitable estate in the defendants' loan and related security, or alternatively to make it clear that the plaintiff was issuing proceedings as bare trustee on behalf of Windmill. It is submitted that this is no mere procedural requirement but is an essential prerequisite to the plaintiff's entitlement to succeed as against the defendants, in order that the defendants are not exposed to the risk of the defendants being required to pay twice in respect of the same debt. The defendants having abandoned all other points made by them (correctly in my view) this is the sole issue now requiring determination in these proceedings and may be posited thus: may the owner of a loan and related security, who has divested itself of the entire beneficial interest in that loan and related security, and whose interest in the same is no more than that of a bare trustee, issue proceedings in its sole name against the borrowers for recovery of the debt and/or possession of the property secured in respect of that debt, and without making any reference at all in the proceedings to its status as trustee on behalf of a third party?

10. It is apparent from the above that the defendants contend that the plaintiff was obliged either to have Windmill join in the proceedings, or alternatively to make it clear on the face of the proceedings that it was issuing the proceedings as trustee on behalf of Windmill. As authority for this proposition, the defendants rely upon two decisions of the Court of Appeal of the United Kingdom. The first is the decision in the case of *Three Rivers District Council and Others v. Governor and Company of the Bank of England* [1995] 4 All E.R. 312 and [1996] Q.B. 292, and the second being the case of *Kapoor v. National Westminster Bank Plc & Anor* [2012] 1 All E.R. 1201. The facts of *Three Rivers* were, to say the least, unusual. There were 6,019 plaintiffs in the action, referred to in the Court of Appeal decision as "the Depositors". The Depositors had lost their deposits following upon the insolvency of the Bank of Credit and Commerce, and had issued proceedings against the Bank of England claiming that it had caused them to suffer the loss of their deposits by not discharging its duties properly. What is particularly unusual about the case from a legal point of view is that the Depositors assigned their claims to the Bank of Credit and Commerce (in liquidation) which, in the words of Staughton L.J. was "…the very company which made off with the money". The action had been directed and financed by the liquidator from the very beginning. If the action succeeded, the monies recovered would be distributed amongst all the creditors of the Bank of Credit and Commerce, including the Depositors so that while the Depositors might not recover all of their losses, they would share in the proceeds of the action by way of a distribution of the same to all creditors, in accordance with whatever priorities apply in the United Kingdom to a company in liquidation. The Bank of Credit and Commerce was not a party to the action and the defendants objected to that omission on the grounds that it should be protected from the risk of having to pay twice. The High Court had ordered that the action be stayed unless and until the plaintiffs join the Bank of Credit and Commerce as a party to the action. The plaintiffs appealed that decision. In the appeal, it was agreed that there had been an equitable assignment of a chose in action by the Depositors to the Bank of Credit and Commerce. Staughton L.J. records that "it was an agreement to assign, and not an outright assignment. It contained an undertaking by the Depositors to execute a legal assignment if called on to do so. It authorised Bank of Credit and Commerce to sue in the name of the Depositors, and the Depositors undertook not to start any proceedings on their own."

11. It is apparent therefore that what was at issue in those proceedings was the entitlement of the assignors of the chose, the Depositors, to bring those proceedings in their own names, in circumstances where the where the assignee of the chose, the Bank of Credit and Commerce, was not a party to the same, and where there had not been an outright assignment of the chose, as is the case here. To that extent the case is analogous to the background to these proceedings, and the decision is of interest because of the very comprehensive analysis undertaken by the court of the entitlements of both assignors and assignees of a chose in action to bring proceedings.

12. Counsel for the defendants relies on the following passage in the judgment of Peter Gibson L.J. at pp. 307 to 308:-

> "For my part, I regard it as sufficient to look at the position as established by the authorities since 1873. In doing so, it is important to distinguish between what is a requirement of substantive law and what is merely a procedural requirement. It is, in my judgment, elementary that where, as here, there is an agreement to assign a legal chose, in equity the assignee becomes the owner and controller of the legal chose. He is entitled to sue for the recovery of the chose, but as a matter of practice he will normally be required by the court to join the assignor either as plaintiff or, if he refuses to give his consent to this, as defendant. All this seems to me to be in conformity with s. 49 of the 1981 Act. An assignor, *if the assignment is known*, will not be allowed to sue in his own name for himself. He may sue as trustee for the assignee if the assignee so wishes, but in that event he should reveal his representative capacity (O. 6, r. 3(1)(a)) and if he attempts to recover from himself, even if, for example, only part of the debt has been assigned, he will be required to join the assignee."

13. In *Kapoor* this passage was cited, with approval, in the judgment of Etherton L.J. He said (at para. 30):-

> "The current state of the authorities, binding on this court, is that an equitable assignee of debt is entitled in its own right and name to bring proceedings for the debt. The equitable assignee will usually be required to join the assignor to the proceedings in order to ensure that the debtor is not exposed to double recovery, but that is a purely procedural requirement and can be dispensed with by the Court. By contrast, the assignor cannot bring proceedings to recover the assigned debt in the assignor's own name for the assignor's own account. The assignor can sue as trustee for the assignee if the assignee agrees and, in that event the claim must disclose he assignor's representative capacity. In any other case, the assignor must join the assignee not because of a mere procedural rule but as a matter of substantive law in view of the insufficiency of the assignor's title. These points emerge clearly from the following authorities."

14. Etherton L.J. then proceeds to cite a number of authorities, including the decision of the Court of Appeal in *Three Rivers* and referring in particular to the passage of Peter Gibson L.J. referred to above. He also cites at para. 35 another passage in the judgment of Peter Gibson L.J. who, having reviewed a range of authorities said:-

> "These authorities, in my judgment, clearly establish that the equitable assignee can be regarded realistically as the

> person entitled to the assigned chose and is able to sue the debtor on that chose, but that save in special circumstances the court will require him to join the assignor as a procedural requirement so that assignor might be bound and the debtor protected. If, unusually, the assignor sues, he will not be allowed to maintain the action in the absence of the assignee."

In his own conclusions on the issue, Etherton L.J. stated at para. 43:-

> "As the authorities I have cited clearly show, the consistent line of authority, binding on this court, is that the equitable assignee of a debt, and not the equitable assignor, has the substantive legal right to sue for the assigned debt. Although there is a procedural requirement that the assignee should join the assignor in order to protect the debtor from successive actions and to prevent conflicting decisions, even that procedural requirement will not apply or may be dispensed with by the court in appropriate circumstances, most particularly where those concerns do not apply."

15. In response to these arguments, Mr. Redmond, S.C. submits that since there has been no sale of the defendants' loan and related security, the plaintiff is the correct person to issue proceedings in this case. Moreover, he draws attention to para. 4(h) of Part A, Schedule 2, of a Portfolio Management Agreement, which the plaintiff and Windmill entered into at the same time as the mortgage sale deed, in which it is stated that the Portfolio Manager (i.e. the plaintiff) shall:-

> "In relation to any default by a borrower under or in connection with a loan or the Related Security, comply with the Portfolio Policies and Procedures and, in particular, with the provisions thereof regarding enforcement of Loans and Related Security, provided that …
>
> (ii) It is acknowledged by the Customer [Windmill] that mortgage lenders generally exercise discretion in pursuing their respective enforcement procedures and that the Portfolio Manager may exercise such discretion as would a Prudent Mortgage Lender in taking or refraining from taking enforcement action against any particular defaulting borrower …"

16. It is submitted on behalf of the plaintiff that unless and until the sale of the defendants' loan and related security is perfected that the plaintiff is entitled to bring forward these proceedings in its own name and on its own behalf. It is submitted that it is settled law in this jurisdiction that a securitisation transaction does not invalidate or affect the entitlement of the holder of the legal title to security to enforce that security to the benefit of the beneficial owner. The plaintiff relies on a range of authorities in this regard including *Wellstead v. Judge Michael White & Fetherstonhaugh* [2011] IEHC 438, *Freeman & Anor v. Bank of Scotland PLC & Ors*. [2014] IEHC 284, *Governor and Company of the Bank of Ireland v. McMahon & Anor* [2017] IEHC 600 and *Pepper Finance Corporation (Ireland) Designated Activity Company v. Hanlon & Anor* (Unreported, High Court, Ní Raifeartaigh J., 11th January, 2018).

17. In *Wellstead* Peart J. held, in a passage approved by subsequent authorities (including those referred to above):-

> "But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors."

18. In *Freeman*, McGovern J. stated at para. 8:-

> "It is an important principle in securitisation transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank. Where customers have provided their consent as part of the standard mortgage terms and conditions, they are not specifically notified that their mortgage has been securitised."

19. More specifically, precisely the same documentation at issue in these proceedings was considered by Ní Raifeartaigh J. in *Hanlon*. In her judgment, at p. 14 she stated:-

> "So the reality is that Pepper Finance stepped into the shoes of Woodchester, the original lender. It was simply a name change and despite the fact that the mortgage had been securitised to Windmill, Woodchester which became Pepper Finance, retained at all times the legal title to repossess the mortgage and so they did have title to bring the proceedings in the Circuit Court."

20. On the basis of these authorities, the plaintiff submits that it is well established that a plaintiff financial institution which has securitised a loan or batch of loans in the manner effected by the plaintiff in these proceedings, remains the owner of the legal title to the security granted by the borrowers and is entitled to enforce that security in that capacity, notwithstanding that the beneficial interest in the borrowers' loan has been sold. In other words the plaintiff in these proceedings is entitled to bring forward the same against the defendants, notwithstanding that the beneficial interest in their loan has been sold to Windmill.

21. For their part, the defendants do not dispute the entitlement *per se* of the plaintiff to bring the proceedings. It is clear that they accept the entitlement of the plaintiff to do so, provided that the plaintiff either does so together with Windmill, as beneficial owner of the defendants' loan and related security, or that the plaintiff makes it clear on the face of the proceedings that they are taken by the plaintiff as trustee on behalf of Windmill. They argue that this is necessary in order that the defendants can know the identity of the party who is entitled, as a matter of law, to receive repayment of the defendants' loan, and, in the event of repayment of the same, to provide a discharge to the defendants. They further argue that it is necessary to avoid the risk that the defendants might be required to repay the same loan twice. Not having structured their proceedings correctly to address these matters, it is submitted that the plaintiff is not entitled to succeed and the proceedings should be dismissed.

22. Having reviewed the authorities relied upon by the plaintiff, it seems to me to be clear that this precise issue has not been considered in those authorities. While those authorities affirmed the entitlement of a lender to bring proceedings following upon the securitisation of a loan, where the lender has retained legal title to that loan, they did not address the more nuanced question raised by the defendants in this appeal as to how the plaintiff should formulate the proceedings and/or whether or not it is necessary for the beneficial owner of the loan to join in the proceedings also. It appears from the decisions referred to that this discrete issue was not raised or argued in those cases. The response of the plaintiff to this argument is twofold. Firstly, it is argued that there has been no sale of the defendants' loan and related security and, secondly, it relies upon the line of authority referred to above.

23. But in my view these arguments do not address the issue raised by counsel for the defendants. The plaintiff does not deny that there has been a sale or transfer of the beneficial/equitable interest in the defendants' loan and related security. To that significant

extent therefore, it is not correct to say that there has not been a sale or transfer of that loan and security, although it is correct to say that the sale has not been completed or perfected under the mortgage sale deed. It is undeniably correct to say that the authorities relied upon by the plaintiff affirm that such transactions do not deprive the owner of the legal estate in a loan and related security to bring forward enforcement proceedings – on the contrary the entitlement to do so is acknowledged and affirmed by those authorities. But the question that has been raised, it appears for the first time, in this jurisdiction at least, is whether or not the owner of the legal title to the loan and related mortgage security must bring forward the proceedings in such a way as to make it clear that it is doing so as trustee for the beneficial owner, or alternatively require the beneficial owner to join in the proceedings also?

24. In *Three Rivers* Staughton L.J. identified the issue for decision in that case as follows at p.298:-

> "The issue is, whether the assignor of a chose in action retains a cause of action, when the assignment is equitable. All are agreed that, as a procedural requirement, he may if the court think fit be compelled to join the assignee as a party; so too an equitable assignee who sues alone may be required to join the assignor. In either case the effect is to avoid double jeopardy, to save the debtor from the risk that he may have to pay twice."

25. Following a comprehensive review of the authorities, Staughton L.J. concluded that those authorities support the proposition that an equitable assignor continues to have a cause of action which he can enforce, albeit for the benefit of the assignee. Somewhat unusually, and for no apparent reason, it had been proposed in *Three Rivers* that, in order to address the issue raised by the defendant, the equitable assignee (i.e. the Bank of Credit and Commerce, in liquidation) should be joined as a party to the proceedings, but without making any claim within the proceedings. That proposal in turn was modified at the hearing of the proceedings before the Court of Appeal to the intent that the summons should be amended to reflect that the assignee made no claim "other than or in addition to the claims which it is already presenting using the names of the individually named plaintiffs who are the legal owners of the claims equitably assigned to it". Staughton L.J. however did not consider that this proposed amendment was necessary for him to arrive at the conclusion that the assignor – the Depositors – should be allowed to advance the claim as the legal owners thereof. He said at p. 303:-

> "But where the assignee is a party to the action, and expressly declines to make a claim, I can see no reason why the assignor would not claim what is his legal right."

26. In other words, Staughton L.J. was of the view that an assignor of a chose in action is entitled to bring forward a claim in his own name where the assignee *expressly* declines to do so. In their decisions in the case, Waite L.J. and Peter Gibson L.J. on the other hand considered that the assignor should be allowed to bring forward the claim on the basis of the proceedings in their modified form which, it appears to me, reflected that the claims as advanced by the assignor were being advanced on behalf of the assignees. Although it is not entirely clear, the decision of the Court as a whole seems to endorse the proposition that an equitable assignee of a chose in action should be a party to proceedings brought by the assignor.

27. However, two other things are clear from a consideration of the decisions in *Three Rivers* and *Kapoor*. The first is that the courts were concerned to consider whether the issue raised is one of procedure over substance. Where the proceedings are brought in the name of the assignee, the joinder of the assignor is a matter of procedure, which the courts may dispense with if they consider it appropriate, because the entitlement to the debt claimed is that of the assignee. When viewed the other way around however, things are different because the assignor is claiming a debt which it has assigned, and because that debt now belongs to the assignee, the person against whom it is claimed must be protected from the risk of two suits, by the joinder of the assignor. This is therefore a substantive issue, and not merely a procedural one.

28. The second issue which has clearly influenced the courts in their consideration of these matters is that of notice. For that reason, I have highlighted at para. 12 above one such passage where reference is made to notice. The reason for this is obvious. If a debtor has received notice of the assignment and, more particularly, has been directed to make payments to the assignee, then it is obviously imperative that the assignee should be a party to the proceedings, because in those circumstances the debtor would otherwise be exposed to a risk of separate proceedings being brought by the assignee. But where no such notice has been given, as in this case it seems to me that the same considerations do not arise. In these circumstances, the debtor (in this case, the defendants) not having been put on notice of the arrangements made between the plaintiff and Windmill, is not just entitled to but is obliged to continue making repayments of the loan to the plaintiff. As long as the defendants have not been put on notice of the assignment, the assignee, Windmill, cannot make any claim against the defendants. In his decision in *Three Rivers*, Staughton L.J. referred to a passage in the judgment of Pennycuick L.J. in the case of *Warner Bros. Records Inc. v. Rollgreen Ltd*. [1976] Q.B. 430 where he said at p. 445:-

> "Where there is a contract between A and B, and A makes an equitable but not a legal assignment of the benefit of that contract to C, this equitable assignment does not put C into a contractual relation with B, and, consequently, C is not in a position to exercise directly against B any right conferred by the contract on A. The equitable assignment may be converted into a legal assignment by notice to B: … but, so long as the assignment remains equitable only, C has no more than a right in equity to require A to protect the interest which A has assigned …"

29. While it is fair to point out that Staughton L.J. noted that this decision was criticised in academic commentaries, he nonetheless concluded that the case supported the proposition that an equitable assignor continues to have a cause of action which he can enforce, albeit for the benefit of the assignee.

30. It seems to me that it is wholly unrealistic to argue that an assignee such as Windmill could, in circumstances where no notice of the assignment has been given to the debtor, successfully bring forward any claim against a debtor such as the defendants in this case. Windmill has very deliberately structured its arrangements with the plaintiff so as to enable the plaintiff to receive repayments from the defendants, and to take such enforcement proceedings arising from non-repayment of the debt as the plaintiff considers appropriate. More importantly, both the plaintiff and Windmill have chosen not to give notice of the assignment or securitisation of the debt to the defendants. This is knowledge that they have gleaned from other sources. Although the decisions of the courts in this jurisdiction as regards the effects of securitisation of debt, to which I have referred above, do not enter upon a consideration as to the rights and entitlements of an assignor and an assignee of a chose in action, they give effect to the manner in which the securitisation was intended to operate by the parties thereto which, it must be said, is in no way prejudicial to the rights of the borrowers. Furthermore, unless borrowers are specifically put on notice of such an assignment I consider that the risk that a borrower could be subjected to more than one suit in respect of the same debt is more illusory than real and I do not believe that the courts would countenance such a proposition.

31. For all of these reasons, I consider that the plaintiff was not obliged either to join Windmill to the proceedings or to declare its

status as trustee of Windmill in the proceedings. The plaintiff is therefore entitled to succeed and the appeal should be allowed.