**THE COURT OF APPEAL**

Neutral Citation Number [2021] IECA 48
**Court of Appeal Record No. 2019/254**
**High Court Record No. 2012/331 SP**

**Whelan J.**
**Noonan J.**
**Haughton J.**

**BETWEEN/**

**EVERYDAY FINANCE DAC**

**PLAINTIFF**

**- AND –**

**JERRY BEADES**

**DEFENDANT/APPELLANT**

**JUDGMENT of Ms. Justice Máire Whelan delivered on the 18th day of February 2021**

**Introduction**

1. This is an appeal from the order of the High Court (O'Connor J.) of 24 May 2019 granting Cheldon Property Finance DAC's (hereinafter "Cheldon") application pursuant to O. 17, r. 4 of the Rules of the Superior Courts ("RSC") to name Cheldon as the sole plaintiff in the proceedings. Cheldon was further granted leave pursuant to O. 42, r. 24(a) RSC to issue execution on foot of the order of McGovern J. of 6 March 2014, the said order to be amended pursuant to O. 28, r. 12 RSC so that Cheldon would be substituted for Permanent TSB as the plaintiff in the title thereof.

2. The title page of this judgment reflects the most up-to-date details of the parties in the underlying High Court proceedings as recorded by the Central Office of the High Court. This should not be taken as a pre-judgment of the issues discussed herein or of any other appeals brought by the appellant. For the purposes of the substance of this judgment, "the respondent" refers to Cheldon.

**Background**

3. The within proceedings were initiated by way of special summons issued on 12 June 2012 by Permanent TSB.

4. Following the judgment of McGovern J. delivered on 25 February 2014, [2014] IEHC 81, Permanent TSB was granted an order for possession on 6 March 2014 of certain properties in Fairview. The order for possession was made on foot of a deed of mortgage in respect of the properties dated 23 December 2002 created by the appellant in favour of Permanent TSB by way of security for his liabilities, including, *inter alia*, those arising on foot of a loan facility letter dated 4 October 2002. Pursuant to the terms and conditions of the facility letter, a loan facility in the amount of €1,778,000 was made available to the appellant.

5. By deed of conveyance and assignment dated 14 October 2015, Permanent TSB transferred, conveyed and assigned to Cheldon all of the rights, title, interest and benefits of Permanent TSB pursuant to the mortgage of December 2002. The appellant was notified of the transfer of the relevant loan facilities to Cheldon in October 2015.

6. By notice of appeal dated 23 April 2014, the appellant initiated an appeal against the order for possession. By order of the Court of Appeal dated 17 October 2016, Cheldon was joined as a co-plaintiff to the proceedings and as co-respondent to the appeal. The special summons was amended on 9 November 2016 pursuant to the order of the Court of Appeal.

7. The appeal against the order for possession was dismissed by the Court of Appeal on 13 November 2017. By a determination of the Supreme Court of 22 November 2018, the appellant was refused leave to further appeal same.

**Notice of motion of 7 March 2019**

8. By notice of motion of 7 March 2019, Cheldon applied to the High Court for the following reliefs:

   (1) an order pursuant to O. 17, r. 4 RSC and/or pursuant to the inherent jurisdiction of the High Court naming Cheldon as the sole plaintiff in the proceedings;

   (2) an order pursuant to O. 42, r. 24(a) RSC and/or pursuant to the inherent jurisdiction of the High Court granting Cheldon liberty to issue execution of the order for possession; and,

   (3) an order pursuant to O. 28, r. 12 and/or pursuant to the inherent jurisdiction of the High Court amending the order for possession to name Cheldon in place of Permanent TSB as the plaintiff in the title thereof.

   The application was grounded on the affidavit of 6 March 2019 of Albert Prendiville, a director of Cheldon.

9. A replying affidavit of the appellant was sworn on 9 May 2019 wherein he took issue, *inter alia*, with the title on the notice of motion and on the grounding affidavit; Cheldon's title and *locus standi*; the assignment or transfer of the order for possession; and, the manner in which the debt due by the appellant was calculated. He averred at para. 16 that he was not in control or possession of the relevant properties as they had been the subject of family law proceedings in 2012. That Albert Prendiville had been given access to the books and records of Permanent TSB was alleged to be in breach of the General Data Protection

Regulation. The appellant also averred at para. 20 that he had entered into negotiations with "the plaintiffs" to resolve matters amicably.

10. An affidavit of John Burke, another director of Cheldon, was sworn on 20 May 2019 in response to the appellant's affidavit.

**Judgment of the High Court**

11. An *ex tempore* judgment of the High Court was delivered on 24 May 2019, [2019] IEHC 359. After outlining the procedural history of the proceedings, the trial judge noted the appellant's reliance on *Talbot v. McCann Fitzgerald Solicitors* [2009] IESC 25 in opposing Cheldon's application pursuant to O. 17, r. 4; submitting that the court had no jurisdiction to set aside the final judgments and orders in the proceedings. At para. 12 the trial judge observed:-

> "There is no question that this court is setting aside or altering the judgment or order of McGovern J. and particularly the orders of the Court of Appeal of 17th October, 2016, and 13th November, 2017, together with the certificate of re-registration of Cheldon. Cheldon is properly applying for the orders because it is desirable, if not necessary, to ensure that an execution order is proper on its face."

12. The trial judge agreed with Cheldon that the decision in *Bank of Ireland Finance Ltd. v. Browne* (Unreported, High Court, Laffoy J., 24 June 1996) was on all fours with the application before the court. He rejected the appellant's submission that Permanent TSB ought to have been notified of the application or consented to same and observed that no consideration was given to the effect of the Court of Appeal order of 17 October 2016.

13. He then turned to consider Cheldon's application pursuant to O. 42, r. 24(a). At para. 16 he characterised the submission made on behalf of the appellant that the order for possession was being assigned in part only as a "typical wearisome attempt by Mr. Beades to delay the inevitable acting with some impunity given his significant indebtedness on the facts disclosed in the affidavits." He referred to para. 40 of *O'Sullivan v. Ireland* [2019] IESC 33 wherein Charleton J. observed that the Supreme Court had identified in *Talbot v. Hermitage Golf Club* [2014] IESC 57:-

> "…that there was a limit as to the time and resources that any case could command. …judges could and, in appropriate cases, should intervene to ensure the efficient disposal of litigation. Cases should move on and judges are cloaked with sufficient authority to take such decisions as would ensure that this happened."

14. The trial judge also referred to para. 38 of *O'Sullivan v. Ireland* wherein Charleton J. had observed that the delays which had incurred in that case arising from sundry applications amounted to a "disservice to the administration of justice". The trial judge noted that the appellant was not making a positive application to the court but rather resisting a rather routine procedural application "to thwart the execution of long-standing orders for possession of properties".

15. He characterised the appellant's suggestion that the "goodbye letter" of 24 April 2019 sent by Cheldon to the appellant notifying him of its intention to transfer the relevant loans to Pepper Finance Corporation Ireland DAC should be considered as indicating that Cheldon will not ultimately be executing the judgment as "yet a further exasperating attempt on behalf of Mr. Beades to cloud and postpone the inevitable."

16. The trial judge determined that the order for possession stood and that the precise sum which would ultimately be found due was not for determination by him.

17. He held at para. 24 that the appellant's complaints about accessing records and issues concerning compliance with the General Data Protection Regulation were "yet another grasp at an ill-considered strand which has no effect on the applications before this court now". He was satisfied that the affidavit of John Burke of 20 May 2019 clarified the issues.

**Notice of appeal**

18. In the notice of appeal filed 31 May 2019, the appellant raised grounds of appeal, *inter alia*, contending that the trial judge erred:

    (1) in holding that he was not amending a final order of the court;

    (2) amending the order for possession without jurisdiction;

    (3) in construing the order for possession in holding that the application was not superfluous; and,

    (4) in holding that service of notice of the application on the original plaintiff was not required.

    It was further alleged that the trial judge had a conflict of interest and should have recused himself from hearing the application, and that the trial judge had shown bias against the appellant and had determined the outcome of the application before hearing the case. However, no written submissions were filed in relation to these grounds and they were not pursued at the hearing of this appeal.

19. The respondent opposed the appeal.

**Submissions of the appellant**

20. The written submissions of the appellant are expressed to be directed to this and related appeals bearing record numbers 2019/276 and 2019/487.

21. At para. 7 of the appellant's submissions, the issues arising in these appeals were identified as:

    (1) whether Permanent TSB ought to have been on notice of Cheldon's applications;

    (2) whether the court could amend a final order of the High Court;

    (3) whether an order for possession could be assigned.

22. Reference was made to *Bank of Ireland Finance Ltd. v. Browne* wherein Laffoy J. noted at p. 2 that the original plaintiff had indicated that it was not opposing the application under O. 17, r. 4. The appellant submitted that the trial judge erred in principle in finding that the application before him was on all fours with that decision given that there was no evidence of consent to the within application by Permanent TSB.

23. It was submitted that the Supreme Court held in *Talbot v. McCann Fitzgerald Solicitors* that the High Court has no jurisdiction to set aside the final judgments and orders in these proceedings and that the trial judge erred in holding that the court was not setting aside or altering the order for possession. Reliance was placed on para. 4 of *Talbot* wherein Denham J. (as she then was) referred to *Belville Holdings Ltd. v. Revenue Commissioners* [1994] 1 I.L.R.M. 29 at pp. 36 and 37*; Ainsworth v. Wilding* [1896] 1 Ch. 673 at p. 677; and *G. McG. v. D.W. (No. 2) (Joinder of Attorney General)* [2000] 4 I.R. 1 at p. 14.

24. At the hearing of this appeal, in response to a question from the court as to whether the jurisprudence relied upon could be distinguished on the basis that the within possession proceedings are not concluded, counsel for the appellant asserted that when an order is made at first instance and is appealed, the court at first instance cannot revisit its order.

25. With regard to Cheldon's application under O. 42, r. 24(a), it was submitted that part of an order cannot be assigned. Reliance was placed on p. 1115 of *Chung Kwok Hotel Co. Ltd. v. Field* [1960] 1 W.L.R. 1112 wherein Harman L.J. opined:-

> "Whether you can assign part of an order without the rest seems to me at least very doubtful. On the whole I should think that one could not; and I should be inclined to the view without deciding it that this order, or part of the order which deals with possession, is probably not at law assignable."

26. Counsel for the appellant launched a new argument at the hearing of the appeal suggesting that the respondent was "trading in litigation". It was asserted that obtaining an order with the intention of passing it to another at a later point amounts to champerty. This was characterised as "selling a right to execute" and it was contended same was to be distinguished from a situation in which a mortgagee sold in possession.

27. It was submitted that the trial judge's reliance on para. 40 of *O'Sullivan v. Ireland* was inappropriate as a basis for criticising the appellant for resisting Cheldon's applications.

**Submissions of the respondent**

28. The written submissions of the respondent were also directed primarily towards the related appeal bearing record number 2019/487 and the appellant's application for a stay on the order of 24 May 2019. At para. 8 thereof, it was noted that none of these appeals concern the substance of the proceedings which have been long since determined. At para. 13, it was noted that all rights of appeal and challenge to the order for possession had been fully exhausted by the appellant.

29. At the hearing of this appeal, counsel for the respondent relied on *SPV Osus Ltd. v. HSBC Institutional Trust Services (Ire) Ltd.* [2018] IESC 44, [2019] 1 I.R. 1 in relation to the

assignment of a bare cause of action. It was asserted that such had not occurred in the instant case, rather what had occurred was the assurance of a series of contractual and proprietary rights. Counsel for the respondent submitted that this is not forbidden under the rules of champerty and maintenance and is specifically facilitated and envisaged by the rules of court.

30. It was submitted that the arguments advanced on behalf of the appellant at the hearing appeared to be contradictory; that the appellant was simultaneously criticising the respondent for not having received a specific assignment of the benefit of the order for possession while simultaneously asserting that same would be impermissible.

**Discussion**

31. In the context of the issues arising in this appeal it is to be borne in mind that certain court orders take effect automatically and do not require any further step or action for their execution. An order for possession is not such a declaration, decree or order. The order for possession as granted by McGovern J. on 6 March 2014 in the above entitled proceedings does not take effect automatically but requires an enforcement process.

32. An application pursuant to O. 42, r. 24(a) is an action upon the judgment and order for possession and is ordinarily brought within the same proceedings. An application for leave to execute pursuant to O. 42, r. 24 is not to be characterised as a fresh action or an application brought to obtain a second judgment. It is an application for leave to issue execution on foot of the possession order made previously within the same action. The fact that the respondent's application for relief was brought within the proceedings bearing High Court record no. 2012/331 SP in connection with the execution of the judgment and order for possession demonstrates that the application for leave to issue execution of same is not to be treated as an autonomous or free standing action. What was before the High Court was a procedural application in the same action including an application for leave to execute.

33. As Collins points out in *Enforcement of Judgments* (2nd ed., Round Hall, 2019) at paras. 1.03 to 1.04:-

> "As observed by Keane C.J. in *A.A. v. Medical Council* [[2003] 4 I.R. 302], the terms 'judgment' and 'order' are used 'virtually interchangeably' throughout the RSC.
>
> The machinery of enforcement does not distinguish between judgments and orders."

***Title of Cheldon***

34. The grounding affidavit of Albert Prendiville filed on 7 March 2019 exhibits a mortgage sale agreement dated 8 July 2015 whereby Permanent TSB agreed to sell, assign, transfer, convey and deliver to Cheldon at a later date, all of the rights, title, interest and benefits (whether past, present or future) held, *inter alia*, in the loan facility as specified in the terms of the loan facility letter dated 4 October 2002, the facility letter itself and the mortgage instrument of 23 December 2002.

35. The mortgage sale agreement is significant insofar as it defines, *inter alia*, "Ancillary Rights and Claims" as: -

> "…(to the extent that the same are capable of being or permitted to be assigned by the Seller) all claims, suits, causes of action, and any other right of the Seller whether known or unknown, against any Obligor, or any of their respective affiliates, agents, representatives, contractors, advisors or any other person that is (in each case exclusively and explicitly) based upon, arises out of or is related to assets referred to in the definition of Mortgage Assets, including all claims (in contract or in tort), suits, causes of action, and any other right of the Seller against any insurer,…arising under or in connection with the Finance Documents…"

36. "Mortgage Assets" is defined to include: –

"(c) all of the other commitments, advances…claims and other rights of the Seller…together with any and all corresponding rights and benefits under any Finance Documents; and

(d) the Ancillary Rights and Claims…"

37. "Plaintiff litigation" is defined to mean: –

> "…litigation initiated by the Seller (or a predecessor in title of the Seller) against an Obligor relating to the Mortgage Assets included the Closing Portfolio…"

38. The language in the "Sale and Purchase" part of the mortgage sale agreement is particularly wide and provides at 2.1: -

> "Subject to the terms and conditions of this Agreement and subject to the subsisting rights of redemption of the Obligors, the Seller agrees to absolutely and unconditionally sell, and the Buyer agrees to purchase all its right, title, interest and benefit (whether past, present or future) in, to and under the Mortgage Assets, the Underlying Loans and the Finance Documents and including the Seller's right, title and interest in and to the Ancillary Rights and Claims, on the Completion Date on the terms of and as provided in the Transfer Documents."

The mortgage sale agreement evinces a clear intention on the part of the seller, Permanent TSB, to vest in Cheldon as purchaser "all claims, suits, causes of action, and any other rights of the Seller…against any Obligor"

39. I am satisfied that all the interest, rights, titles and benefits and claims enuring to Permanent TSB as held or enjoyed by them on 8 July 2015 were captured by the terms of the mortgage sale agreement and were intended to and did pass to the purchaser. I am further satisfied that same included the benefit of the order for possession which was obtained by the seller, Permanent TSB, on 6 March 2014 in its capacity as mortgagee.

40. The order for possession, as sought and obtained by the mortgagee pursuant to the terms of the mortgage instrument of 23 December 2002, travelled with the ownership of the mortgagee's interest. To the extent that the order for possession required (which it clearly did) an enforcement process pursuant to O. 42, r. 24(a), which is a remedy available to a mortgagee who holds an order for possession of the secured property, all rights and entitlements under the possession order travelled with the mortgagee's title and came to vest in the purchaser by operation of law as is clear from the language of the deed of conveyance and assignment which passed the legal interest. Accordingly, the benefit of all extant rights, entitlements and interests under the above entitled litigation including the order for possession, all other orders thereunder obtained and the continuing rights and entitlements pertaining to the execution of same effectively vested in the purchaser, Cheldon, on 14 October 2015.

Order 17, r. 4

41. The Rule provides: -

> "Where by reason of death, 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, or of such person interested having come into existence."

42. The execution of the deed of conveyance and assignment in 2015 came within the ambit of O. 17, r. 4 since it occurred after the commencement of the above entitled proceedings in 2012 and caused a change of interest insofar as there was a disposition by Permanent TSB of all its rights and interests in the mortgage and the mortgaged properties and the ancillary rights and claims derived from the within proceedings.

43. The authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) suggest, and I agree, that an application pursuant to O. 17, r. 4 is the appropriate procedure to adopt following the assignment of a loan or chose in action. See pp. 351 to 352 as follows:-

> "6-111 However, it would seem that the assignment of a loan or chose in action is an 'event' within the meaning of O. 17, r. 4. This was the view of Peart J. in *Irish Bank Resolution Corporation v. O'Driscoll*, [(Unreported, High Court, Peart J., 6 February 2015)] who commented that '[t]he event is clearly the purchase by it of the loan book referred to'."

***Balance of probabilities test***

44. The decision of *Bank of Ireland Finance Ltd. v. Browne* is also instructive. It pertained to registered land and the proceedings in question had been instituted in May 1985. An order for possession had been granted to the original mortgagee in July 1985. Subsequently, the

mortgagee transferred the charge to a third party, Bio Enterprises Limited. The latter was registered as owner of the charge on the relevant folio.

45. Two reliefs were sought before the High Court, firstly an order pursuant to O. 17, r. 4 substituting the applicant, Bio Enterprises Limited, as plaintiff in the proceedings in lieu of Bank of Ireland Finance Limited, the original plaintiff and original mortgagee. Secondly, relief was sought pursuant to O. 42, r. 24 granting liberty to Bio Enterprises Limited to execute the order for possession made in July 1985. As Laffoy J. observed in her judgment at pp. 2 to 3: -

> "The Defendants did not and could not seriously contend that an order should not be made under O. 17, r. 4. The Applicant has clearly established that the interest of the mortgagee under the charge is now vested in it and the Applicant is clearly entitled to be substituted as Plaintiff in these proceedings in lieu of Bank of Ireland Finance Limited."

Laffoy J.'s treatment of the application under O. 42, r. 24 is considered further below.

46. In *Bank of Scotland plc v. McDermott* [2019] IECA 142 an application was made for substitution under O. 17, r. 4 in the context of summary summons proceedings. At para. 37 Peart J. stated:-

> "Where, as in the present case a substitution application is made after judgment has been granted, and where therefore there is no opportunity at trial to raise any issues in relation to the proofs adduced in support of the application, it seems to me that the *prima facie* test referred to by Kelly J. in [*Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671] is not the correct test. In such cases the correct test is that applicable in civil proceedings generally, namely on the balance of probabilities. The evidence will nonetheless be adduced in the normal way in such applications by affidavit, and if necessary any deponent may be cross-examined on their affidavit as provided for by the Rules of the Superior Courts. But such applications remain purely procedural in nature, and there can be no question of such an application becoming in the nature of a mini-trial."

***Order 86A***

47. Order 86A, r. 2(1) provides: -

> "Subject to the provisions of the Constitution and of Statute –
>
> (a) the Court of Appeal has on any appeal in civil proceedings and may exercise or perform all the powers and duties of the court below,
> (b) the Court of Appeal may give any judgment and make any order which ought to have been given or made and may make any further or other order as the case requires."

This jurisdiction is concurrent with the jurisdiction of the High Court.

***Order 28*, r. *12***

48. The trial judge made an order pursuant to O. 28, r. 12 RSC that the possession order made on 6 March 2014 be amended to substitute Cheldon Property Finance DAC for Permanent TSB as the plaintiff in the title thereof. The rule provides: –

> "12. The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

49. In the instant case, by the grounding affidavit of Albert Prendiville, Cheldon demonstrated on the balance of probabilities that it was the party entitled to enforce the possession order of 6 March 2014 since it was the sole owner of the full legal and beneficial interest pursuant to the loan facility, the facility letter and the original mortgage. As such Cheldon had acquired the possession order and all rights thereunder including the entitlement to enforce it which enures for its benefit *qua* mortgagee.

50. The respondent has identified special and unusual circumstances justifying the making of an order pursuant to O. 28, r. 12 including the following: -

    (a) that it has acquired all the estate, right, title and interest of Permanent TSB under the loan facility, the facility letter of 4 October 2002 and the mortgage instrument of 23 December 2002;

    (b) that it acquired the said rights and interests by virtue of the mortgage sale agreement and the deed of conveyance and assignment of 2015;

    (c) that thereby and by act and operation of law the order for possession of 6 March 2014 enures for the benefit of Cheldon and its successors *qua* mortgagee and did so from the date of execution of the deed of conveyance and assignment on 14 October 2015; and,

    (d) the mortgage had not been redeemed nor had possession been yielded up by the mortgagor.

51. Whilst of course it is not possible after judgment has been given, while that judgment or order stands, to recast pleadings or to proceed again to another separate or different judgment in the same action or suit, that is not what the respondent seeks to do. The order for possession on its face was made in favour of Permanent TSB. Subtending the appellant's sundry propositions is the core assertion that the benefit of the order for possession did not enure to Cheldon. That is patently incorrect. The order for possession was granted to a plaintiff in its capacity as mortgagee in accordance with the tenor of the proceedings. The argument is repeated over and over by the appellant across various appeals that the benefit of the order for possession did not pass to the purchaser of the mortgagee's interest or was not capable in law of passing. This proposition is unsound.

52. The appellant seeks to rely on *Belville Holdings Ltd. v. Revenue Commissioners* where Finlay C.J. stated at p. 36: -

> "There is, however, I am satisfied, a wider and more fundamental jurisdiction in a court to amend an order which it has previously made, even though that order is in the form of a final order and has been perfected.
>
> We have not been referred to, nor have I been able to discover, any decision of this Court or of the Irish courts dealing with this question."

53. Reliance was placed on the decision of Romer J. in *Ainsworth v. Wilding*, a decision of the Chancery Division, where at p. 677 he observed: -

> "So far as I am aware the only cases in which the Court can interfere after the passing and entering of the judgment are these: (1.) Where there has been an accidental slip in the judgment as drawn up - in which case the Court has power to rectify it under Order xxviii, r. 11; (2.) when the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended."

As to the exercise of the jurisdiction Finlay C.J. observed at p. 37 in *Belville*: –

> "I would emphasise, however, that it is only in special or unusual circumstances that an amendment of an order passed and perfected, where the order is of a final nature, should be made by the court. The finality of proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not lightly be breached."

54. In the instant case the respondent does not seek to amend any aspect of the curial or operative part of the order for possession granted by McGovern J. on 6 March 2014 but merely the title of the plaintiff to more accurately reflect the current identity of the party now entitled to enforce and to proceed to execute the order for possession itself.

55. I am satisfied that the respondent as successor in title to the original mortgagee and original plaintiff held, without more, all the rights and entitlements of the original plaintiff on foot of the order for possession and in particular the right to issue execution on foot of the said order and to proceed to execute same. However, in the unusual circumstances that arise in the instant case where the appellant has denied that the respondent ever acquired the benefit of the order for possession consequent upon its acquisition of the mortgagee's title, I am satisfied that the trial judge was confronted with special circumstances and also unusual circumstances which entitled him to conclude that the interests of justice warranted the amendment of the title of the plaintiff appearing on the face of the order for possession to reflect the true party currently entitled to proceed to enforce rights on foot of the said order for possession by way of execution and to invoke O. 42, r. 24(a) in that behalf.

56. The amendment to the name of the plaintiff effected by the judge pursuant to O. 28, r. 12 was necessitated for the purposes of ensuring that the respondent could proceed to issue

execution without further unnecessary applications to court arising from any contention that the identity of the party entitled to the benefit of the order for possession as made in the High Court on 6 March 2014, being Permanent TSB, was different to the identity of any successor in title, the party seeking to enforce the order as mortgagee in succession with the benefit of the order for possession acquired by act and operation of law *qua* mortgagee, namely Cheldon and its successors in title.

57. There was a "real question" or "issue" within the meaning of O. 28, r. 12 outstanding namely the issue of execution and the entitlement to be granted leave so as to reflect the current true position as between the parties.

58. There was no requirement that the original lender, Permanent TSB, be on notice of the application or consent to the application in circumstances where a deed executed by it vesting all of its interests in Cheldon was before the court. It had divested itself of its title and had no further interest in the property or the related *lis*.

59. Neither is the appellant correct to characterise the order as in effect "setting aside the final judgments and orders in these proceedings". It does not do that. It merely amended the title to identify the holder for the time being of the mortgagee's title and to address the contention repeatedly advanced by the appellant without valid grounds that the benefit and rights pursuant to the order for possession made on 6 March 2014 did not enure for the benefit of the respondent as successor in title to the original mortgagee. It cannot be contended that amending the title encroaches upon the principle of the finality of litigation. The order for possession was final. The matters contained in the curial part of the order are beyond contest and are not now capable of review.

***Order 42, r. 24(a)***

60. With regard to orders sought pursuant to O. 42, r. 24 to execute the order for possession, Laffoy J. observed at p. 4 of *Bank of Ireland Finance Ltd. v. Browne*: -

> "In the grounding affidavit in support of this application…it is averred that the defendants have failed to discharge the debt secured by the Charge and have failed to deliver possession of the lands to the applicant notwithstanding demands. The Defendants have not controverted this averment."

61. Considering the import of the order for possession made in 1985, Laffoy J. observed at p.6:-

> "I think it is important to emphasise that the issue of the liability of the defendants *qua* mortgagors under the charge and the entitlement of the plaintiff *qua* mortgagee has been conclusively determined. The only 'matter' which arises now in these proceedings is whether the applicant should be given leave to execute so as to obtain possession of the lands at this juncture."

62. Having considered the terms of the security instrument in that case she was satisfied that "the plaintiff was entitled to transfer the security thereby constituted to a third party without the consent of the defendants after its power of sale had become exercisable…". It had

been contended that a party who agreed to pay the consideration for the transfer of the security on foot of which the order for possession of July 1985 had been made had agreed with the borrower that the transfer would not carry "at any stage" an entitlement to proceed on foot of the order.

63. In her conclusions in relation to O. 42, r. 24 Laffoy J. observed at p. 8: -

> "It cannot be disputed that the interest of the Plaintiff under the Charge is now vested in the Applicant and that the order for possession of 15th July, 1985 enures for the benefit of the Applicant *qua* mortgagee. It is not disputed that the default which gave rise to the mortgagee's entitlement to an order for possession – the default in payment of the mortgage debt – has not been remedied. The only circumstance which could vitiate the applicant's entitlement to issue execution on foot of the order [for possession]… in my view, would be the existence of an agreement by the applicant in favour of the defendants to forego or waive its entitlement."

She concluded that no such issue had been established.

64. The right to possession in favour of a mortgagee under the terms of a mortgage instrument has historically been distinguished from all other powers vested in a mortgagee and it is regarded as a right and not a remedy. As Cheldon acquired the rights of the mortgagee under the mortgage it also automatically acquired *qua* mortgagee the benefit of the order for possession and the underlying litigation including the rights thereunder to pursue execution and all enforcement processes as it considered fit. This took effect by act and operation of law; there being no language or provision to the contrary either in the mortgage sale agreement or the 2015 deed.

65. The appellant contends that only part of the order for possession was assigned and that same is invalid. He relies on a decision of the English Court of Appeal in *Chung Kwok Hotel Co. Ltd. v. Field* wherein two arguments were advanced; firstly, that an order for possession "of this sort" is not assignable at all and, secondly, that even if it was there had been no assignment. That decision is distinguishable from the instant case on its facts in a number of material respects including that it was primarily concerned with issues of landlord and tenant law and an order for possession against a protected or controlled tenant. The property at issue in that case was accommodation which had been de-controlled pursuant to the provisions of the Rent Act 1957 of England and Wales, a statute which has no application in this jurisdiction. The level of protection to be afforded to a protected tenant and the policy of the courts of England and Wales concerning same is not an issue in this case.

66. The case of *Chung Kwok* does not concern the law of mortgages or the rights under Irish law of a mortgagee to an order for possession, including that the benefit of same passes with the title and is enforceable by the mortgagee's successors in title. Furthermore the observations relied upon from *Chung Kwok* are wholly *obiter*.

67. The benefit of the order for possession made on 6 March 2014 which remained unexecuted, automatically enured for the benefit of the original mortgagee's successor in title by act and operation of law and therefore there never was a "part assignment" of an order of the kind the subject matter of consideration in the judgment of the English Court of Appeal. Possession from the point of view of such a mortgagee is to be regarded as a right not a remedy. The decision in *Chung Kwok Hotel Co. Ltd. v. Field* does not assist the appellant nor does it identify any valid ground for refusing an order pursuant to O. 42, r. 24(a), the basis for the granting of which was clearly made out before the trial judge.

68. I do not think the trial judge can be fairly criticised for citing with approval the Supreme Court decision in *Talbot v. Hermitage Golf Club* and the decision of Charleton J. in *O'Sullivan v. Ireland* concerning the limit to the time and resources that any case could reasonably be expected to command. Nowhere does the trial judge suggest, nor can his words reasonably be construed as implying, that a meritorious and coherent legal argument cannot be advanced if the circumstances so warrant.

69. The assertion of champerty launched by counsel on his feet at the appeal hearing was not made out. When the totality of the transaction under consideration is looked at, the right to enforce the orders derived from the status of Cheldon *qua* mortgagee. The devolution of the mortgagee's title bears no *relationship to the complex and intricate processes and schemes considered by O'Donnell J. in SPV Osus Ltd. v. HSBC Institutional Trust Services (Ire) Ltd*. The appellant failed to establish any basis for his contention that the assurance of the estate, right, title and interest of the mortgagee to the respondent savoured of champerty.

**Conclusions**

70. It is well established that O. 17, r. 4 can be invoked in proceedings seeking the recovery of land by way of an order for possession and, I am satisfied, that is equally so for the purposes of seeking leave to execute the said order or take other requisite steps by way of enforcement. Whilst this order was made subsequent to the making of the possession order and perforce the standard of proof is of necessity higher, the affidavits filed and the exhibits clearly demonstrate that Permanent TSB divested itself of all its rights and interests on foot of the mortgage in question in 2015 in favour of Cheldon. The validity of the sale of the mortgagee's rights on foot of the original mortgage instrument has been effectively established on the balance of probabilities.

71. There was ample evidence before the trial judge to satisfy him on the balance of probabilities that Cheldon had good title to the mortgagee's interest and further it was demonstrable that, since the order for possession made on 6 March 2014 was in full force and effect and pertained to the mortgaged lands, the benefit of same passed with the mortgage to the respondent, Cheldon, *qua* mortgagee by act and operation of law. A clear entitlement was made out by the respondent before the trial judge for an order pursuant to O. 17, r. 4 by reason of a "change or transmission of interest" from Permanent TSB to Cheldon in 2015.

72. All rights of appeal pertaining to the possession order made on 6 March 2014 have been long since exhausted. The three affidavits sworn on behalf of Cheldon, including those of Albert Prendiville in March 2019, Liam Roe in May 2019, and John Burke also in May 2019, clearly established that Cheldon had acquired all the estate, right, title and interest of Permanent TSB in the mortgage and was its successor in title in all material respects. This had clearly occurred in 2015 upon the execution of the contract and deed. Thus a transmission of interest and rights had taken effect and there had come to vest in Cheldon all the rights, estate and interests of Permanent TSB including the benefit of the order for possession. Therefore the provisions of O. 17, r. 4 were directly engaged and the judge was entitled to make the order which he did pursuant to the said Rule.

73. Since the contract and deed executed by Permanent TSB in 2015 was effective to vest all the mortgagee's rights in Cheldon and carried with it the benefit of the order for possession of 6 March 2014, it necessarily followed that Cheldon as the party stepping into the shoes of Permanent TSB was entitled to seek orders *inter alia* pursuant to O. 17, r. 4 without any necessity of serving proceedings on Permanent TSB.

74. O. 17, r. 4 is purely procedural in nature. The onus of proof is on the moving party and it is discharged in a case such as this where evidence is adduced before the court that, on the balance of probabilities, an event effecting a transmission of interest has occurred such that it is necessary or desirable that another party should be joined in the proceedings. The clear recitals and statements are consistent only with the loan and underlying security having come to vest in Cheldon. Were the court to refuse to make the order, a grave injustice would be visited upon Cheldon as a successor in title to the original mortgagee. The onus of proof was clearly discharged by Cheldon on the balance of probabilities.

75. The amendment of the order for possession of 6 March 2014 pursuant to O. 28 was solely with regard to its title and in particular the title of the plaintiff to align same with the identity of the party who at the date of the application was the holder for the time being of the mortgagee's title and was not as to substance.

76. The said order was not strictly required once Cheldon demonstrated (as I am satisfied it did) that it was the successor in title to the original mortgagee since it thereby, *qua* mortgagee, held all the rights of Permanent TSB on foot of the order. However, in the unusual circumstances prevailing in the instant case where this fact was persistently denied by the appellant it was reasonable and proportionate for the court to make such an order where sundry competing arguments were being repeatedly advanced in connection with this possession order to the effect that it either wholly failed or that it or rights under it were incapable of passing to Cheldon (or its successors in title) or rights thereunder were not exercisable by the respondent. The court had power to so order under its inherent jurisdiction once satisfied that the interests of justice so required and no prejudice could be identified by the appellant from its making.

77. Ultimately O. 28 is purely procedural in nature. Where the making of an order under the rules would minimise or obviate the risk of injustice, doubt or uncertainty, particularly as to title, the High Court judge was entitled to make the order as he did. There was no

evidence that prejudice was visited upon the appellant by the making of the order which merely ensured explicit conformity as between the identity of the party appearing on the face of the order for possession of 6 March 2014 as plaintiff and the party seeking to enforce the said order. Otherwise the judge had inherent jurisdiction to make such an order in the circumstances pertaining as found by him.

78. An application by Cheldon pursuant to O. 42, r. 24 was necessitated on the facts arising from its acquisition of the mortgagee's rights and interest under the mortgage in and over the three secured properties. Further, having regard to the unregistered nature of the title, Cheldon in succeeding to the interest of Permanent TSB as mortgagee acquired thereby *qua* mortgagee the rights and benefits pursuant to the order for possession of 6 March 2014 and became entitled to same by act and operation of law.

79. The order for possession held and beneficially enjoyed by Cheldon by virtue of its position as successor in title to the original mortgagee is a valuable property right exercisable by it and its successors in title. One of the rights which flows from its interest in the said order is a right to enforce it and take all necessary steps to do so including pursuant to O. 42, r. 24(a).

80. Since I am satisfied that not alone could the possession order be assigned but that it effectively vested in Cheldon *qua* mortgagee which held the rights under it, Cheldon was entitled as such to make an application pursuant to O. 42, r. 24(a) and same was necessitated as a result of a change in the parties then entitled to execute the said order. Entitlement to the granting of leave to execute was clearly established by the respondent to be necessary to enable it to enforce the order for possession in respect of the three secured properties.

81. Cheldon disposed of its interest in the mortgage and all attached rights prior to the hearing of this appeal. However, given that the contentions in this appeal went to the very title of Cheldon and the enforceability by it of the rights of the original mortgagee and as such was an issue which had not ceased to exist at the date of Cheldon disposing of its interest but rather devolved upon and vested in its successor in title, it was necessary to determine the issues raised which if left undetermined would directly impact upon Cheldon and its successors in title and result in further groundless claims, uncertainty, delays and additional unnecessary litigation.

82. I would dismiss this appeal on all grounds.

83. This judgment is one of a number of judgments arising from appeals and motions heard by the court together in which the issues and contentions overlapped significantly and all can be read together. They include the following judgments delivered herewith in appeals bearing record numbers 2018/378, 2019/458, 2019/276 and 2019/487 and in respect of a motion brought on behalf of Pepper Finance Corporation Ireland DAC.

84. Noonan J. and Haughton J. are in agreement with this judgment. Since the appellant was wholly unsuccessful in this appeal, having regard to O. 99 (recast) and ss. 168 and 169 of

the Legal Services Regulation Act 2015, costs follow. However, this appeal overlapped with appeal 2019/487 and a motion seeking a stay disposed of at the appeal hearing with an order that costs in the matter be costs in the cause in this appeal. In respect of the said expressly referenced matters the respondent is entitled to one set of costs only to include the costs of each respondent's notice filed and to be assessed in default of agreement. The issue of costs in appeals 2018/378, 2019/458, 2019/276 and Pepper's motion and other matters not expressly referred to therein are dealt with separately in the judgments pertaining thereto. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.