THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 142

Peart J.
Whelan J.
Costello J.

(1) APPEAL NUMBER: 2018/127

BETWEEN:

BANK OF SCOTLAND PLC

PLAINTIFF/RESPONDENT

- AND -

EUGENE MCDERMOTT

DEFENDANT/APPELLANT

(2) APPEAL NUMBER: 2017/512

BETWEEN:

EUGENE MCDERMOTT

PLAINTIFF/APPELLANT

- AND -

ENNIS PROPERTY FINANCE DAC

DEFENDANT/RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 17TH DAY OF MAY 2019

1. There are two appeals before the Court. The first appeal ("the substitution appeal") is by Mr McDermott ("the appellant") against an order of the High Court (McGovern J.) dated 5th February 2018 whereby it was ordered that the respondent ("Ennis") be substituted as plaintiff in place of Bank of Scotland Plc, in summary summons proceedings (2013/1833S) brought by the bank against him, and wherein by order dated 29th July 2013 judgment was already granted against him in a sum of €6,971,856.49, and further that the said order be amended so that Ennis be substituted for Bank of Scotland Plc as the party entitled to enforce same.

2. The second appeal ("the dismissal appeal") is brought by the appellant against an order of the High Court (McGovern J.) dated 18th July 2017 whereby it was ordered that the appellant's proceedings against Ennis commenced by way of plenary summons on the 4th October 2016 (2016/8810P) be dismissed (a) pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the basis that they disclose no reasonable cause of action, and (b) pursuant to the inherent jurisdiction of the Court on the basis that they are an abuse of process and vexatious.

3. I propose addressing the second appeal ("the dismissal appeal") in the first instance.

The dismissal appeal

4. The factual background to the appellant's plenary proceedings commences in 1995/1996 when he drew down a loan from a bank then called Equity Bank Limited ("Equity")(company number 16551). That loan was secured on the appellant's lands comprised in folios 17644F and 17159F of the Register of Freeholders County Kildare by deed of mortgage and charge dated 3rd October 1996 which was registered as a burden on the said folios on the 9th December 1996.

5. Equity changed its name by a special resolution to Bank of Scotland (Ireland) Limited ("BOSI") following the acquisition of Equity by Scotland International B.V., as evidenced by certificate of change of name dated 25th April 2000.

6. On the 23rd January 2002 the Minister for Finance signed S.I. No. 27/2002 – Central Bank Act 1971 (Approval of Scheme of Bank of Scotland (Ireland) Limited and ICC Bank Plc) Order 2002. By that statutory instrument the Minister approved a scheme whereby BOSI (formerly Equity) would transfer its banking business to ICC Bank Plc ("ICC")(company number 8545).

7. On 2nd February 2002, BOSI (formerly Equity) transferred its business, including the said loans and the said mortgage and charge, to ICC pursuant to that approved scheme. After the transfer occurred and ICC became the owner of the appellant's loans and mortgage and charge, each company changed its name. On 12th February, 2002 BOSI resolved to change its name to BOS (Ireland) Financial Enterprises Ltd. and this occurred on 25th February, 2002. According to Mr McDermott ICC changed its name to BOSI on 14th February, 2002, though he does not exhibit this certificate of change of name.

8. In his submissions to this court the appellant argued that the mortgage and charge was not transferred to ICC under the approved Scheme and that it remained in the ownership of the financial institution which originally advanced him the loans which was renamed Bank of Scotland (Ireland) Financial Enterprises Limited. He does not in terms argue that the loan was not transferred under the approved scheme to ICC. He says that the original loan from equity which was secured by the mortgage and charge was refinanced in 2005 with a new loan advanced by BOSI (formerly ICC). This meant that the loans secured by the charge were repaid and therefore

the charge ought to have been released. He further argues that the loans advanced by BOSI from 2005 onwards were unsecured loans, notwithstanding the terms of the loan agreements as BOSI (formerly ICC) never acquired the 1996 mortgage and charge. He argues that due to the alleged break in the chain of title in respect of the 1996 mortgage and charge, Ennis is not now entitled to take any enforcement action on foot of that mortgage and charge because it is not the successor in title to the original 1996 mortgage and charge. In that regard he states:

> "8. It is by no means clear that my loans and related securities formed part of that agreement [i.e. the transfer from BOSI to ICC]. Mr Hanly's bland averments at paragraphs 14 and 36 of his affidavit that Equity Bank Ltd changed its name to Bank of Scotland (Ireland) Ltd do not in any way fully describe the complexities of the arrangements relating to the ownership of Equity Bank Ltd, the takeover of ICC Bank plc and two different entities taking on the name Bank of Scotland Ireland Ltd or the transfer of assets to ICC Bank shortly to be named Bank of Scotland Ireland Ltd by agreement dated 23rd November 2001."

9. In his grounds of appeal, the appellant states that as a consequence the loans made to him between 2005 and 2008 were not secured by the 1996 mortgage.

10. The respondent has submitted that in so far as the appellant seeks to make the argument that there are two different companies or entities named BOSI, and that it is unclear therefore that his loans were part of what was transferred eventually to Ennis, that is not the case pleaded in the statement of claim.

11. At any rate, in 2005 and again in 2008, the appellant applied for and was granted a further four loan facilities by BOSI which Ennis claims were also secured upon the existing 1996 mortgage and charge. Recital C set forth in that deed of mortgage and charge stated that it was in respect of "monies now owing *or which shall hereafter become owing* on a general balance of account or otherwise from the borrower to the lender" [emphasis provided].

12. Three of the four facility letters in respect of the loans just referred to describe the security for same as "an extension of the bank's specific charge over the freehold land of the borrower consisting of 258 acres of land at Kennycourt, Brannockstown, Naas, Co. Kildare". These are the lands comprised in the two folios referred to above. The remaining facility letter refers to the security as being "a first specific charge over the borrower's 258 acres of land at Kennycourt, Brannockstown, Co. Kildare".

13. However, one of the appellant's contentions in his plenary proceedings is that because one of the purposes of these later facilities was to refinance the 1996 loan, the 1996 mortgage and charge ought properly to have been "released or vacated", and that since no new mortgage or charge was entered into by the appellant following that refinancing of the 1996 loan, the later borrowings were not secured on the lands. In such circumstances, his contention is that Ennis, claiming to be the successor in title to the 1996 mortgage, is not entitled to rely on the 1996 mortgage and charge for the purpose of seeking to recover the amount claimed to be owing by the appellant, including by the appointment of a receiver over the lands.

14. Further background to these proceedings is that as of the 31st December 2010 BOSI merged with Bank of Scotland Plc ("BOS"). This was as a result of a cross-border merger of the two entities which received the approval of both the High Court in this jurisdiction, and the Scottish Court of Session. Thereafter BOS was registered on the two folios as the registered owners of the said mortgage and charge – *i.e.* that which was originally registered by Equity Bank Ltd back in 1996. BOSI had never applied to the Property Registration Authority to be noted as registered owner of the charge as a result of the various events already referred to. The appellant has raised an issue in that regard which I will come to.

15. In due course BOS issued demand letters to the appellant seeking repayment of the sums due in respect of the various loans referred to. Those demands were not met, and on the 11th July 2011 BOS appointed Martin Ferris as receiver of the security property.

16. In addition, on the 7th June 2013 BOS issued the summary summons proceedings referred to in para. 1 above and in respect of which judgment was granted on the 13th July 2013 in the amount of €6,971, 856.49.

17. The appellant's loans were acquired by Ennis from BOS subsequent to the said judgment being granted, which accounts for the fact that it is Ennis that is named as the defendant in the present proceedings, and for the other appeal by the appellant against the order made by the High Court dated 5th February 2018 by which Ennis was substituted for BOS as plaintiff in the said summary summons proceedings and as the party in law entitled to enforce the said judgment.

The plaintiff's claims in the present proceedings

18. In its affidavit grounding the motion to dismiss the present proceedings Ennis provided details of previous proceedings brought by the appellant in which he raised various issues relating to his borrowings, the 1996 mortgage and the secured property, and characterises those proceedings and the present proceedings as a "concerted effort to delay and frustrate the defendant in realising its security". The trial judge summarised those other proceedings as follows at para. 6-8:-

> "6. In order to put this motion in context, it is of some relevance to look at other proceedings in which the plaintiff has been involved arising out of the loan facilities, the mortgage and the security.
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> (a) *Eugene McDermott v. Bank of Scotland plc and Martin Ferris, High Court* Record No. [2012 No. 12,919P] ("the plenary proceedings").
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> These proceedings were commenced on 19th December, 2012. Mr Ferris was appointed receiver over the secured property by BOS. At para. 2 of the plenary summons in those proceedings, the plaintiff pleads that BOS is successor in title to BOSI "by way of a Cross-Border Merger in 2010". In those proceedings, the plaintiff included pleas of fraud, deceit and fraudulent misrepresentation against BOS and the receiver. These proceedings have not progressed for some time.
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> (b) *Eugene McDermott v. Bank of Scotland plc, Scottish Court of Sessions Record* No. [14/CA14] ("the Scottish proceedings").
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> The Scottish proceedings were initiated in 2014 and came before the Court of Session for argument on 16th and 17th January, 2017. In these proceedings, the plaintiff purports to challenge the Cross-Border Merger and the appointment of the receiver. The proceedings have been struck out in order to enable the issues arising therein to be canvassed in proceedings in this jurisdiction.

(c) *Eugene McDermott v. An Bord Pleanala, High Court Record No.* [2016 No. 256 JR] ("the judicial review proceedings").

The applicant in these proceedings applied for judicial review seeking an order of *certiorari* of the decision of An Bord Pleanala in respect of which ex parte leave was granted on 25th of April, 2016. The judicial review proceedings seek to challenge a planning permission granted by An Bord Pleanala that would assist the receiver appointed to the secured property in disposing of same.

7. Apart from those proceedings mentioned above, there are other proceedings entitled *Bank of Scotland plc v. Eugene McDermott* [2013 No. 1833 S] ("the summary summons proceedings"). In the proceedings, BOS obtained judgement on 29th of July, 2013, (Kelly J.) in the sum of €6,971,85 6.49. On 18th May, 2015, the High Court (McGovern J.) refused Mr McDermott's application to set aside the judgment. This order was appealed to the Court of Appeal which remitted the matter back to the High Court. On 15th February, 2017, Barrett J. set aside the order made on 29th July, 2013. The court was informed that that decision is under appeal. Therefore, as matters currently stand, BOS does not have a judgement against Mr McDermott.

8. There are other proceedings entitled *Eugene McDermott v. Property Registration Authority* [2015 No. 190 MCA] but the court has not been informed of the subject matter of those proceedings".

19. On its motion Ennis contended that there was a considerable overlap between some the issues raised in the present proceedings and issues raised already in the other previous proceedings just referred to, others which are bound to fail such as that concerning the validity of the cross border merger between BOSI and BOS being a matter that has already been the subject of High Court and Supreme Court decisions, and yet others which could have been, but were not, included in earlier proceedings, and therefore which may not be raised in the present proceedings by virtue of the principles in *Henderson v. Henderson* [1843] 3 Hare 100.

20. The statement of claim delivered by the appellant in these proceedings on the 3rd October 2016 was, it is safe to assume, drafted by himself. He was not legally represented when he issued the proceedings or when he delivered his statement of claim. He was represented by solicitor and counsel in the High Court when the present motion to dismiss was heard, and indeed before this Court on the appeal. I have no doubt therefore that it was of assistance to the trial judge to be provided with written submissions from both the appellant and the respondent prior to the hearing of the motion in order to clarify precisely what were the issues being relied upon by the plaintiff in the proceedings, and what the parties' submissions would be on the motion itself.

21. It is clear from those written submissions by the appellant that he raised the following issues:

(1) That BOS was not the legal entity entitled to be registered as the owner of the mortgage and charge between the appellant and Equity Bank in 1996, and therefore was not entitled to transfer same to Ennis, because the 2005 facility by BOSI to the appellant refinanced the earlier loan from Equity thereby releasing the 1996 mortgage and charge, and no new mortgage or charge was entered into between the appellant and BOSI in 2005.

(2) While the appellant accepted that the Cross Border Merger between BOS and BOSI received court approval in principle, the appellant could not be sure that condition 12 of the scheme was complied with since accounts for the year ending 31st December 2010 had not been available for inspection in the Companies Registration Office, and therefore the appellant was unaware whether his loans with BOSI had passed to BOS under the scheme. Condition 12 provided:

"12. BOS plc shall acquire the assets and liabilities of BOSI on the basis of their book values as reported in BOSI's balance sheet for the period ending on 31st December 2010".

(3) The receiver was appointed by BOS on the 11th July 2012 prior to it being actually registered on the folios as the registered owner of the 1996 mortgage and charge, that registration being completed only on the 9th April 2015. It was contended that in these circumstances BOS was not entitled to appoint a receiver for the purpose of taking enforcement action in respect of the secured lands.

(4) That the registration of BOS as registered owner of the mortgage and charge in favour of Equity on the folios by the Property Registration Authority was invalid, where BOSI itself had never been so registered. That registration application was on the basis of the Cross Border Merger already referred to and as urged to the PRA by Messrs. Arthur Cox, solicitors in their letter to the PRA dated 8th April 2015.

(5) The copy loan sale document dated 29th July 2015 by which the appellant's loans and security are said to have passed to Ennis, which has been provided to the appellant, is so extensively redacted that it is not clear whether the appellant's loans and security falls within the schedules to the deed of sale.

The trial judge's judgment

22. In the course of his judgment the trial judge outlined the history of events to which I have referred already. The appellant takes issue with some remarks by the trial judge such as at para. 10 (and repeated at para. 20) where the trial judge stated in relation to the appellant's challenge to the power of the receiver to act on his authority, and his seeking certain declarations against BOS, that neither the receiver nor BOS are parties to these proceedings, and that "accordingly, the plaintiff cannot obtain relief against them". The appellant has submitted that this is not a correct statement as it is unnecessary for BOS to be a party since its successor in title (Ennis) to the mortgage and charge is a party to the proceedings. It is unnecessary for this Court to express any conclusion on that particular argument. In my view the trial judge was correct to state that there is a clear contractual power to transfer the loan and to appoint a receiver, and that on the 31st December 2010 BOSI merged with BOS as a consequence of the cross-border merger. The appellant complains that the trial judge in so stating has not made any reference to the earlier transaction, and has therefore overlooked the fact that if nothing passed by virtue of those previous transactions, then Ennis has acquired no title to the mortgage and charge. The evidence adduced by the appellant as set out above establishes that the transfer of the banking business of BOSI (formerly Equity) to ICC occurred before both parties to the agreement and transfer changed their names. It is mere speculation unsupported by any evidence that the banking business transferred did not include the appellant's loans and associated security. Therefore, there is simply no case on this point to be addressed.

23. The trial judge correctly identified the court's jurisdiction to strike out proceedings as an abuse of process, or on the basis that no reasonable cause of action is disclosed on the pleadings. He referred to *Aer Rianta cpt. V. Ryanair Ltd* [2004] 1 I.R. 506, and to *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425. He stated correctly that the jurisdiction to strike out proceedings under the court's inherent jurisdiction is one that ought to be exercised "sparingly and with considerable caution", that caution being equally applicable to an application brought under O. 19, r. 28 RSC. He correctly stated that the onus in such applications is on the moving party, the defendant, to satisfy the court that the proceedings are bound to fail.

24. The trial judge was also satisfied that it was not open to the appellant to challenge the legality of the cross border merger between BOS and BOSI given the judgments of the Supreme Court in both *Kavanagh & Bank of Scotland plc v. McLoughlin* [2015] IESC 27, and in *Freeman v. Bank of Scotland plc & ors* [2016] IESC 14. He considered that any such claim as now being made was bound to fail. In my view he was correct in this conclusion.

25. The trial judge correctly concluded that the appellant's proceedings were bound to fail. In particular, in my view, he correctly identified the fact that the two folios comprising the lands that were the subject of the mortgage and charge herein establish that the appellant is the registered owner, and also that the defendant "Ennis" is the registered owner of that charge, and that by virtue of s. 31 of the registration of Title Act, 1964 the register is conclusive evidence of what is contained therein absent some allegation of fraud being made by the appellant. He noted that there was no such allegation of fraud being advanced in the present case.

26. In my view, the fact that Ennis is registered as the owner of the charge on the folios in question is sufficient to indicate the hopelessness of the appellant's plenary proceedings. In so far as there are claims being made that could and ought to have been brought in previous proceedings brought by the appellant, as outlined by the trial judge, I am satisfied also that these present plenary proceedings are an abuse of process.

27. The trial judge struck out the proceedings as being an abuse of process, and also dismissed them under O. 19. r. 28 RSC on the basis that they disclose no reasonable cause of action and/or being frivolous and vexatious. I am satisfied that he was correct so to do for the reasons that he has stated. I find no error on the part of the trial judge, and I would dismiss this appeal.

The substitution appeal

28. As stated at the opening of this judgment, the substitution appeal is against an order of the High Court (McGovern J.) dated 5th February 2018 whereby it was ordered that Ennis be substituted as plaintiff in place of BOS, in summary summons proceedings (2013/1833S) brought by the bank against him, and in which judgment has already been granted against him in a sum of €6,971,856.49, and further that Ennis be substituted for BOS as the party entitled to enforce that judgment.

29. It is contended on this appeal that the evidence before the trial judge on this application was insufficient to enable the court to be satisfied that it was appropriate to make the substitution order. It was argued also that the application was premature, in the sense that it should have waited the determination by this Court of the appellant's appeal against the dismissal of his plenary proceedings which are dealt with above. Clearly that question is now moot, and need not be further addressed.

30. The application to substitute Ennis for BOS in the summary proceedings was in the context of a sale by BOS to Ennis of a "loan book" which, according to the affidavit grounding the application included each of the loan facilities which gave rise to the summary judgment granted to BOS by the High Court on the 29th July 2013. BOS had consented to the substitution order being made. The purpose of the application to substitute Ennis was to enable it to take steps on foot of that judgment to enforce same and obtain payment on foot thereof.

31. An application for substitution was made under O. 17, r.4 RSC. The application to declare Ennis to be the party entitled to enforce the summary judgment was made pursuant to the inherent jurisdiction of the court. While O. 17, r. 4 RSC specifies that an application for substitution under that rule may be obtained ex parte, the fact is that Ennis brought its application by way of notice of motion which was served upon the appellant. I would consider that the very fact that such an application may be made on an *ex parte* basis is at least an indication that it is not contemplated that such a simple, straightforward, and perhaps formal application should give rise to the level of controversy that has attended upon the present application. Of course, it goes without saying, that the court must be satisfied by the affidavit evidence adduced by the applicant that it is entitled to be substituted. But it should not be seen as yet another opportunity for the other party to raise issues that relate more to the merit of the underlying proceedings, and to in that way open up an avenue for further litigation and consequent delay in such proceedings. In my view, the appellant has seized upon the respondent's application for substitution, having been put on notice of it, in order to further frustrate the efforts of the creditor bank, now Ennis, to take steps of enforcement against him on foot of the summary judgment obtained on the 29th July 2013, by raising grounds of objection that are devoid of merit.

32. The substitution application was grounded on an affidavit sworn by Donal O'Sullivan, a director of Ennis on the 16th January 2018. He describes the straightforward background to the application whereby judgment was obtained by BOS in default of appearance. He describes how the appellant's loans already referred to were sold to Ennis as already described. In particular, he exhibited a substantially redacted purchase deed in respect of the loan book purchased by Ennis from BOS, and other documents related thereto. The redaction was so that the details of loans other than those referring to the appellant would not be revealed, and other sensitive information such as the consideration paid. The redactions are explained by Mr O'Sullivan at para. 15 of his affidavit. But the court was in a position to see from the purchase deed that all claims, suits, causes of action and any other right of BOS were acquired by Ennis.

33. Mr O'Sullivan went on to refer to the plenary summons proceedings already dealt with earlier in this judgment, and to the fact that those proceedings had been struck out by the order of McGovern J. dated 18th July 2017. Apart from those issues, it remained necessary for the trial judge to be satisfied that Ennis had adduced sufficient evidence to satisfy the court that it was entitled to be substituted as plaintiff in the summary proceedings so that it could take enforcement steps on foot of that judgment.

34. This Court has the benefit of a transcript of the hearing of the substitution application before the trial judge. Counsel for Ennis moved the application in the normal way by opening the relatively short grounding affidavit, and explaining the background to the application. Counsel referred also to the dismissal of the plenary proceedings already referred to. Counsel for the appellant indicated to the court at the outset of the application that just one point would be made in opposition to the application. In due course that point was explained, and it amounted to a contention that there was an insufficient level of proof that the appellant's loans had been absolutely assigned to Ennis by the exhibited purchase deed, in order to meet the requirements of s. 28(6) of the Supreme Court Judicature (Ireland) Act, 1877. It was submitted that the un-redacted parts of the purchase deed did not establish that the appellant's loans were assigned. But counsel for Ennis was able by way of response to point to page 168 of the purchase deed and to certain loan account numbers, and to other parts of the document, from which it was possible to see clearly that by reference to other detail shown that those loans were indeed part of what was assigned to Ennis. Once that was explained to the trial judge he

expressed his conclusion that he was "absolutely satisfied that the transfer of the loan has been established". He went on to say that he was also satisfied that the case now being made by the appellant in resisting the application by Ennis "is nothing more than an attempt to frustrate a judgment which was given as far back as July 2013 and which has been through the High Court and the Court of Appeal on various occasions". He went on to make the order now under appeal.

35. On appeal, the appellant has sought to argue that the level of proof required on the present application, being one made after judgment has been granted, as opposed to the perhaps more usual circumstance where a substitution of a party is sought prior to final judgment being granted, should be to a higher standard that prima facie proof, as stated in cases such as *IBRC v. Comer* [2014] IEHC 671. In that case, Kelly J. (as he then was) described this type of application as procedural, and not one where substantive issues are determined, and where such issues will await a determination at any eventual trial of the case. It was in such circumstances that he stated at para. 43:

> "43. In my view, the onus of proof on a procedural motion of this sort is very different to the onus of proof which is required at trial. I do not believe that it would be either appropriate or indeed in the interest of justice that on a procedural motion of this sort, far reaching decisions concerning the efficacy and validity of the underlying sale agreement or the assignment of a notice of that assignment should be made.
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> 44. That would turn a procedural motion which, even under the rules is contemplated as one which can be made ex parte, into a sort of mini-trial of the action. That is not what is envisaged by the rules of court.
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> 48. The defendants at trial will be perfectly free to raise whatever issues they think are appropriate in relation to any alleged imperfections or invalidity as they see them in any of the documents which underscore the bringing of this application and the substitution order which I now make."

36. There is, of course, the distinction in the present case that the substitution order is made after final judgment has been granted, and therefore that there is no opportunity at a subsequent trial where issues as to the validity of the assignment of the loans to Ennis might be ventilated. But the fact remains that the application to substitute a party is still one of a purely procedural nature.

37. 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 *IBRC v. Comer* 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.

38. In the present case the appellant was correctly put on notice of the application and therefore was given the opportunity to raise such issues as he wished to raise, and he did so by raising the question of whether Ennis had established to the required level of proof that the appellant's loans were included in the purchase deed referred to. That argument was put forward. On the evidence adduced by Ennis it was, in my view, beyond any doubt that the appellant's loans were assigned as sworn to by Mr O'Sullivan, and certainly met the test of the balance of probabilities. There was no attempt made to seek to cross-examine Mr O'Sullivan on his affidavit. The judge expressed himself satisfied not just that prima facie evidence had been adduced but that he was "absolutely satisfied that the transfer of the loan has been established". In my view there was ample evidence adduced to justify that conclusion. While that conclusion is not expressed in terms of being "absolutely satisfied", it is clear that the trial judge was satisfied at least to the level of the balance of probabilities, if not beyond, and was entitled to be so satisfied.

39. For these reasons I would also dismiss the appeal against the making of the substitution order.