

## THE HIGH COURT

[RECORD NO. 2008/499 SP]

BETWEEN

LAUNCESTON PROPERTY FINANCE LIMITED

PLAINTIFF

AND

FRANK BURKE AND LORNA BURKE

DEFENDANTS

**JUDGMENT of Mr. Justice Robert Eagar delivered on the 22nd day of June, 2018**

1. This is a judgment on an application for discovery by way of notice of motion dated the 22nd March, 2018 and which was heard by the Court on the 23rd March, 2018. The defendants sought the following: -

(i) An order pursuant to O. 31 r. 12 of the Rules of the Superior Courts, 1986, as amended, directing the plaintiff to make discovery within such time as maybe fixed by order of this Court, of the following categories of documents:

(a) All documentation relating to the plaintiff's purported change in title to Launceston Property Finance Designated Activity Company including, (but not limited to) all documentation lodged in the Companies Registration Office in respect of the purported change of name and objects of the company.

(b) All documentation relating to why the plaintiff's notice of motion issued on the 11th December 2017 was not brought in the Supreme Court.

(c) All documentation relating to the number of directorships held by the present and past directors of the plaintiff and/or the purported entity Launceston Property Finance Designated Activity Company.

And

(d) All documentation evidencing the assets held by the plaintiff and/or Launceston Property Finance Designated Activity Company.

The applicant also sought an order abridging time for the service of the notice of motion and grounding affidavit, and also sought an order for the costs of and incidental to the application.

2. The Court has duly abridged the time for the service of the within notice of motion and grounding affidavit.

3. The background to this application for discovery arises from an application by way of notice of motion dated 11th December, 2017, on behalf of the plaintiff, for an order pursuant to O. 17 r. 4 of the Rules of the Superior Court that this Court amends the title of the proceedings from "Launceston Property Finance Limited" to "Launceston Property Finance Designated Activity Company".

4. On the 15th March, 2010, McGovern J. made an order for possession in favour of Anglo Irish Bank Corporation plc. This order for possession was appealed by the two defendants to the Supreme Court and on the 31st October, 2014, the plaintiff was substituted into the proceedings by way of order of the Supreme Court.. The appeal in the Supreme Court was heard on the 19th July, 2016 and an *ex tempore* judgment was given on the 15th March, 2017 and a final order was made on the 27th July, 2017.

5. Subsequent to the order of the Supreme Court on the 27th July, 2017, the plaintiff issued a motion seeking leave of the court to renew the order for possession herein which heard above on the 16th October, 2017. The motion was adjourned from time to time, the court noting by replying affidavit from Lorna Burke dated the 10th November, 2017, which *inter alia* highlighted, there were existing Circuit Court proceedings in being relating to a "turning bay" which was never intended to be conveyed to Anglo Irish Bank. The matter came before Coffey J. on the 13th November, 2017, and the matter was adjourned on the application of the plaintiffs so that the plaintiffs could clarify the position. On the 11th December, 2017, the plaintiff issued a motion in the High Court, to amend the title of the proceedings returnable for the 15th January, 2018.

6. The issues which this Court will consider are:

(i) Whether or not the Court can order discovery in relation to the proceedings as sought by the defendants,

(ii) Whether or not the Court should make any order

(iii) If the court is to make any order for discovery, what issue or issues should the Court direct discovery?

7. The Court notes the judgment of McKechnie J. delivered in the Supreme Court on the 15th March, 2017 in *Launceston Property Finance Limited v. Frank Burke and Lorna Burke* [2017] IESC 62.

8. At para. 2 of his judgment, McKechnie J. noted that:-

"Although there were many grounds advanced in the Notice of Appeal, which was received on the 30th September, 2010, only three of those therein nominated were canvassed in the hearing before us. These, along with the further issues sought to be advanced for the first time, can be described as follows:

(i) that the delineation of the Taylor's Hill property, in the relevant mortgage and charge, was incorrect; it was inaccurately described as including a turning bay, which was in error;

(ii) that as the plaintiff was not a "regulated body" under the Central Bank Act 1997, as amended ("the 1997 Act"), it could not take any further steps to enforce the underlying security;

(iii) that the loan arrangement fees and interest rate charged, and the legal fees imposed by the plaintiff, were excessive and thus were in the nature of a penalty, unenforceable at law;

and, finally,

(iv) that Article 8 of the European Convention on Human Rights applies so that when the appellants' rights to their family home are measured against the respondent's property rights, the Court should decline to exercise its discretion and thus should refuse to uphold the Possession Order made by the High Court."

9. McKechnie J. outlined the background which can be summarised by this Court as follows: - From 1999 onwards, the defendants had a banking relationship with Anglo Irish Bank Corporation which resulted in the bank advancing to them certain sums of money in the years which followed. There were three such arrangements which are relevant: -

(i) A letter of offer dated the 7th January, 2003, which provided loan facilities up to a maximum sum of €855,000;

(ii) (ii) a 'Housing Loan Agreement' dated the 6th October, 2005, which increased that sum to a maximum of €974,500;

and,

(iii) A Credit Agreement dated the 14th August, 2006.

Each such arrangement was in substitution for other facilities then existing, with the amount said to have been advanced under the Credit Agreement being approximately €1,088,000.

10. The common security underpinning each transaction was:-

(i) a first legal charge over the Clarinbridge Property,

and

(ii) A first ranking mortgage over what was described by the Supreme Court, as the family home at Taylor's Hill.

Default having been made allegedly as and from January, 2007, Anglo Irish Bank, by letter of demand dated the 22nd February, 2008, called on the defendants to pay the entirety of the sum then outstanding, which, when interest was added, amounted to €1,214,118.47.

11. A special summons was issued on the 18th June 2008 in which possession of the registered property was sought under s. 62(7) of the Registration of Title Act 1964 and possession of the family home under O. 3, r. 15 and O. 54, r. 3 of the Rules of the Superior Courts. The matter came before McGovern J., who granted the possession order as sought on the 15th March, 2010.

12. McKechnie J. noted, that the defendants in this notice of motion did not dispute the fact that they entered into the transactions above described, that the monies were advanced, that default had occurred within the meaning of the relevant facility letters and the charge/mortgage instruments, and that the mortgagee has the power of sale thereunder. Moreover, they did not challenge that the court had the power to grant a possession order under s. 62(7) of the Registration of Title Act 1964 being the law then applicable in respect of the registered parcel, and under O. 3, r. 15 and O. 54, r. 3 of the Rules of the Superior Courts in respect of the unregistered portion, the defendants however, submitted that the High Court erred in law in making the orders which it did in March 2010.

13. The new ground of appeal that appeared before the Supreme Court related to the description of the area in the schedule to the indenture dated the 22nd May, 2001, and the defendants claim that this description of the area is incorrect in that it included what is described in the relevant map as a "turning bay" in respect of which it was never the intention of the mortgage holder to convey any interest or title to Anglo Irish Bank.

14. McKechnie J. noted, that the relevant Mortgage Deed was executed by the defendants as far back as 2001 at a time when both were solicitors in their own right. He also noted, that at no point up to the institution of the within proceedings, was any concern expressed about the description of the mortgage property as contained in this instrument. He noted that the case was before the High Court for more than 20 months, again without objection being taken, it was not raised as any part of the submissions during the High Court hearing nor did it feature in the Notice of Appeal. For these reasons McKechnie J. said that the court would not entertain the argument at this juncture of the proceedings.

15. McKechnie J. described under the heading Transfer of Title, the history of the proceedings, and he said: -

"15. Following nationalisation in 2009, Irish Nationwide Building Society and Anglo Irish Bank merged, some two years later, to form a new entity known as Irish Bank Resolution Corporation (IBRC). That company, pursuant to the provisions of the Irish Bank Resolution Corporation Act 2013, was put into special liquidation by the Minister for Finance in February of that year. Mr. Kieran Wallace and Mr. Eamonn Richardson were appointed as joint special liquidators thereof. In that capacity they entered into the following transaction which directly gave rise to Launceston Property Finance Limited ("Launceston Property") becoming entitled to continue with the instant proceedings which, as noted, had previously been issued by the Bank as far back as 2008.

16. By agreement in writing dated the 28th March, 2014, the special liquidators of IBRC, who at the time were the owners of and had full legal title to the credit facilities the subject matter of the within proceedings, agreed to transfer and assign absolutely onto Launceston Property the entirety of IBRC's rights and benefits in these and in many other such facilities. The 23rd May, 2014, was specified as the 'effective date' for the completion of this agreement.

17. On that date, the special liquidators duly executed a Deed of Transfer whereby the entirety of whatever rights, title

and interest which IBRC had or were entitled to pursuant to the transactions entered into by Anglo Irish Bank and the defendants were transferred to the purchasers. Accordingly, as and from that date, Launceston Property in effect stepped into the shoes of IBRC, and thereby became the owners of a large and diverse loan portfolio, with related security, which included the facilities referable to Mr. and Mrs. Burke (see section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877).

18. By letter dated the 6th June, 2014, the special liquidators wrote to the defendants/appellants and informed them of the agreement which they had entered into with Launceston Property. On the 26th June, 2014, Pepper Asset Servicing (see para. 21, *infra*) also wrote to Mr. and Mrs. Burke pointing out that they had been appointed by Launceston Property as its intermediary, so as to provide portfolio and asset management services in respect of their particular facility. That series of correspondence also outlined in general terms the effect and consequences of such transaction for both the defendants and for the within proceedings. Finally, on the 31st October, 2014, by Order of this Court, Launceston Property Finance Limited was substituted for Anglo Irish Bank Corporation as plaintiff/respondent.

19. Accordingly, there can be no doubt but that the interest which Anglo Irish Bank once had in these facilities was *validly* transferred, via the above process, to Launceston Property.” (This Court’s emphasis).

**Whether or not the Court can order discovery in relation to the proceedings as sought by the defendants.**

16. In their written submissions, the defendants identified the relevant orders of the Rules of the Superior Courts and quotes in particular from O. 31 r. 19, that where the court is satisfied that the right to discovery in a particular case depends on the determination of any question in dispute, it may order that such issue be determined first and reserve the question as to the entitlement to discovery and also identifies the authority for the proposition that orders for discovery may be made after judgment.

17. However, the position in this case is that it is impossible to see that there are any questions finally in dispute. The Supreme Court, by order dated the 31st October, 2014, substituted Launceston Property Finance Ltd. for Anglo Irish Bank Corporation. The matter was heard by the Supreme Court on the 19th July, 2016. The Supreme Court appropriately decided that the matter had been completed on the 19th July, 2016, and in those circumstances the title was not further amended to Launceston Property Finance Designated Activity Company and this application comes to be determined by this Court. Counsel for the plaintiff, quoted from *Keating v. RTE and the Commissioner of An Garda Síochána* [2013] IESC 22, where McKechnie J. said at para 60, that the purpose of discovery was: -

“...to aid a party in the progress of litigation: it is not designed to identify grounds capable of establishing a cause of action”.

McKechnie J. further stated in *Keating* at para 62: -

“A sharp distinction exists between situations where a party to be a plaintiff or defendant, seeks discovery to support or advance his particular point of view, and where such is sought for the purpose of making or formulating a claim which otherwise does not exist. In other words, discovery is an aid to further a viable action or defence or an issue in either, but is not a means in itself to establish one.”

It is apparent to this Court that that is the very nature of this application for discovery. This Court held in *ACC Loan Management Ltd. v. Oliver Kelly and Margaret Kelly* [2017] IEHC 304, that it is only when a court decides that a plaintiff is not entitled to summary judgment that the issue of discovery arises. This case was not appealed to the Court of Appeal; the Court therefore decides that the Court should not order discovery in relation to the proceedings as sought by the defendants.

18. It appears to this Court that the defendant’s case is coming towards the end of its road. The circumstances are, as outlined by McKechnie J., that they agreed to discharge this debt and have failed to do so. The purpose of this application for discovery is to further delay the already prolonged litigation that has taken place. The Court is satisfied in these circumstances that the Court will refuse the application for discovery in all categories sought in this case and will propose to deal with the notice of motion dated 11th December, 2017, which seeks to amend the title of the proceedings from Launceston Property Finance Ltd. to Launceston Property Designated Activity Company.