

## THE HIGH COURT

2015 135 CA

## BETWEEN

Permanent tsb Finance Limited

Applicant

– and –

Paul Breheny

Respondent

**JUDGMENT of Mr Justice Max Barrett delivered on 10<sup>th</sup> February, 2016.****Part 1: Key Issue Arising**

1. Permanent tsb Finance Limited ('Permanent TSB') seeks to substitute another party for itself in the within appeal against a refusal of substitution by the Circuit Court.

**Part 2: Background Facts**

2. This matter has been ongoing since 2010 and is perhaps best summarised by way of chronology.

18th April, 2008. Mr Breheny, as hirer, entered into a hire-purchase agreement with "*Permanent TSB Finance Limited... 'The Owner' which expression shall include its successors and assigns.*"

9th March, 2010. Circuit Court proceedings for recovery of outstanding sums plus interest and costs commenced by Ordinary Civil Bill of 9th March, 2010.

23rd March, 2010. Mr Breheny enters an Appearance.

16th April, 2010. Solicitors for Mr Breheny issue Notice for Particulars.

8th June, 2010. Solicitors for Mr Breheny issue Notice for Further and Better Particulars.

22nd December, 2010. Solicitors for Mr Breheny issue Notice of Motion seeking to compel reply to Notice of 8th June.

20th April, 2011. Circuit Court strikes out Motion of 22nd December by consent.

22nd April, 2011. Solicitors for Mr Breheny deliver his Defence

8th July, 2011. Notice of Motion for Summary Judgment filed with Circuit Court for Permanent TSB.

12th October, 2011. Notice of Motion for Summary Judgment struck out by Circuit Court.

21st November, 2012. *Permanent TSB and another entity, as vendors, enter into a Receivables Sales Agreement with, inter alia, Consumer Auto Receivables Finance Limited.*

16<sup>th</sup> January, 2013. *Mr Breheny is advised in writing of transfer of all rights, title, interests and benefits (including all present and future amounts owing under his facility) to Consumer Auto.*

25th March, 2013. *Power of Attorney executed by Consumer Auto purporting to confer on First Citizen Finance Limited the rights necessary to facilitate recovery of all amounts due under Mr Breheny's hire purchase agreement.*

9th April, 2014. Notice of Intention to Proceed issues for Permanent TSB.

18th November, 2014. Notice of Motion to Dismiss for Want of Prosecution issues for Mr Breheny.

21st November, 2014. Notice of Motion issues seeking substitution of Consumer Auto for Permanent TSB.

7th July, 2015. Circuit Court refuses application to substitute Consumer Auto for Permanent TSB.

15th July, 2015. Notice of Appeal to High Court filed.

3. The first thing that jumps out from the above chronology is that almost eight years after Permanent TSB commenced proceedings for the recovery of just over €15k owing under a hire purchase agreement concerning a Ford Transit van, a full and final decision on that debt dispute has not yet issued. Permanent TSB has not showered itself with glory as regards the pace with which it has pursued the debt, and these are its proceedings to advance. Even so, the public might wonder at the efficacy of a debt recovery process that permits the delays identifiable in the above chronology. But, beall that as it may, this Court must and does take the debt recovery system as it finds it, and must and does apply the law as it stands.

**Part 3: Order 22, Rule 4 of the Circuit Court Rules**

4. Order 22, rule 4 of the Circuit Court Rules provides as follows:

*"Where, by reason of the death, or bankruptcy, or any other event occurring after the commencement of an action, proceeding or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, proceeding, or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, 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."* [Emphasis added].

5. As the underlined text shows, the standard threshold for substituting a party under O.22, r.4 is very low indeed.

#### **Part 4: What the Receivables Sales Agreement Provides**

6. Clause 2.1 of the Receivables Sales Agreement provides, *inter alia*, that subject to certain conditions as to consideration and completion of the agreement, title to "*all right, title, interest and benefit, present and future*" in the "*Sale Assets*" other than "*the Banking Sale Assets*" passes absolutely and unconditionally to Consumer Auto. As is usual in commercial agreements of this type it is rich in defined terms, with the various definitions appearing in clause 1.1 of the Agreement. Thus a "*Sale Asset*" is defined at some length but – so far as appears relevant to the within proceedings – means the "*Sale Facilities*". The term "*Sales Facilities*" means such "*Facilities*" as are contained in certain of the "*Data Tapes*" (specifically the "*Updated Historic Business Data Tapes*" and the "*New Business Data Tapes*", but excluding the "*Excluded Facilities*"). The term "*Facilities*" includes certain "*hire purchase, leasing, loan, chattel mortgage or other contracts of agreement*". And somewhere in that bundle of '*Facilities*', one suspects, is Mr Breheny's hire-purchase agreement. The court cannot be certain of this because the relevant detail as to what the "*Data Tapes*" contain does not appear in the agreement; it is contained in folders that are referred to in Schedule 1 but which are contained in one or more virtual data rooms to which the court does not have access.

7. It is not a matter for the court to start tracing through definitions in the above manner in a bid to identify whether an agreement achieves the end represented by one of the parties, only to discover that in fact the court arrives at a dead-end, being referred to extraneous materials that it does not possess and has not seen. The court will therefore require that a fresh affidavit be sworn for Permanent TSB that 'walks through' each of the definitions so that one gets from Mr Breheny's agreement through to the point of sale, and also identifying the precise nature of what is sold. There will also need to be identified in that affidavit an explanation of how one gets from the "*Data Tapes*" to the specific mention/sale of Mr Breheny's loan. It would be helpful if that affidavit could also confirm (a) that the Receivables Sales Agreement has been executed by all of the parties thereto and (b) when this occurred – this is necessary because the signature blocks and accompanying signatures are entirely missing, not just redacted. The court notes too that completion of the sale and purchase arrangements contemplated by the Receivables Sales Agreement was due to take place, per cl.3.4.1 "*at 10:00 on the day which is the later of: (i) the Target Date; and the day which is the second Business Day after the fulfilment of the Conditions at the offices of the Vendors' Solicitors*". The court assumes that such Completion has now occurred, given that the within application is now being brought. However, this cannot be determined from a perusal of the Receivables Sales Agreement. This is, therefore, another matter that will have to be sworn to for Permanent TSB.

#### **Part 5: Certain Contentions Raised**

8. Although the within application can be made on an *ex parte* basis, counsel for Mr Breheny appeared at the within application and made various objections to what Permanent TSB might, perhaps not unreasonably, have expected would be a fairly straightforward process. Indeed the fact that O.22, r.4 of the Circuit Court Rules contemplates that the within application can be made on an *ex parte* basis might be contended to intimate that it was contemplated that an order such as that now sought would not lightly be refused. Regardless of whether that is so, counsel for Mr Breheny made, by the court's counting, six objections to the application now presenting, each of which is considered hereafter.

9. First, counsel suggested that there is some doubt arising from the affidavit evidence as to who was the true donor of the power of attorney referred to above (between Consumer Auto and First Citizen). However, this seems an irrelevance insofar as the transmission of the interest or liability from Permanent TSB to Consumer Auto under the Receivables Sales Agreement is concerned, and it is this latter issue with which this Court is concerned.

10. Second, counsel for Mr Breheny disputed the precise effect of the said power of attorney. Again, this seems an irrelevance insofar as the transmission of the interest or liability from Permanent TSB to Consumer Auto under the Receivables Sales Agreement is concerned, and it is this latter issue with which this Court is concerned.

11. Third, counsel for Mr Breheny sought to rely on certain purported deficiencies arising under the Bankers' Books Evidence Acts 1879–1959, reference being made in this regard to the judgment of O'Malley J. in *Ulster Bank Ireland Limited v. Dermody* [2014] IEHC 140. But no bank is party to the within proceedings. Nor does it appear from the documentation furnished to the court, and certainly it has not been claimed before the court, that Permanent TSB is among the wider categories of party to which the definition of 'banker' now extends for the purposes of the Bankers' Books Evidence Acts. The individual deponent to whom objection is taken has not sworn her evidence as a bank employee; she has sworn to certain matters in her personal knowledge. And the fact that a one-off contract entered into by a number of parties, one or two of which is a bank, does not suffice to transform that contract into a record used in the ordinary course of business of a bank or otherwise to render it a 'banker's book' within the meaning of the Bankers' Books Evidence Acts. Those Acts were introduced to facilitate banks required to produce customer records in court. They removed the need for such banks to bring ledgers and other records to court, the absence of which would disrupt the business of a bank with its customers. Notwithstanding the wider definition of 'banker' that now pertains for the purposes of the Bankers' Books Evidence Acts, the Receivables Sales Agreement – a redacted version of which has been exhibited in evidence – is not such a record. In short, the invocation of the Bankers' Books Evidence Acts by counsel in the context of the within application appears mis-founded.

12. Fourth, counsel for Mr Breheny suggested that while debts are assignable, the assignment of a liquidated claim is more difficult and that the purported transmission of interest or liability required under O.22, r.4 cannot present here. The only case-law cited before the court in this regard was the decision of the House of Lords in *Trendtex Trading Corporation v. Credit Suisse* [1982] A.C. 679. However, it is notable that in *Trendtex* the assignment of the bank-customer's rights was deemed invalid on grounds of champerty because the assignment was done to enable the bank to sell on the right of action to a third party (with the profit from any enforcement to be divided between the bank and that third party). In other words what made the assignment in *Trendtex* so objectionable as to be unenforceable on grounds of champerty was the fact that the assignee-bank entered the assignment with a view to selling on the right of action and splitting the profits, i.e. it did not enter the assignment with a view to enforcement. Here, the substance of the within application is to substitute the assignee in the enforcement proceedings so that the assignee may enforce its rights as assignee. That is so different from *Trendtex* – the sole case on which counsel relied in this regard – that the court does not consider *Trendtex* to offer any support for counsel's contention that the Receivables Sales Agreement could be set aside by reference to what the House of Lords decided.

13. Fifth, counsel for Mr Breheny complained that elements of the Receivables Sales Agreement are redacted, though he conceded that this is a technical point. The court understands from counsel for Permanent TSB that the reason for the redactions is because Permanent TSB is precluded by contract and/or the Data Protection Acts 1988 and 2003 from disclosing the redacted portions of the agreement. However, it seems to the court that any difficulty perceived to present in this regard can be cured by means of order of the trial court, after it hears argument and if it considers any order to be necessary.

14. Sixth, counsel for Mr Breheny drew the court's attention to the fact that certain of the documentation contained in the booklet of pleadings ought to have been stamped by Permanent TSB, though again he conceded that this is a technical point. The court will be satisfied to accept an undertaking from counsel for Permanent TSB that the relevant documentation will be stamped if this has not already been done by the date of judgment.

**Part 6: Conclusion**

15. The court will order that a further affidavit of the type contemplated by the court in Part 4 of this judgment be sworn by or for Permanent TSB. Provided the form of affidavit sworn is satisfactory to the court, the court shall order the substitution sought.