THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 41
Court of Appeal Record No. 2018/378
High Court Record No. 2006/623 SP

Whelan J.
Noonan J.
Haughton J.

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

- AND –

JERRY BEADES

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 17th day of February 2021

Introduction

1. This is an appeal from an order of Costello J. made in the within proceedings on 25 July 2018 which was perfected on 23 August 2018 made for the reasons stated in her judgment of 29 June 2018.

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 potential future appeals brought by the appellant. For the purposes of the substance of this judgment, "the respondent" refers to KBC Bank Ireland plc.

Background

3. The judgment sets out the factual background in detail and key facts. Briefly put, by letter dated 20 May 2003 IIB Homeloans Ltd. (formerly Irish Life Homeloans Ltd., hereinafter "IIB Homeloans") approved facilities in favour of the appellant amounting to €1,200,000 secured on the properties 31 Richmond Avenue, Fairview, Dublin 3 and 21 Little Mary Street, Dublin

1 (hereinafter "the mortgaged properties") subject to certain special and standard conditions.

4. The special conditions attached to the loan offer letter included the following: -

> "147. The Applicant(s)' attention is drawn to clause 11(iii) of the Mortgage Indenture. The Applicant(s) hereby acknowledges the Lender's right, without further consent from or notice to the Applicant(s) to transfer the benefit of this Letter of Offer, the mortgage loan and the Lender's mortgage security (including any insurance policy or policies of life or endowment term assurance) over the property to any person, company or corporation on such terms as the Lender may think fit, without any further consent from or notice to the Applicant(s) or any other person, or any consequential assurance or reassurance or release under such scheme whereupon all powers and discretions of the Lender shall be exercisable by the transferee."

5. The said special condition also provided as follows: -

> "…The Applicant(s) hereby irrevocably and unconditionally authorises the Lender, for the purpose of or in connection with any proposed transfer, assignment, disposal, sub-mortgage, sub-charge, trust or arrangement of this agreement, to disclose to the proposed transferee and every person proposing to participate in or promote or underwrite or manage any such transfer or securitisation scheme and to disclose to every person to whom the Lender is obliged thereunder to make disclosure, details of this agreement including, without prejudice to the generality of the foregoing any information and documentation in the Lender's possession in relation to the Borrower, the mortgage loan and the Lender's mortgage security over the Mortgaged premises and so far as such information constitutes personal data within the meaning of the Data Protection Act, 1988, this authority shall be consent for the purposes of section 8(h) of the said Act."

6. By an indenture of mortgage dated 12 June 2003 between IIB Homeloans of the one part and the appellant of the other part, all monies then owing or which should thereafter become owing were, with interest, costs and charges secured upon the mortgaged properties for the benefit of IIB Homeloans. Significantly, since the title was unregistered the appellant granted and conveyed the mortgaged premises held in freehold tenure to the lender in fee simple subject to the proviso for redemption contained in the indenture. A memorial of the said mortgage was registered in the Registry of Deeds on 1 August 2006.

The proceedings

7. Arising from certain defaults by the appellant, on 29 November 2006 proceedings were instituted by IIB Homeloans by way of special summons seeking possession of the mortgaged properties pursuant to the terms of the mortgage. Possession was sought on foot of the mortgage indenture of 12 June 2003 and pursuant to O. 54, r. 3 of the Rules of the Superior Courts ("RSC") which rule provided: -

"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or person having the right to redeem any mortgage, whether legal or equitable, may take out a special summons for relief of the nature or kind specified in Order 3(15), (15A) or (15B)."

8. The special summons proceedings were fully defended by the appellant and ultimately on 23 June 2008 Dunne J. in the High Court granted IIB Homeloans an order for possession of the two mortgaged properties.

9. The appellant appealed the orders on or about 16 July 2008 to the Supreme Court. There were significant delays in the said appeal being progressed. The appellant lodged a certificate of readiness with the Supreme Court Office in February 2010. The appeal came on for hearing in April 2014 and judgment was delivered on 12 November 2014. The Supreme Court dismissed the appeal and affirmed the order of the High Court dated 23 June 2008.

Leave to issue execution order

10. About six months following dismissal of the appeal by the Supreme Court, IIB Homeloans brought an application to the High Court seeking leave to issue an execution order pursuant to the order for possession of 23 June 2008. Leave to issue execution was granted on 18 May 2015 and on foot of same, an execution order issued on 3 July 2015. The order for possession issued to the Sheriff of the City of Dublin for recovery of possession of the two mortgaged properties on 22 September 2015.

11. The evidence was that in or about the year 2015, subsequent to the conclusion of the Supreme Court appeal, it first became apparent to the mortgagee that both mortgaged properties were in occupation and possession of third parties. In the case of 31 Richmond Avenue, same had been subdivided into seven residential units, all of which were occupied. In respect of 21 Little Mary Street, Dublin 1, it comprised three residential units which were occupied together with part of the premises occupied by an organisation. In those circumstances IIB Homeloans did not proceed to enforce the execution order at that time. It appears the mortgagee hoped that the rental income would be applied to discharge the debt.

12. Over the ensuing years there was limited contact between the appellant and IIB Homeloans or its successor, although the appellant in the months of November and December 2017 made contact and also attended at the offices of KBC Bank Ireland plc to raise issues over alleged overcharging, imposition of additional charges and alleged breaches of the consumer codes.

13. By a notice of motion issued on 25 October 2017 liberty to issue execution of the possession order was sought. In addition an order was sought amending the title of the plaintiff from IIB Homeloans to KBC Bank Ireland plc. The appellant opposed the application.

The judgment

14. In her judgment Costello J. noted at para. 9 that the properties remained occupied and the appellant received rental income from both which he did not remit to the respondent. She found that as of 30 January 2018 the total sum due and owing by the appellant was €2,068,765.17. The last payment made by the appellant on the loan account was in the month of February 2008.

15. The judgment traced the factual, procedural and statutory process resulting in the acquisition by KBC Bank Ireland plc of the mortgagee's interests and rights, noting that by special resolution dated 2 October 2008, IIB Homeloans changed its name to KBC Mortgage Bank and a certificate of incorporation on the change of name was issued by the Companies Registration Office on 24 October 2008. Thus the change of name took effect over one year and ten months subsequent to the institution of the 2006 proceedings. The judgment outlined the statutory process whereby KBC Mortgage Bank entered into a scheme of transfer pursuant to s. 33 of the Central Bank Act 1971, as amended, which was duly approved on 3 April 2009 by the Minister for Finance pursuant to s. 33 of the Central Bank Act and under and by virtue of S.I. No. 125 of 2009 whereby the business of KBC Mortgage Bank was transferred to KBC Bank Ireland plc.

16. At para. 8 the trial judge noted:-

> "…In November 2017 the defendant contacted the plaintiff to complain about alleged overcharging in respect of his loan and additional charges in breach of the consumer codes at the Central Bank and on the 29th December, 2017 he attended at the office of KBC Bank Ireland Plc at Sandwith Street, Dublin 2 apparently without prior arrangement or notification and he was unable to meet with the persons dealing with this matter on behalf of KBC Bank Ireland Plc. The defendant complained in his affidavit of 9th January, 2018 that the plaintiff never invited nor engaged with him for any form of resolution."

17. The judgment noted the appellant's contention that S.I. No. 125 of 2009 had not effected a transfer of the order for possession made in the proceedings in June 2008 and that the original and existing plaintiff, IIB Homeloans, had not proved that the order for possession had been transferred to the intended plaintiff, KBC Bank Ireland plc. The court noted that the main ground upon which the appellant opposed the grant of leave to issue an execution order was his contention that an order for possession was not assignable and that the order for possession in the instant case had not been assigned. Reliance had been placed on the decision of the English Court of Appeal in *Chung Kwok Hotel Co. Ltd. v. Field* [1960] 1 W.L.R. 1112.

18. The trial judge observed at para. 15: -

> "…There is no question of the order for possession being assigned to KBC Bank Ireland plc. It was the plaintiff in the proceedings when the final order was made. Therefore, the defendant's argument simply does not arise on the facts of this case."

19. A third ground argued at the hearing was that an applicant for an execution order had not shown compliance with the requirements of O. 9, r. 14 RSC. Order 9, r. 14 requires that an affidavit of service of a summons in certain actions for recovery of land shall state that the deponent does not know of and does not believe that there is any person, other than those who have been served, in the actual possession or in receipt of the rents and profits of the land sought to be recovered, or any part thereof and that same be verified by an affidavit of the plaintiff or a solicitor for the plaintiff. The trial judge held that O. 9, r. 14 referred to the affidavit of service of the special summons and further: –

> "…There is nothing in the rule to suggest that it should apply to an execution order in respect of an order for possession granted pursuant to such summons. It is clear that an execution order may be executed within a year from its issue without any application to court (O. 42, r. 20). It follows that it is not necessary to consider at the execution stage of proceedings whether there are other parties who may be in possession of the land or in receipt of rents and profits or that there may have been developments in that regard since the date of the order for possession. It is envisaged that the interests of those parties will be dealt with prior to the pronouncement of the order for possession and that account of their interests will be taken by the court in any terms attached to the order for possession." (para. 17)

20. The court noted at para. 18, regarding O. 42, r. 24: –

> "In contrast to rule 20, rule 24 provides that the court may…order that any issue or question necessary to determine the rights of the party shall be tried 'in any of the ways in which any question in an action may be tried'. The rule expressly provides that the court may impose such terms as to costs or otherwise as shall be just. There is no indication that there is an express requirement to comply with the terms of O. 9, r. 14 and I am satisfied that the defendant's argument in this regard is incorrect."

21. Costello J. considered a further argument advanced on behalf of the appellant that the bank was not entitled to an order pursuant to O. 42, r. 24 and failed to bring itself within the scope of the rule, it being contended that the bank, in addition to compliance with O. 42, r. 24(a), was obliged to also demonstrate that it came within the provisions of O. 42, r. 24(c) before being entitled to apply to the court for leave to issue execution and that the said sub-rule did not apply to the bank. The trial judge held at para. 20 that the argument was without merit. She determined that O. 42, r. 24 sub-rules (a), (b) and (c) operate thus: -

> "…It is clear that the rule envisages three separate cases where a party may apply to the court for leave to issue execution. The rule is not confined to sub-rule (c). The construction of the rule advanced by the defendant means that sub-rules (a) and (b) are otiose and further that persons who come within either of those sub-rules may not apply for leave to issue execution. I am satisfied that the rule applies to all three situations set out in the three sub-rules and this is underscored by the fact that at the end of each sub-rule there is a semicolon. The plaintiff brings the application

under sub rule (a) and it is entitled to do so as it comes within the scope of that sub-rule." (para. 20)

22. It was contended that there had been a misuse of confidential information by IIB Homeloans in providing information concerning the loans to KBC Bank Ireland plc. The trial judge held at para. 21 that this argument was without merit. She based that decision firstly on the terms of the indenture of mortgage executed by the appellant on 12 June 2003 which:-

> "…expressly irrevocably and unconditionally authorised IIB Homeloans Ltd to disclose the information which he now says was wrongfully disclosed to KBC Bank Ireland plc in circumstances where KBC Bank Ireland plc is the transferee of the loans and the indenture of mortgage pursuant to the scheme of transfer approved by the Minister for Finance by S.I. 125 of 2009 and pursuant to s. 33 of the Central Bank Act, 1971." (para. 22)

She was satisfied that Clause 11(iii) of the mortgage operated as consent for the purposes of s. 8(h) of the Data Protection Act 1988.

23. The judgment likewise rejected the appellant's contention that IIB Homeloans had no right to sell the appellant's loans without his consent.

24. The court noted that a final argument advanced by the appellant in opposition to the application for an order for execution was that the initial order for possession had not been executed and the respondent had delayed in seeking to recover possession of the two properties without adequate explanation for the delay such that the bank had in fact forfeited its right to execute the order in the circumstances. At para. 8 the trial judge had noted that:-

> "…The execution was therefore put on hold 'in the hopes that the defendant would engage to address the liabilities outstanding to the plaintiff or, at a minimum, to remit the rental income being generated by the subject properties to the plaintiff.'"

25. Having analysed the various periods of time in question, noting the affidavit of Mr. Andrew Groarke Keenan explaining why the respondent exercised its discretion in refraining from enforcing the order obtained by it on 18 May 2015 granting leave to issue an execution order, the court concluded: -

> "…The defendant has benefitted from a delay of upwards of ten years when he has continued to enjoy the use of the properties and to receive the rents from the properties. On the other hand, the secured creditor has received neither repayment on foot of the loans nor had the benefit of any income generated by the properties. In the circumstances I have no hesitation in exercising my discretion in favour of the plaintiff and in granting it leave to issue an execution order pursuant to the order in these proceedings dated 23rd June, 2008." (para. 28)

The order

26. The court ordered that the title to the proceedings be amended and that KBC Bank Ireland plc be substituted for IIB Homeloans as the plaintiff in the proceedings – a copy of the order to be entered up with the proper officer in the Central Office of the High Court. It was further ordered pursuant to O. 42, r. 24 RSC that the respondent have leave to issue an execution order pursuant to the order for possession made in the High Court in the within proceedings on 23 June 2008.

Notice of appeal

27. The grounds of appeal contend, *inter alia*, that the trial judge erred:

    (1) in finding the appellant owed the sum of €2,068,765.17 and in finding there was no relevance to his contentions that he was subjected to "a rapacious level of overcharging by the plaintiff/respondent";

    (2) in holding that the Central Bank Act 1971 effected a substitution of KBC Bank Ireland plc for the original plaintiff/respondent;

    (3) in holding that an assignment of the order for possession to KBC Bank Ireland plc was unnecessary prior to granting leave to issue the execution order;

    (4) in holding there was no requirement for the bank to comply with the provisions of O. 9, r. 14 prior to the grant of an order for execution;

    (5) in holding that the bank qualified for inclusion within the scope of O. 42, r. 24 and was accordingly entitled to the relief claimed;

    (6) in holding that there had been no abuse/wrongful disclosure of confidential data of the appellant to the respondent and its predecessors/successors *ad litem*;

    (7) in holding that IIB Homeloans was lawfully entitled to sell the appellant's loans to KBC Bank Ireland plc;

    (8) in holding that there was no unreasonable and unexplained delay in enforcing the earlier execution order; and,

    (9) in exercising her discretion to grant leave to the bank to issue an execution order despite "unreasonable delay in enforcing the earlier execution order".

Discussion

Ground 1: Interest

28. The assertion of overcharging was alluded to only tangentially by the appellant before the High Court. In his replying affidavit filed on 10 January 2018 there is reference to an "effort to resolve matters" and copy of a letter to the respondent dated 13 November 2017 is exhibited referring to "Overcharging of loan and additional charges in breach of the consumer codes of the Central Bank". It is noteworthy that in that correspondence what the appellant sought was "to lodge a complaint in line with the Central Bank guidelines on such matters."

29. It was for the appellant to develop and argue such avenues of defence before the High Court as were considered appropriate. This court should accordingly refrain from effectively embarking on a substantially new ground of defence at appeal stage where same was not properly agitated at first instance. Such a contention, even if proven, could not give rise to a valid ground of opposition to the making of an order for execution pursuant to O. 42, r. 24(a).

Ground 2: Substitution of KBC Bank Ireland plc

30. The recitals in S.I. No. 125 of 2009 clearly identify the statutory process pursuant to the Companies Acts 1963 to 2006 whereby the original plaintiff was first incorporated on 4 March 1988 under the name Ayrsome Ltd. Thereafter on 31 January 1989 it changed its name to Irish Life Homeloans Ltd. Subsequently on 6 December 1999 it changed its name to IIB Homeloans Ltd. Then on 24 October 2008 it changed its name to KBC Mortgage Bank. KBC Mortgage Bank was the holder of a licence in relation to banking business in the State granted on 24 October 2008 pursuant to s. 9 of the Central Bank Act 1971. Thus, simply put, at the date of institution of the above entitled proceedings on or about 29 November 2006, it operated as IIB Homeloans Ltd. Almost two years later it effected a name change to KBC Mortgage Bank on 24 October 2008.

31. As S.I. No. 125 of 2009 recites, KBC Bank Ireland plc was a public limited company incorporated on 14 February 1973 under the name Irish Inter-Continental Holdings Ltd. Thereafter on 25 April 1973 it changed its name to Irish Intercontinental Bank Ltd. On 29 March 2006 it re-registered as a public limited company under the name IIB Bank plc. On 24 October 2008 it changed its name to KBC Bank Ireland plc. It was the holder of a licence in relation to its banking business in Ireland granted on 17 May 1973 pursuant to s. 9 of the Central Bank Act 1971. Accordingly at the date of execution of the statutory instrument by the Minister for Finance on 3 April 2009 both the transferor bank, KBC Mortgage Bank, and the transferee bank, KBC Bank Ireland plc, were the holders of valid operative licences granted pursuant to s. 9 of the Central Bank Act 1971. Thus there was clear *prima facie* compliance with s. 33(1) of the Central Bank Act 1971.

32. S.I. No. 125 of 2009 was effected pursuant to the enabling provision of s. 33 of the Central Bank Act 1971. The Interpretation Act 2005 treats all statutory instruments as enactments.

33. Section 33 of the Central Bank Act 1971 is to be found in Part III of the said Statute and deals with the transfer of banks. It establishes a statutory mechanism for the transfer of the undertaking, assets and business of a licenced bank to another financial institution. Schemes have been approved pursuant to s. 33 on over twenty occasions whereby approval is granted by the Minister for Finance for the transfer of a bank undertaking.

34. The order made by the Minister for Finance pursuant to s. 33 of the Central Bank Act 1971 and embodied in S.I. No. 125 of 2009 effected the statutory transfer of the banking undertaking and business of KBC Mortgage Bank to KBC Bank Ireland plc in accordance with the transfer scheme. The concern identified by the appellant that the benefit of the judgment and order for possession of 23 June 2008 did not pass to the transferee, KBC

Bank Ireland plc, in June 2009 by virtue of S.I. No. 125 of 2009 is addressed at Clause 8(1) of the statutory instrument where it provides: -

"8. (1) Subject to paragraph (2), on the Transfer Date—

(a) any…loan agreement, facility agreement or facility letter, …charge, mortgage, assignment, …undertaken or entered into by the Transferor with any person in the course of or incidental to the business in force or in effect immediately before the Transfer Date shall be transferred or assigned or deemed to have been transferred or assigned to the Transferee and shall become from that date a contract, agreement or instrument between the Transferee and that person with the same rights and subject to the same obligations and incidents…as would have been applicable thereto if such contract, agreement or instrument between the Transferor and such person had continued…and the proceeds of any claims, awards and judgements which at the Transfer Date are or may be or become receivable or received by the Transferor pursuant thereto and all other rights and benefits whatsoever accruing to the Transferor under or by virtue of any such contract, agreement or instrument shall become due and payable by that person to the Transferee instead of the Transferor…" (emphasis added)

Section 41 of the Central Bank Act 1971

35. It is noteworthy that in a judgment delivered on 22 February 2018, F*irst Active plc v. Cunningham* [2018] IESC 11, [2018] 2 I.R. 300, McKechnie J. made the following observations regarding s. 41 of the Central Bank Act 1971, observing at para. 25: -

"…Section 41 of the 1971 Act, said in the marginal note to concern the continuance of pending legal proceedings, provides as follows:

'Where, immediately before the transfer date, any legal proceedings are pending to which the transferor is a party and the proceedings have reference to the business agreed to be transferred*, the name of the transferee shall on the transfer date be substituted* for that of the transferor and the proceedings shall not abate by reason of such substitution.' (emphasis added).

26. The different constructions, it seems to be me, centre on the proper interpretation of the emphasised portion of the text. Undoubtedly there are different meanings that may be attributed to the word 'shall'. For the respondent, the use of this word means that the process is mandatory and automatic. It leaves no uncertainty as to what is to occur or when it is to occur: no application under the Rules is necessary because the substitution has already occurred automatically as a result of the operation of the section. However, the appellant disputes that this is so, maintaining that an application for substitution under the Rules is required. Under this reading, 'shall' is to be construed as a command to the parties to take action to effect the substitution, rather than indicating an unavoidable and inevitable substitution that operates independent of the taking of any procedural step by the parties."

McKechnie J. continued: –

> "27. This section must be viewed as being ancillary to the substantive provisions of s. 33 of the 1971 Act, and in this case S.I. No. 481 of 2009, by which the business transfer was effected. Section 41 does not disturb or affect the underlying rights and/or obligations of the parties to the relevant proceedings. Its single aim is to regularise the title of extant legal proceedings for administrative purposes. In my view, effect is given to the intended purpose of the section by permitting such change to be brought about in as procedurally straightforward and simple a manner as the provision itself permits. Accordingly, despite the appellant's arguments to the contrary, I am of the view that the proper construction of the section is that the substitution of the title of the proceedings occurs automatically. Thus without more, *i.e.*, by automatic process, at least for the purpose of the business transaction, the substitution in respect of legal proceedings is concluded. Indeed it is not clear that the appellant disputes this interpretation, but rather maintains that an application to the court is nonetheless required to regularise the proceedings. I cannot agree. As the substitution occurs pursuant to statute, it obviates the need for a formal application under the Rules of the Superior Courts, for of course the 1971 Act cannot be subordinated to the Rules (see, for example, *Luby v. McMahon* [2003] 4 I.R. 133). Thus, as a matter of substantive law, the name of Ulster Bank was substituted for that of the respondent as of the date of the transfer, and accordingly the subsequent judgments and orders stand to be read in favour of Ulster Bank. This is the plain meaning of the section and the natural consequence of the statutory process therein described."

36. McKechnie J. observed, regarding Part III of the 1971 Act (of which s. 33 forms part), that "Part III of the 1971 Act ensures the continuity of banking relationships" (para. 11). In that judgment he had to consider the legal effect of the approval of a scheme of transfer by order pursuant to s. 33 of the 1971 Act.

37. At para. 32 of the judgment McKechnie J. addressed the issue as to how the court ought best to address a position where the provisions of O. 15, r. 14 RSC permits the substitution of a plaintiff only before or at the trial of the action and therefore that same cannot be done when judgment has been delivered. He observed: -

> "…However, as stated above (para. 27, *supra*), the automatic statutory substitution envisaged by s. 41 of the 1971 Act operates external to the Rules and does not require any formal application to be made thereunder; indeed, as also pointed out, the requisite change should be effected by the trial judge simply upon notification of the transfer. If this be correct, as I believe it to be, it follows that any necessary amendment to the title of the proceedings to reflect the provisions of that section can also be made by this court…"

The appellate judge proceeded to substitute the name of Ulster Bank for First Active, stating: –

"…For the reasons above explained, the failure to make this procedural amendment prior to this stage does not have the consequences claimed by the appellant, and this ground of appeal must be dismissed."

38. In the instant case the clear terms of the order of 12 November 2014 of the Supreme Court are worthy of note in that regard. It is recited that the appeal was from the judgment and order of the High Court (Dunne J.) given and made on 23 June 2008. It was expressly ordered and adjudged that the appeal be dismissed and "the said order of the High Court do stand affirmed accordingly".

39. It will be recalled that subsequent to the order for possession being made in the High Court, IIB Homeloans had changed its name to KBC Mortgage Bank on 24 October 2008. The transferee had also on 24 October 2008 changed its name from IIB Bank plc to KBC Bank Ireland plc. The order of the Supreme Court made on 12 November 2014 operated for the latter's benefit. It did so by act and operation of law, there being no necessity to amend the title to the proceedings. As such therefore, the order of the High Court together with the benefit of the proceedings constituted a constituent element of the "proceeds of any claims, awards and judgments", referred to in S.I. No. 125 of 2009 as forming part of the banking business of KBC Mortgage Bank, all rights on foot of the said orders having automatically come to vest in the respondent, KBC Bank Ireland plc.

Banking licence

40. A further point raised is that IIB Homeloans did not have a banking licence from 1999 to 2008, a period of time when loans were advanced to the appellant and when proceedings for recovery of the loans were instituted. It was argued that the transfer of the benefit of a possession order obtained in such circumstances is a void. However this submission does not withstand scrutiny. No authority has been identified to support the proposition. The original lender was clearly defined in the indenture of 12 June 2003 as including IIB Homeloans and its "successors and assigns". There was no delimitation to be found on the face of the mortgage instrument itself as to the status of a party to whom the mortgagee could transfer its interest pursuant to the mortgage deed.

41. S.I. No. 125 of 2009 indicates in the recitals that the transferor was the holder of a licence in relation to banking business in Ireland from 24 October 2008 pursuant to s. 9 of the Central Bank Act 1971. Nothing in the indenture of mortgage of 12 June 2003, the contractual instrument governing the relationship between the parties, required the holder of the mortgagee's title for the time to hold a banking licence. The entitlement to the said order was clearly established in accordance with the express terms of the mortgage deed between the parties.

42. As and from 26 June 2009, the "Transfer Date" specified in S.I. No. 125 of 2009, KBC Bank Ireland plc constituted the plaintiff in the above entitled proceedings by act and operation of law. Thereupon there came to vest in KBC Bank Ireland plc all the rights, title and interest of the original mortgagee, IIB Homeloans, in the mortgage, the related litigation and orders.

43. Under and by virtue of S.I. No. 125 of 2009 and in accordance with its tenor, all the estate, right, title and interest hitherto held by IIB Homeloans on foot of the legal mortgage of 12 June 2003 vested in KBC Bank Ireland plc in accordance with, *inter alia*, Clause 5 in the operative part of the deed and thereby the latter came to acquire the mortgaged properties insofar as held as a freehold tenure in fee simple subject to the proviso for redemption contained in the mortgage deed itself.

44. The issues raised by the appellant in this appeal have to be considered in their context. A fundamental aspect of the relationship between the appellant and the original mortgagee is that the mortgage was created by way of a legal mortgage which in law conferred enhanced rights on the mortgagee. In particular there was a general common law rule that a mortgagee to whom a legal estate had been conveyed by way of a deed of mortgage was entitled to possession of the property. Further, in the context of a legal mortgage, possession was distinguishable from other powers of a mortgagee in that it was regarded as a right and not a remedy.

Ground 3: Assignability of the order for possession

45. The appellant asserts that an express assignment of the order for possession made by Dunne J. in the High Court on 23 June 2008 and affirmed by the Supreme Court on appeal on 12 November 2014 was a necessary prerequisite to granting leave to issue the execution order.

46. An alternative argument advanced by the appellant is that the respondent did not acquire the benefit of the order of the High Court of 23 June 2008 granting possession as same was not capable of assignment.

47. Reliance is placed on *obiter* observations of the English Court of Appeal in *Chung Kwok Hotel Co. Ltd. v. Field*. However a number of significant distinguishing elements arise in relation to that judgment which concerned the relationship of landlord and tenant in circumstances where a statutorily protected tenant had been the subject of an order for possession in the County Court. The ultimate sub-purchaser executed both a deed of trust declaring that he held the property in trust for a named company and a deed transferring the property to that company. However, he did not transfer to the company the rights and benefit he had acquired under a separate agreement which at the contract stage had been entered into and executed between the vendor/landlord and the original purchaser, agreeing to sell the property subject to and with the benefit of the order for possession. Such a factual matrix bears no relationship to the facts in the instant case where the mortgagee never held subject to a binding tenancy, still less a statutorily protected one as arose in *Chung Kwok*.

48. It is relevant that that case concerned the interests of a statutorily protected tenant and that there were significant deficiencies in the transfer executed by the purchaser company; the court noting at p. 1114: -

> "…but very unfortunately he omitted to transfer that right to the plaintiff company, merely executing in their favour a common form registered transfer. Consequently,

so far as I can see, the company has not the benefit of the covenant with Mrs. Silvester that it was so desirable they should have."

Ultimately at issue in *Chung Kwok* was a conveyancing transaction governed by the English Law of Property Act 1925. It is noteworthy that as regards the assignability of an order for possession in general, Harman L.J. (with whom Hodson and Ormerod L.JJ. agreed) observed at p. 1115: -

> "I do not think that it is necessary to decide finally whether an order of this kind is assignable at law."

It is material that the appellant did not identify any decision over the ensuing sixty years where the case of *Chung Kwok* was applied or even considered as authority for the proposition for which it was advanced in this appeal. The *Chung Kwok* decision is accordingly not relevant to the interpretation of a statutory process of vesting.

49. The mortgagee had an interest in the property as specified in the mortgage instrument and the order for possession was obtained and took effect wholly or substantially out of that interest and operated in accordance with its tenor as a legal chose in action. As such, it was a right appendant to the mortgagee's interest in the mortgaged properties.

50. Nothing stated in *Chung Kwok* can trench on the effect of S.I. No. 125 of 2009 and s. 33 of the Central Bank Act 1971. The statutory instrument makes clear at Clause 8(1)(a) that with effect from the transfer date, defined to mean 26 June 2009, there was or was deemed to have been transferred to and vested in the transferee, *inter alia*:-

> "…the proceeds of any claims, awards and judgments which at the Transfer Date are or may be or become receivable or received by the Transferor pursuant thereto and all other rights and benefits whatsoever accruing to the Transferor under or by virtue of any such contract, agreement or instrument…"

51. Section 33, as amended, provides: -

"(1)– Whenever the holder of a licence… (in this Part referred to as the transferor) agrees to transfer, in whole or in part, to another holder of a licence (in this Part referred to as the transferee) the business to which the licence…relates and all or any of the other assets and liabilities of the transferor –

(a) the transferor and transferee may, before the date on which the transfer is intended to take effect (in this Part referred to as the transfer date), submit to the Minister for his approval a scheme for the transfer,
(b) the transferor and transferee shall, not less than one month before the transfer date, publish notice of the transfer in at least one daily newspaper published in the State,
(c) the Minister, after consultation with the Bank, may, not less than two months before the transfer date, either approve of or decline to approve of the scheme by order (in this section called a 'transfer order'),

(d) if the Minister approves of the scheme—

(i) the assets and liabilities of the transferor described in the scheme shall be transferred under the transfer order, and

(ii) if the scheme so provides, sections 34 to 39 and 42 have effect in relation to the transfer, but only to the extent that the scheme so provides,

(e) the Minister, if the transferor and transferee so request—

(i) may include in the transfer order such incidental, consequential and supplemental provisions as he or she thinks appropriate for facilitating and implementing the transfer and securing that it is fully and effectively carried out, including provisions for substituting the name of the transferee for the transferor or otherwise adapting references to the transferor in any instrument, and

(ii) may provide in the transfer order for such transitional matters, including the sharing of assets and other contracts, as the Minister considers appropriate,

and

(f) a transfer order takes effect notwithstanding:

(i) any duty or obligation to any person;

(ii) any provision of any enactment, rule of law, code of practice or agreement providing or requiring—

I. notice to any person, or

II. the consent, approval or concurrence of any person.

(2) An order under subsection (1) of this section or under this subsection may, after consultation with the Bank and with the consent of the transferor and the transferee to whom it relates, be amended by the Minister by order."

52. The statutory transfer in its entirety of a banking business to another pursuant to s. 33 of the Central Bank Act 1971 bears no relationship to the matters under consideration in *Chung Kwok*. Accordingly the said decision is of no assistance to the appellant.

53. The contention at ground three of the notice of appeal that the trial judge erred in holding that an assignment of the order for possession was unnecessary prior to granting leave to issue an execution order is fundamentally misconceived. When, by act and operation of law on 26 June 2009, KBC Bank Ireland plc stepped into the shoes of KBC Mortgage Bank (formerly, IIB Homeloans), all the rights and interest of KBC Mortgage Bank in the *lis* and all orders and constituent aspects of the litigation as a chose in action came to vest in KBC Bank Ireland plc by act and operation of law.

54. The within special summons was in being at the date of execution of S.I. No. 125 of 2009 by the Minister on 3 April 2009. The principles outlined by McKechnie J. in *Cunningham* applied *mutatis mutandis* in respect of the within litigation. Demonstrably the operation of S.I. No. 125 of 2009 coupled with ss. 33 and 41 of the Central Bank Act 1971 resulted in

KBC Bank Ireland plc being substituted as plaintiff in the proceedings. The automatic statutory substitution clearly envisaged by s. 41 of the 1971 Act operates *dehors* the Rules of the Superior Courts. There never was any requirement for a formal application to be made since it was always open to the plaintiff to apply to formalise the legal position and such an application was open to be made in any court seised of any issue in relation to the proceedings. Indeed that position is confirmed by McKechnie J. at para. 32 of the aforesaid judgment: -

> "If this be correct, as I believe it to be, it follows that any necessary amendment to the title of the proceedings to reflect the provisions of that section can also be made by this court: the powers of the Supreme Court on appeal are set out in O. 58, r. 29 RSC, which provides that, subject to the provisions of the Constitution and of statute, this court (a) has on appeal, and may exercise or perform, all the powers and duties of the court below, and (b) may give any judgment and make any order which ought to have been made and may make any further or other order as the case requires."

55. The same principle applies *mutatis mutandis* to the Court of Appeal having regard to O. 86A, r. 2(1).

Ground 4: Order 9, r. 14

56. The appellant contends that, in relation to the application now before the court which was instituted by way of a notice of motion filed on 25 October 2017, there was non-compliance with O. 9, r. 14 RSC which provides:-

> "Every affidavit of service of a summons in other actions for recovery of land, shall state that the deponent does not know of and does not believe that there is any person, other than those who have been served, in the actual possession or in receipt of the rents and profits of the land sought to be recovered, or any part thereof, and the said statement shall be verified by the affidavit of the plaintiff or of one of the plaintiffs, or of the solicitor for the plaintiff".

57. The proceedings under consideration in the said rule are the original proceedings seeking possession which were instituted in 2006 bearing record no. 2006/623 SP. The relevant date is the date of service of the special summons. On their face, O. 9, rr. 13 and 14 require express confirmation in the affidavit of service that the said rules have been complied with. The time to raise any issue, if it was being suggested that there was a deficit in compliance with the rules, was in the course of the said proceedings before the High Court. It is noteworthy that when the order for possession was made on 23 June 2008, the appellant was represented by solicitor and counsel. No point was taken regarding non-compliance with O. 9, r. 14. Neither was it a ground of appeal to the Supreme Court. Such a novel point cannot now be re-opened over twelve years after the order for possession was made and over six years after the appeal was dismissed by the Supreme Court.

58. The trial judge correctly identified that O. 9, r. 14 pertains to the affidavit of service of the original summons in the suit. It is not engaged where the issue before the court is an

application to effect execution of an order for possession granted pursuant to the special summons in question.

59. If the appellant as mortgagor subject to an order for possession made in open court in the presence of his counsel in June 2008 has seen fit to subsequently place third parties in occupation and possession of the said property on any basis, such conduct on the part of the appellant was wrongful and in breach of the order. The appellant, as a mortgagor who has resisted the mortgagee's valid demand for possession in the manner in which he has done, automatically becomes a trespasser as is well established in law having regard to authorities such as *Birch v. Wright* (1786) 1 Term Rep. 378 at p. 383 and *Jolly v. Arbuthnot* (1859) 4 De G. & J. 224 at p. 236.

60. The respondent sought to invoke, if necessary, O. 124, r. 1 and I am satisfied that were non-compliance with O. 9, r. 14 sustainable as a ground of appeal in the instant case same ought to be refused for not having been made within a reasonable time.

Ground 5: Order 42, r. 24

61. The fifth issue raised was that the bank was not entitled to an order pursuant to O. 42, r. 24 and that it did not come within the scope of the rule, it being contended that the bank was obliged to also demonstrate that it came within the provisions of O. 42, r. 24(c)

62. It will be noted that the opening line of O. 42, r. 24 provides: -

"In the following cases, *viz*.: -

(a) where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;

(b) …

(c) where a party is entitled to execution against any of the shareholders of a company upon a judgment recorded against such company, or against a public officer or other person representing such company…" (emphasis added)

It is clear that (a), (b) and (c) pertain to discrete circumstances in which a party alleging entitlement to execution may apply to the court for leave to issue execution. It cannot be sensibly suggested that r. 24 envisages that an applicant, such as the respondent, who alleges entitlement to execution and moves an application before the High Court for leave to issue execution is obliged to demonstrate that it comes within the provisions of O. 42, r. 24(c). It is clear that the respondent came within the rubric of O. 42, r. 24(a). That sufficed to engage the operation of the rule.

Ground 6: Data

63. There is an express declaration on the part of the borrower at Clause 11(iii) of the mortgage, irrevocably and unconditionally authorising the lender in connection with any

proposed transfer, assignment, disposal, sub-mortgage, sub-charge, trust or arrangement of the mortgage to disclose details of the agreement including: –

> "…without prejudice to the generality of the foregoing any information and documentation in the Lender's possession in relation to the Borrower, the mortgage loan and the Lender's mortgage security over the Mortgaged premises and so far as such information constitutes personal data within the meaning of the Data Protection Act, 1988, this authority shall be a consent for the purposes of section 8(h) of the said Act."

The appellant gave clear consent for the purposes of s. 8(h) of the Data Protection Act 1988.

Ground 7: Was the mortgagee entitled to sell the appellant's loans to KBC Bank Ireland plc?

64. The indenture of mortgage is dated 12 June 2003 and a memorial of same was registered in the Registry of Deeds on 1 August 2006. The indenture created a legal mortgage over the two mortgaged premises. IIB Homeloans as "the Lender" was defined as follows, "which expression shall where the context so admits or requires include its successors and assigns". This legal mortgage operated by way of a conveyance to the mortgagee, IIB Homeloans.

65. The mortgage contains the following express proviso:-

> "11. It is hereby agreed and declared as follows:-
>
> …
>
> (iii) The Borrower hereby acknowledges the Lender's right, without any further consent from or notice to the Borrower, to transfer the benefit of this Mortgage, the Mortgage loan and the Lender's mortgage security (including any insurance policy or policies of life or endowment term assurance) over the Mortgaged Premises to any person, company or corporation on such terms as the Lender may think fit, without any further consent from or notice to the Borrower or any other person or any consequential assurance or reassurance or release under such scheme whereupon all powers and discretions of the Lender shall be exercisable by the transferee."

66. In light of the clear terms of the mortgage which the appellant executed, the mortgagee's interest was clearly alienable. This ground of appeal is unsustainable.

Grounds 8 and 9: Delay

67. It is clear from the jurisprudence, particularly the decision of the Supreme Court in *Smyth v. Tunney* [2004] 1 I.R. 512, that O. 42, r. 24 is a discretionary order and reasons must be given for the lapse of time since the judgment or order during which execution did not occur. Even where a good reason is identified for the delay, the court can take into account counterbalancing arguments of prejudice. It is noteworthy that in *Smyth v. Tunney*, as in the instant case, orders sought to be executed had been made in the course of long running litigation, and leave to issue execution pursuant to O. 42, r. 24 had been made some twelve

years or so later. It is also noteworthy that the reasons identified for lapse in time in *Smyth v. Tunney* included that the applicants had made a number of unsuccessful attempts to execute.

68. In the subsequent judgment of *Bula Ltd. v. Tara Mines Ltd.* [2008] IEHC 437, Dunne J. extrapolated three principles from the said decision:

(1) Order 42, r. 24 is a discretionary order.

(2) Reasons must be given for the lapse of time since the judgment or order during which execution has not taken place.

(3) If there is good reason for the delay, the court must consider counterbalancing allegations of prejudice.

69. The judgment has been subject to extensive academic analysis and consideration including Collins, *Enforcement of Judgments* (2nd ed., Round Hall, 2019) where the author observes at Chapter 3, Section 6: -

> "…The combination of a light onus on a judgment creditor to provide reasons for the delay, coupled with a general difficulty in establishing prejudice on the part of the judgment debtor, suggests that for such applications brought 6–12 years after the date of the order or of recovery of the judgment the court will generally extend time." (para. 3–47)

Conclusions

Ground 1: Interest

70. This ground of appeal was not pursued at the hearing of the appeal or in the written submissions to any extent. For completeness I am satisfied that the issue of alleged overcharging of interest raised in 2017/2018 could not, on the facts of this case, afford an answer in law to the application for an order pursuant to O. 42, r. 24 RSC seeking leave to issue an execution order pursuant to the order for possession granted on 23 June 2008 or the order sought to amend the title of the plaintiff. The properties remain occupied and the appellant receives rental income from both properties which he does not remit to the respondent. As of 30 January 2018 the total sum due and owing by the appellant was €2,068,765.17 and the last payment made on the loan account was in February 2008, more than ten years ago.

71. The finding of the trial judge that the sum of €2,068,765.17 was due was in accordance with the evidence and cannot be disturbed.

Ground 2: Substitution of KBC Bank Ireland plc

72. The second ground is answered by the operation of S.I. No. 125 of 2009 which had the effect, pursuant to the Central Bank Act 1971, of automatically substituting KBC Bank Ireland plc for KBC Mortgage Bank (formerly IIB Homeloans) by act and operation of law. I am satisfied that S.I. No. 125 of 2009 was effective to vest in the transferee, without more, the benefit of the judgment and orders obtained by the original mortgagee.

73. It follows accordingly that the trial judge correctly identified the relevant statutory and regulatory provisions as can be seen from paras. 10 and 11 of her judgment. The *lis* and all rights, interests and subsisting orders operating for the benefit of the original plaintiff in the proceedings had vested automatically in KBC Bank Ireland plc by act and operation of law. Having due regard to s. 41 of the Central Bank Act 1971, the trial judge was perfectly correct in her analysis that it was not as a matter of law necessary to amend the title of the proceedings from IIB Homeloans to KBC Bank Ireland plc. She was entitled to do so in the interests of clarity and legal certainty. I am satisfied accordingly that the contention that substitution of KBC Bank Ireland plc for the original plaintiff had not been effected pursuant to the Central Bank Act 1971 was not established. The contrary was demonstrated to have occurred by act and operation of law.

74. Thus, although the trial judge made a formal order amending the title to the proceedings for good order, it is demonstrable that she was correct in her analysis that such an order was not necessary.

Ground 3: Assignability of the order for possession

75. The contention by the appellant that the benefit of the judgment and order for possession of 23 June 2008 did not pass to the transferee, KBC Bank Ireland plc, is erroneous. The combined effect of s. 33 of the Central Bank Act 1971 and S.I. No. 125 of 2009 demonstrate the contrary. The transfer took effect by act and operation of law on 26 June 2009 having regard to the definition of "Transfer Date" in Clause 2 and the clear terms of Clause 8(1) of the statutory instrument.

76. Accordingly, when the appellant's appeal against the order for possession made by Dunne J. in the High Court on 23 June 2008 was disposed of at the conclusion of the Supreme Court hearing, the said judgment and order made in November 2014 enured for the benefit of the transferee by virtue of S.I. No. 125 of 2009 without any necessity to amend the title to the proceedings.

77. The decision of *Chung Kwok Hotel Co. Ltd. v. Field* is not relevant to and does not address the issue of the statutory vesting in the transferee of the benefit of the order for possession in the mortgaged properties effected in this case. The statutory instrument executed by the Minister for Finance effected by act and operation of law a statutory vesting of, *inter alia*, any relevant judgment and order as pertained to the banking business of the transferor in the transferee in accordance with s. 33 of the Central Bank Act 1971. The tenor and clear terms of S.I. No. 125 of 2009 itself makes that clear. There is no suggestion that the appellant's mortgage was not thereby transferred nor could there be. The 2008 judgment and order for possession as appendant rights obtained by virtue of the mortgagee's title under the mortgage instrument and derived therefrom were encompassed by the terms of S.I. No. 125 of 2009 and transferred automatically to the transferee in June 2009. Further, when the Supreme Court affirmed the order for possession in November 2014, it did so as a matter of law, by virtue of s. 41 of the Central Bank Act 1971, directly for the benefit of the transferee, KBC Bank Ireland plc.

78. It is beyond question that S.I. No. 125 of 2009 operated from 26 June 2009 to automatically vest in the transferee the benefit of the judgment and order for possession made by Dunne J. in the High Court on 23 June 2008 which was then under appeal to the Supreme Court.

79. Alternatively, there is no requirement at law for a specific and discrete assignment of an order for possession for the rights thereunder to pass to a successor in title of the mortgagee who obtained the order in the first place.

Ground 4: Order 9, r. 14

80. The contention that O. 9, r. 14 is engaged when an application is brought before the High Court for the purposes of an execution order in respect of an order for possession is unsound. The right to raise such an issue was temporally spent at the latest when the Supreme Court dismissed the appeal in November 2014.

Ground 5: Order 42, r. 24

81. No authority was identified for a proposition that the sub-clauses (a) to (c) inclusive of O. 42, r. 24 should be construed otherwise than disjunctively. To do otherwise would lead to an absurdity. The rule is directed to addressing distinct circumstances where execution has not taken place within six years from recovery of the judgment or the date of the order, or where a party is entitled to apply to the court for leave to issue execution notwithstanding.

Grounds 6 and 7: Data and entitlement to sell loans

82. These grounds of appeal are not sustainable in light of the clear terms of Clause 11(iii) of the indenture of mortgage dated 12 June 2003. There was continuing express consent operative pursuant to s. 8 of the Data Protection Act 1988.

Grounds 8 and 9: Delay

83. In the circumstances it is clear that leave to issue execution was properly granted by the trial judge based on a consideration of and clear reference to the principles in *Smyth v. Tunney*. There was a good explanation advanced for the delay in executing the order for possession. There was no countervailing prejudice to the appellant demonstrated. In particular, it would appear that the appellant has been in receipt of the rents and profits from the properties throughout the years. The construction contended for in respect of O. 42, r. 24 does not withstand scrutiny.

84. I am satisfied that the contention that the transfer effected pursuant to S.I. No. 125 of 2009 concerned an entity which did not hold a banking licence is erroneous. Further, no argument concerning a banking licence was ever raised when the order for possession was appealed to the Supreme Court where it was affirmed in November 2014. It is unsatisfactory that this entirely novel point was not raised in the High Court on any occasion. No leave to amend the notice of appeal was brought. The findings at para. 23 of the High Court judgment were not appealed. I accept the respondent's contention that it would have had an impact on the evidence adduced before the High Court had the point been raised. The interests of justice lean against introduction of a further novel argument in the context of this appeal.

85. KBC Bank Ireland plc disposed of its interest in the mortgage and all subsisting rights it held *qua* mortgagee prior to the hearing of this appeal. However, given that the assertions advanced in the notice of appeal and arguments trench on its title and the devolution of its title and enforceability of its rights by its successors it has been necessary to determine the above issues to obviate further unnecessary litigation by it or its successors in title.

86. Insofar as the issues determined in appeals 2019/254, 2019/487, 2019/276 and 2019/458 overlap with the issues determined herein the said judgments are intended to be read together.

87. Accordingly, I would dismiss this appeal on all grounds.

88. With regard to costs, as the respondent has been entirely successful in opposing this appeal, my provisional view is that the respondent is entitled to its costs of the appeal. Since the appellant was wholly unsuccessful in this appeal and having regard to O. 99 (recast) and ss. 168 and 169 of the Legal Services Regulation Act 2015 costs follow the event.

89. 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.

90. As this judgment is being delivered electronically, Noonan and Haughton JJ. have indicated their agreement with it.