

THE HIGH COURT

[2006 No. 623 S.P.]

BETWEEN

I.I.B. HOME LOANS LIMITED (FORMERLY IRISH LIFE HOME LOANS LIMITED)

PLAINTIFF

AND

JERRY BEADES

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 29th day of June, 2018

1. In this application the plaintiff seeks an order pursuant to O. 42 r. 24 of the Rules of the Superior Courts granting leave to issue an execution order pursuant to an order dated 23rd June, 2008 and an order amending the title of the plaintiff from IIB Home Loans Ltd to KBC Bank Ireland Plc.

Background

2. On the 29th November, 2006 IIB Home Loans Ltd sought an order for possession of the lands and premises known as 31 Richmond Avenue, Fairview, Dublin 3 and 21 Little Mary Street in the city of Dublin pursuant to O. 54 r. 3 of the Rules of the Superior Courts pursuant to mortgage of indenture dated 12th June, 2003 made between the defendant of the one part and IIB Home Loans Ltd of the other part. The mortgage was registered in the registry of deeds on the 1st August, 2006.

3. On the 23rd June, 2008 Dunne J. in the High Court granted the plaintiff an order for possession of the two premises. The defendant appealed the order on the 16th July, 2008 and he lodged a certificate of readiness with the Supreme Court office in February, 2010. Ultimately the appeal was heard on the 29th April, 2014 and judgment was delivered on the 12th November, 2014 dismissing the appeal and affirming the order of the High Court dated 23rd June, 2008.

4. On the 30th September, 2008 by way of special resolution IIB Home Loans Ltd converted to an unlimited company, IIB Home Loans. The company reregistered as an unlimited company on the 16th October, 2008. By a special resolution dated the 2nd October, 2008 IIB Home Loans changed its name to KBC Mortgage Bank and a certificate of incorporation on the change of name was issued by the company registration office on the 24th October, 2008.

5. In 2009 KBC Mortgage Bank and KBC Bank Ireland Plc agreed to enter into a scheme of transfer. Both KBC Mortgage Bank and KBC Bank Ireland Plc are the holders of a licence in relation to the carrying on of banking business in Ireland granted under s. 9 of the Central Bank Act, 1971. As such s. 33 of the Central Bank Act, 1971 applied to the scheme of transfer. Section 33 provides:

"33. — (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

—

(a) the transferor and transferee may, not less than four months 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,

(d) if the Minister approves of the scheme under this section, the provisions of sections 34 to 39 and 42 of this Act shall, if, and to the extent only that, the scheme so provides, have effect in relation to the transfer,

(e) the Minister may, at the request of the transferor and transferee, include in an order approving of the scheme under paragraph (c) of this subsection such incidental, consequential and supplemental provisions as he thinks appropriate for facilitating and implementing the transfer and securing that it shall be 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 statute or instrument made under statute.

(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."

6. If the scheme of transfer is approved by the Minister, then any account (s. 34) and any security (s. 35) held by the transferor in connection with the business agreed to be transferred as security shall be deemed to have been transferred. Section 41 of the Act provides:

"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."

7. The Minister for Finance approved the scheme of transfer pursuant to s. 33 on the 26th February, 2009 pursuant to S.I. 125 of the 2009:

"Central Bank Act 1971 (approval of scheme of KBC Mortgage Bank and KBC Bank Ireland Plc.) Order 2009 whereas:

"(a) KBC Mortgage Bank (in the following Order referred to as the "Transferor") is a private unlimited company with a share capital incorporated in Ireland under the Companies Acts 1963 to 2006 (no. 129761) on 4 March 1988 under the name Aysome Limited. On 31 January 1989, it changed its name to Irish Life Homeloans Limited. On 6 December 1999, it changed its name to IIB Homeloans Limited. On 24 October 2008, it changed its name to KBC Mortgage Bank. The Transferor carries on a banking business in Ireland from its registered office at Sandwith Street, Dublin 2 and is the holder of a licence in relation thereto granted on 24 October 2008 under Section 9 of the Central Bank Act 1971.

(b) KBC Bank Ireland plc. (in the following Order referred to as the "Transferee") is a public limited company incorporated in Ireland under the Companies Acts 1963 to 2006 (no. 40537) on 14 February 1973 under the name Irish Inter-Continental Holdings Limited. On 25 April 1973, it changed its name to Irish Intercontinental Bank Limited. On 10 January 2000, it changed its name to IIB Bank Limited. 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. The Transferee carries on a banking business in Ireland from its registered office at Sandwith Street, Dublin 2 and is the holder of a licence in relation thereto granted on 17 May 1973 under Section 9 of the Central Bank Act 1971.

AND WHEREAS on 26 February 2009 the Transferor and the Transferee submitted to the Minister for Finance for his approval the Scheme for transfer (in the following Order as referred to as the "Scheme") made by the Transferor and the Transferee on 26 February 2009.

NOW I, BRIAN LENIHAN, Minister for Finance after consultation with the Central Bank and Financial Services Authority of Ireland and, in respect of Articles 4 to 10 of this Order, at the request of the Transferor and Transferee, hereby, in exercise of the powers conferred on me by section 33 of the Central Bank Act 1971 (No. 24 of 1971), order as follows:

[The relevant portions of the Scheme are contained in paragraph 8(1) which states: -]

(1) Subject to para. (2), on the transfer date –

(a) any contract of guarantee, indemnity, letters of credit or other contract or suretyship, loan agreement, facility agreement or facility letter, lease, hire purchase agreement, deposit agreement, charge, mortgage, assignment, pledge, swap, option, forward, future or other derivative contract, bond, warrant, foreign exchange contract or any other contract, agreement or instrument of the type described in Schedule 1 to the Agreement 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 (including rights of set-off) as would have been applicable thereto if such contract, agreement or instrument between the Transferor and such person had continued and any order, instruction, direction, mandate or authority given, whether before or after that date, by that person in relation to any such contract, agreement or instrument and subsisting at the Transfer Date shall apply and have effect after the transfer of the such contract, agreement or instrument to the Transferee as aforesaid and all monies which at the Transfer Date are or may be or become payable to the Transferor pursuant thereto and the proceeds of any claims, awards and judgements which at the Transfer Date are or maybe 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."

8. On the 18th May, 2015 the plaintiff was granted leave to issue an execution order pursuant to the order of the 23rd June, 2008. Pursuant to that order an order for possession issued to the sheriff of the city of Dublin on the 3rd July, 2015 for the recovery of possession of the two properties. When preparations were being made for execution of the order it became clear that 21 Little Mary Street, Dublin 1 was occupied by an organisation and three residential tenants. 31 Richmond Avenue was split into seven residential units which were also occupied. Mr. Andrew Groarke Keenan, solicitor for KBC Bank Ireland Plc, who swore the affidavit grounding the application, said that the plaintiff had very significant concerns in relation to the logistics of executing the order and more importantly the import and effect on the persons residing in the properties of the execution of the order. 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."* 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.

9. The properties remain occupied and the defendant receives rental income from both properties which he does not remit to the plaintiff. As of the 30th January, 2018 the total sum due and owing by the defendant was €2,068,765.17 and the last payment made on the loan account was in February, 2008, more than ten years ago.

Discussion

10. By statutory instrument no. 125 of 2009 the Minister for Finance approved a scheme of transfer by KBC Mortgage Bank to KBC Bank Ireland Plc dated 26th February, 2009. The defendant submitted that the statutory instrument did not transfer the order for possession made in these proceedings in May, 2008 and therefore the existing plaintiff, IIB Home Loans Ltd had not proved that the order for possession had been transferred to the intended plaintiff, KBC Bank Ireland Plc.

11. The transfer scheme was carried out pursuant to s. 33 of the Central Bank Act, 1971. Under s. 41 of the Act the name of the transferee shall be substituted for the transferor in any legal proceedings pending at the transfer date to which the transferor was a party (being proceedings referable to the business agreed to be transferred). The loan and associated security the subject of these proceedings were transferred by Clause 8 of the Order of 2009 on 26 February 2009.

12. The special summons proceedings were pending on 26th February, 2009 as the defendant had appealed the order for possession to the Supreme Court. The proceedings have reference to the business agreed to be transferred by KBC Mortgage Bank to KBC Bank Ireland Plc. Therefore, applying s. 41, the name of the transferee "shall on the transfer date be substituted for that of the transferor". It follows that from that date as a matter of law the proceedings continued with KBC Bank Ireland Plc as the plaintiff. It further follows that it is not as a matter of law necessary to amend the title of the plaintiff to these proceedings from IIB Home Loans Ltd to KBC Bank Ireland Plc. However, in the interests of clarity and legal certainty I order pursuant to s. 41 of the Central Bank, 1971 and S.I. 125 of 2009 that the title of the proceedings be amended and that KBC Bank Ireland Plc be substituted for IIB Home Loans Ltd as plaintiff in these proceedings.

13. The main grounds upon which the defendant opposed the grant of leave to issue an execution order to the plaintiff was that an order for possession was not assignable and the order for possession in this case as a matter of fact had not been assigned. The defendant relied upon the decision of the Court of Appeal of England and Wales in *Chung Kwok Hotel Company Ltd v. Field* [1960] 1 Weekly Law Reports 112. Counsel relied upon the following passage from p. 1115:

"On appeal to this court two points are taken: first that an order for possession of this sort is not assignable at all; secondly, that, even if it is, there has been no assignment. I do not think that it is necessary to decide finally whether an order of this kind is assignable at law. I myself rather doubt it. There would be an obvious difficulty in this case in that the order itself contains an order for costs. Whether you can assign part of an order without the rest seems to me at least very doubtful. On the whole I think that one could not; and I should be inclined to the view without deciding it that this order, or part of the order that deals with possession, is probably not at law assignable."

14. The judgment continued at pp. 1116-7 as follows:

"Mr. Dunn cited in support of that proposition Goldthorpe v. Bain where Jenkins L.J. was dealing with a case of death, and where the bold argument was put up that a judgment for possession, anyhow in a statutory tenancy case, was a thing merely personal to the person who obtained it, and did not devolve on his or her personal representative. That view Jenkins L.J. had no difficulty in rejecting. He used words which, if they were taken without relation to the context in which they were used, might cover a case like the present. He said:

'in such a case the judgment, being one which concerns a proprietary interest of the deceased landlord which would normally pass to the landlord's personal representatives, those representatives, or a beneficiary claiming through them by means of an assent, on proof to the court of the grant of probate and of the assent, if there is one, would prima facie be entitled as of right to an order (under O. 25, r. 6 of the County Court Rules) declaring them entitled to enforce the order for possession.'

That is all he decided; and the fact that he talks about such an assignee being a successive in title does not mean that a mere assignment of the land inter vivos and without more would pass the benefit of an order of this sort. Therefore, it seems to me that the difficulty that the plaintiffs are in is that they have not got an assignment of the benefit of this judgment.

15. The defendant's argument cannot succeed in the light of the wording of Clause 8 (1) (a) of the Order of 2009 approving the scheme of KBC Mortgage Bank and KBC Bank of Ireland Plc when combined with s. 41 of the Central Bank Act, 1971. As of the transfer date KBC Bank Ireland Plc was substituted as plaintiff in the proceedings by operation of law and the proceedings and the proceeds of any claims, awards and judgments and all other rights and benefits whatsoever accruing to the transferor became due and payable by, in this case, the defendant, to the transferee instead of the transferor. The order was affirmed by the Supreme Court in November 2014, long after the transfer date when the KBC Bank Ireland Plc was the plaintiff in the proceedings. 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.

16. A third point raised by the defendant is that the applicant for an order pursuant to O. 42 r. 24 must comply with the requirements of O. 9 r. 14 of the Rules of the Superior Courts. The defendant says that the plaintiff has not complied with this order and this is a reason why the court ought to refuse the application to grant leave to issue an execution order. Order 9 r. 14 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."

17. The rule clearly refers to the affidavit of service of a summons in an action for the recovery of land. 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. If persons subsequently go into possession of the lands they do so subject to the existing order for possession with whatever consequences that may have for their right (if any) to remain in possession of the lands.

18. In contrast to rule 20, rule 24 provides that the court may, if satisfied that the party applying for leave to issue execution, 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.

19. The defendant argued that the plaintiff was not entitled to an order pursuant to O. 42 r. 24 and it did not come within the scope of the rule. The rule provides as follows:

"24. In the following cases, viz.:

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

(b) where a party is entitled to execution upon a judgement of assets in futuro;

(c) where a party is entitled to execution against any of the shareholders of a company upon a judgement recorded against such company, or against a public officer or other person representing such company; the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgement or order made in a matrimonial cause or matter, an order of fieri facias may be issued as of course upon an affidavit of service of the judgement or order and non-payment."

20. The defendant argued that it was only a party who came within sub rule (C) who is entitled to apply to the court for leave to issue execution and that sub rule (C) did not apply to the plaintiff. This argument is without merit. 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 that 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 so to do as it comes within the scope of that sub rule.

21. The defendant argued that there had been a misuse of confidential information by IIB Home Loans Ltd in providing information concerning the loans and security of the defendant to KBC Bank Ireland Plc. This argument likewise is without merit. By Clause 11 (iii) the borrower [the defendant] "*irrevocably and unconditionally authorises the lender [IIB Home Loans Ltd] for the purpose of or in connection with any proposed transfer, assignment, proposal, sub mortgage, sub charge, trust or arrangement of this mortgage, 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 mortgaged 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 s. 8 (h) of the said Act."*

22. By his indenture of mortgage dated the 12th June, 2003 the defendant expressly irrevocably and unconditionally authorised IIB Home Loans 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. The defendant expressly agreed that the authority set out in Clause 11 (iii) is consent for the purposes of s. 8 (h) of the Data Protection Act, 1988. Therefore, I reject this argument.

23. The defendant argued that IIB Home Loans Ltd had no right to sell his loans without his consent to KBC Bank Ireland Plc. This argument also must be rejected. IIB Home Loans Ltd was entitled to transfer the business to another licenced bank pursuant to s. 33 of the Central Bank Act, 1971. The requirement was that the Minister for Finance should approve the scheme. This occurred by S.I. 125 of 2009. There was no requirement that individual borrowers should consent to the transfer in order that the transfer be effective.

24. The final argument advanced by the defendant in opposition to the application for an order for execution was the fact that the first order had not been executed and the plaintiff had delayed in seeking to recover possession of the two properties on foot of the order of possession, it had failed adequately to explain the delay, and in effect it had forfeited its right to execute the order in the circumstances.

25. Counsel for the defendant did not press this argument and no authority was advanced to suggest that the plaintiff was not entitled to a renewal of the order of execution on the grounds that a prior order for execution had not itself been executed. There could be any number of reasons why a party who obtained an order for possession refrained from or failed to either obtain an order for execution or, having obtained such an order, failed in turn to execute the order. In this case there was a considerable delay while the order for possession was appealed to the Supreme Court. It was only in November 2014 that the Supreme Court dismissed the appeal. It was not unreasonable for a period of six months to elapse before the plaintiff applied to court for leave to issue an execution order pursuant to the order of possession in this matter. The Rules of Court envisage that a party may, without reference to the courts, issue an execution order for up to a year from the date of the grant of an order for possession. In this case the plaintiff waited six months after the date of the order of the Supreme Court affirming the order for possession. While there was no stay on the order of the High Court pending the appeal, in reality, given that the appeal was outstanding, the plaintiff could not have executed the order despite the absence of a stay.

26. Having obtained an order on the 18th May, 2015 granting leave to issue an execution order, the order for possession issued to the sheriff promptly on the 3rd July, 2015. Mr. Andrew Groarke Keenan has explained why the plaintiff exercised its discretion in refraining from executing the order for possession in relation to the two properties. This was not a case of laches or unreasonable delay on the part of the plaintiff; the plaintiff and the sheriff assessed the situation and the probable difficulties of attempting to execute the order in respect of the two properties.

27. The defendant said that the plaintiff has delayed in seeking a second execution order and has not adequately explained the delay. If he is to succeed in resisting the order sought on grounds of delay he should point to some reason, such as prejudice he has suffered as a result of the delay, which would make it unjust to grant the order sought. Insofar as the defendant relies upon the doctrine of laches, it should be noted that it is an equitable doctrine and thus the conduct of both parties must be considered by the court.

28. The plaintiff comes to court seeking a further execution order in circumstances where the defendant has made no payment in respect of the loan for more than ten years, he has multiple tenants in the two properties and is in receipt of the rent in respect of the units. There is no information before the court as to the value of the rent roll or how long the tenants have been in situ but there is no dispute that none of the rent is being remitted to the plaintiff in part discharge of the very considerable sums outstanding on the loan. 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.