

# THE HIGH COURT

[2024] IEHC 727

[Record No. 2014 No. 29 CA]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

AND BANK OF SCOTLAND PLC

PLAINTIFFS

AND

PAT O'CONNOR AND JOAN O'CONNOR

DEFENDANTS

**JUDGMENT of Mr. Justice Barr delivered *ex tempore* on the 18<sup>th</sup> day of December 2024**

## **Introduction.**

1. This is an application by Mars Capital Finance Ireland DAC (hereinafter “the applicant”) to be substituted as the first named plaintiff for purposes of the within proceedings. The application was made pursuant to Order 17, rule 4 of the Rules of the Superior Courts. In the alternative, the applicant seeks to be joined as a co-plaintiff in the proceedings.

2. This application is grounded on the assertion that it is appropriate to join the applicant into the proceedings due to the fact that the first named plaintiff by means of a global deed of transfer dated 28 July 2023 and by means of an Irish law deed of conveyance and assignment dated 19 October 2023 transferred all its rights and interests in a large number of loans and underlying securities to the applicant.

3. The applicant states that one of the loans and securities that were transferred to it was the loan originally made to the defendants by the second named plaintiff in 2007, and also the underlying mortgage security over a property situated at “Meridian”, Hainault Road, Foxrock, Dublin 18 (hereinafter “the property”), which was given as security for the loan by the defendants.

4. The second named plaintiff obtained an order for possession of the property on 12 February 2014. It subsequently transferred its interest in the loan and in the underlying security to a company called Tanager Ltd, which, in turn, transferred its interest in loan and underlying security to the first named plaintiff; which in turn transferred its interest in the loan and underlying security to the applicant.

5. The proceedings are currently pending as an appeal from the order for possession made in the Circuit Court.

6. The applicant submits that due to the transfers of interests that have taken place between the first plaintiff and it, it is appropriate for the applicant to be substituted as a plaintiff in place of the current first named plaintiff, or in the alternative to be joined as a co-plaintiff for the purposes of the appeal. This application is made pursuant to the provisions of O. 17, r. 4 of the Rules of the Superior Courts.

7. The appeal against the order for possession was lodged only by the second named defendant. She swore an affidavit on 19 March 2024 setting out a number of grounds, on which she maintains that it is not appropriate for the court to make the orders sought by the applicant in its notice of motion. In addition, legal submissions were made on her behalf by counsel. The grounds of objection and legal submissions will be dealt with later in the judgment.

**Background to the Present Proceedings.**

8. As appears from the documentation that was submitted for the purpose of the Circuit Court proceedings, the initial letter of loan offer was issued by the second named plaintiff to the defendants on 19 September 2007. That letter of loan offer was accepted by the defendants on 28 November 2007. Their respective signatures were witnessed by their solicitor.

9. Under the terms and conditions attaching to the loan, clause 8 provided for securitisation of the loan by the lender, being the second named plaintiff. Under that clause, the defendants irrevocably and unconditionally consented to the lender transferring, assigning or otherwise disposing of its interest in the loan and in the underlying security that had been granted by the borrowers in respect of the loan. The clause further provided that the defendants irrevocably and unconditionally authorised the bank for the purposes of and in connection with the transfer of its interest in the loan, or in the security for the loan, to disclose such information as may be necessary to the proposed transferee for the purposes of such transfer.

10. By deed dated 20 December 2009, the defendants had executed a mortgage and charge over their property known as Meridian, Hainault Road, Foxrock, Dublin 18. Clause 5 of that deed provided that the defendants irrevocably and unconditionally consented to the second named plaintiff transferring its interest in the mortgage and charge to any third party it wished. The deed of mortgage and charge was signed, sealed, and delivered by each of the defendants on 20 December 2009. Their signatures were witnessed by their solicitor. The mortgage conditions clearly provided at clause 18, that the second named plaintiff was entitled to transfer its interest in the mortgage and charge which had been created over the property as security for the loan to any third party to whom it chose.

11. The present proceedings were commenced by Civil Bill issued on 24 October 2012, with the second named plaintiff being the sole plaintiff. On 12 February 2014, an order for

possession in respect of the property, was made in favour of the second named plaintiff. The second named defendant lodged a notice of appeal against that order on 15 February 2014.

12. Subsequent to obtaining the order for possession, the second named plaintiff transferred its interest in the loan and in the underlying security to a company called Tanager Ltd. An order was made by Peart J on 30 June 2014 substituting Tanager Ltd in place of the second named plaintiff.

13. On 25 January 2016 an order was made by Moriarty J re-joining Bank of Scotland as a plaintiff in the action. There was a subsequent inconsequential amendment to that order made on 18 July 2016.

14. Subsequent to the transfer of the interest in the loan and underlying security held by Tanager Ltd to the first named plaintiff, an order was made by Ferriter J on 13 December 2021, substituting the first named plaintiff, as plaintiff in place of Tanager Ltd.

15. The notice of motion in the present application was issued on 19 December 2023, wherein the applicant seeks to be substituted in the proceedings in place of the current first named plaintiff. This is based on the assertion that the interests of the first plaintiff in the loan and in the underlying security have been transferred by it to the applicant.

16. The evidence led on behalf of the applicant is contained in the affidavits sworn by Mr Glen Hogan, a manager in the applicant, which were sworn on 12 December 2023 and 10 January 2024. In those affidavits, Mr Hogan exhibited the global deed of transfer dated 28 July 2023, under which the first plaintiff transferred all its rights, title and interest in the loans and underlying security documents to the applicant in relation to a large number of loans as set out in the schedule to that deed. Included in the schedule is the loan and underlying security created by the defendants in respect of the loan they originally obtained from the second plaintiff and in relation to the deed of mortgage and charge executed by them creating the mortgage over their property at Hainault Road, Foxrock, Dublin 18 as security for the loan.

17. Mr Hogan also exhibited the Irish law deed of conveyance and assignment dated 19 October 2023, wherein the first named plaintiff transferred its interest in the security documents held by it as security for the loan, to the applicant. In the schedule to the deed of conveyance and assignment there is clear reference to the property owned by the second defendant.

18. Mr Hogan also exhibited in his affidavits the letter sent by the first plaintiff to the second defendant on 2 August 2023 informing her that they had transferred their interest in the loan and underlying security documents to the applicant. This is commonly known as a *“Goodbye Letter”*.

19. This affidavit also exhibited a letter from the applicant that was sent to the second defendant dated 04 August 2023, informing her but they had taken a transfer of the interest held by the first plaintiff in the loan and underlying security documents. This is commonly known as a *“Hello Letter”*.

20. Mr Hogan stated that in view of the fact that the original possession order had been made in favour of the second named plaintiff and that order having been appealed to the High Court; and there having been a number of intermediate transfers of the interest originally held by the second named plaintiff in the loan and underlying security documents to a number of parties, ultimately resting with the applicant, the applicant had been advised and believed that it was appropriate that an order should be made by the court substituting the applicant as the first named plaintiff for the purposes of the second defendant’s appeal.

21. An affidavit was sworn by the second named defendant on 19 March 2024 in response to this application. In it she states that she opposes the reliefs sought by the applicant in its notice of motion. She states that the applicant was a stranger to her and that she had never consented to the transfer of her loan or underlying security documents to it.

22. She further stated that she had been advised by her lawyers and believed that she was entitled to bring a claim for damages for breach of her rights under data protection legislation and under consumer protection legislation.

23. In particular, the second defendant asserted that she was entitled to an award of damages for breach of her rights in relation to the giving of “*informed consent*” to the transfer of personal data from the plaintiffs to the applicant. She stated that there had been a lack of transparency and accountability on the part of the plaintiffs, and on the part of the applicant, in relation to the transfer of her personal data among them; in respect of which she was entitled to obtain damages.

24. In addition, she stated that she was entitled to an award of damages for failure on the part of the plaintiffs and the applicant to observe the laws and regulations relating to accountability and transparency regarding consumer personal data. In particular, she alleged that there had been no evaluation of the legal basis for processing her personal data and a lack of notification practices in relation to the keeping of records and registers concerning her personal data. In addition, she claimed that there had been a number of breaches of various regulations concerning data processing which were referable to her and in respect of which breaches she was entitled to an award of damages.

25. The second defendant stated that she was also entitled to an award of damages for disclosure of her personal financial data without her lawful informed consent. In addition, she stated that she was entitled to an award of damages for disclosure of personal health data without her consent, and also for disclosure of personal tax information in the form of her personal tax number and/or her PPS number, without her lawful informed consent.

26. The second defendant also alleged that she was entitled to damages arising from breach of competition laws and regulations. In addition, she stated that she was entitled to damages for breach of the laws and regulations applicable to the “*right to be forgotten*” and the “*right*

to erasure” of a person’s consumer data and she was entitled to damages for failure on the part of the plaintiffs and the applicant to uphold the “right to informational self-determination” of consumer subjects, including the second defendant.

27. She asserted that there was a necessity to bring an application to the Court of Justice of the European Union to obtain a ruling to clarify matters once a public interest point of law arose, which it had done as a result of the assertions made by her in respect of breach of her rights concerning her personal data as contained in her affidavit. She concluded by asking the court to refuse the relief sought by the applicant in this motion. She requested the court to set a date for the hearing of her application to refer the matter to the CJEU.

### **Conclusions.**

28. This application is made pursuant to O.17, r. 4 of the Rules of the Superior Courts. This rule states as follows:

*“Where by reason of death, or any other event occurring after the commencement of a cause 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 cause 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.”*

29. The procedural nature of such applications was emphasised by Kelly J (as he then was) in *Irish Bank Resolution Corporation v Comer* [2014] IEHC 671, where he noted at paragraph

30 that what he was being asked to do was to consider a procedural application which, if it was granted, would have the effect of bringing to an end the entitlement of the existing plaintiff to further prosecute the proceedings. It would substitute a different entity that would take over the entitlement to prosecute the proceedings, subject to all of the imperfections that had been present when the action was constituted as between the original plaintiff and the defendants, subject also to proving at trial that there had been a valid sale of the underlying assets; a valid assignment of the chose in action; and a valid notice given to the debtors. He said that what he had to do was to satisfy himself as to whether there was *prima facie* evidence of that having occurred. There had to be evidence adduced which would justify the substitution of the existing plaintiff by the applicant.

30. The test that had to be applied was also examined by Finlay Geoghegan J in *Irish Bank Resolution Corporation Limited v Halpin* [2014] IECA 3. That case involved an application to substitute a new plaintiff where judgment had already been obtained by the existing plaintiff. She objected to that course being taken, because judgment had been obtained by the existing plaintiff and there was no assertion that the proposed new plaintiff had any entitlement to judgment at the time when the judgment was granted. The judge held that the better course of action was to add the applicant as a co-plaintiff and incorporate it into the proceedings, rather than substitute it in place of the plaintiff that had already obtained judgment against the defendant.

31. In her judgment she emphasised that the court was not deciding the primary issue between the parties, but was merely deciding whether it was in the interests of justice that the applicant be added as a party to the proceedings. In determining that it was appropriate to join the applicant into the proceedings, she stated as follows at para 28:

*“It is simply determining that it has put forward evidence on a prima facie basis that would entitle it to be joined as a co-plaintiff in the proceedings for the*



*purpose of pursuing its claim either to the facilities which it contends have been transferred or to the judgments which it contends have been transferred or assigned.”*

32. In the course of argument counsel for the second named defendant referred to the decision in *Start Mortgages DAC v Ramseyer & Anor* [2024] IEHC 329, where it was held that the burden of proof was higher than merely on a *prima facie* basis. However, it is important to note that while the judge asserted that there may be occasions where it was appropriate to look at the debt owed by the defendants and consider the evidence adduced by the proposed applicant seeking to be joined as a co-plaintiff, the test was still whether it was in the interests of justice that the party should be joined into the proceedings.

33. The judge was careful to point out that the making of an order joining the party as a co-plaintiff, did not determine the core issues that may be raised at the trial of the action between the plaintiffs and the defendants. He pointed out that it may well be that the defendants could raise those grounds of objection if and when the plaintiff sought to execute the judgment. However, those were substantive matters that could be raised at the enforcement stage. They did not have to be determined conclusively at the time of the application by the party seeking to be joined into the proceedings.

34. Having regard to the evidence contained in the documents before the learned Circuit Court judge and having regard to the evidence contained in the affidavits sworn on behalf of the applicant by Mr Hogan, and in particular, to the documents exhibited thereto, which disclose that there has been a transmission to the applicant of the interest that was held by the first named plaintiff in both the loan and in the underlying security that had been granted by the defendants for that loan; I am satisfied that it is in the interests of justice that the applicant should be substituted as plaintiff in place of the first named plaintiff.

35. In making that order, I am not determining any of the substantive issues that may arise either on the hearing of the appeal, or at the enforcement stage, in the event that the appeal is concluded in favour of the plaintiffs.

36. While it is hard to see how the existence of any alleged claim to damages that there may be on the part of the second defendant for an alleged breach of her rights to protection of her personal data could be a defence to the action, particularly as such issue does not form part of the pleadings in the Circuit Court action and, therefore, is not part of the issues that will fall to be determined at the appeal; I am not satisfied that such belief that the second defendant may have of an entitlement to damages is sufficient to cause the court to refuse the application on behalf of the applicant to be joined into these proceedings as plaintiff in place of the current first named plaintiff.

37. The court refuses the application that has been made on behalf of the second defendant to state any question of law to the Court Justice of the European Union. The court is not satisfied that any question of European law arises for determination on the hearing of this application.

38. I am satisfied that making the order joining the applicant as a plaintiff to the proceedings at this stage is entirely in accordance with the interests of justice having regard to the fact that there is strong affidavit evidence before the court that there has been a valid transmission of the interest formerly held by the first plaintiff in the loan and in the underlying security documents to the applicant. In the circumstances, it is just and appropriate that the applicant should be joined into the proceedings. Such joinder does not prejudice any substantive defences that the second defendant may have either at the hearing of the appeal, or at the enforcement stage, should that arise.

39. For the reasons set out in this judgment, the court will make an order substituting the applicant as plaintiff in place of the first named plaintiff.