

THE HIGH COURT

[2022] IEHC 8

[Record No. 2020/79 CA]

BETWEEN

**PEPPER FINANCE CORPORATION (IRELAND)
DESIGNATED ACTIVITY COMPANY T/A PEPPER ASSET SERVICING
PLAINTIFF/RESPONDENT**

AND

**DEIRDRE TIGHE AND CHRIS PENDERGAST
DEFENDANTS/APPELLANTS**

JUDGMENT of Mr. Justice Barr delivered electronically on the 10th day of January, 2022.

Introduction

1. This is an appeal by the defendants/appellants (hereinafter referred to as 'the defendants'), who represented themselves in this matter, against an order of the Circuit Court made on 10th March, 2020, which granted the plaintiff/respondent (hereinafter referred to as 'the plaintiff'), an order for possession of a property owned by the first named defendant, known as No. 4 Ardmore, Carnew Road, Gorey, Co. Wexford, as contained in folio 32744F, County Wexford (hereinafter referred to as 'the property').
2. The proceedings were commenced in the Circuit Court by civil bill issued on 25th November, 2014, wherein the plaintiff sought an order for possession of the property on foot of a loan that had been made to the defendants by the plaintiff, formerly known as GE Capital Woodchester Home Loans Limited, on or about 1st May, 2007, and further to an indenture of mortgage executed by the defendants on 9th May, 2007.
3. The first named defendant has resisted the plaintiff's application on the basis of several extensive affidavits that had been filed in the proceedings. In essence, the defendant has resisted the application on the following grounds: That the plaintiff has failed to establish jurisdiction in the Circuit Court; that the plaintiff has no legal right to the mortgage following the sale on 28th September, 2012, referring to a mortgage sale deed between GE Capital Woodchester Home Loans Limited, as a wholly owned subsidiary of the GE Group and Windmill Funding Limited (hereinafter 'Windmill'), whereby it is alleged that GE Capital Woodchester Home Loans Limited sold all their rights in the loan and only retained a bare trust in the loan and mortgage, meaning that the plaintiff cannot make any independent decisions of any consequence and therefore lacks *locus standi* to bring the present proceedings; it is further asserted that the plaintiff has failed to properly establish that, as a bare trustee, they have a right to an order for possession of the property.

Evidence on behalf of the plaintiff.

- (a) The plaintiff's *locus standi*.
4. The plaintiff's case was set out in a number of affidavits sworn by Ms. Caroline Loftus, Operations Manager in the plaintiff company. In an affidavit sworn on 18th November, 2014, Ms. Loftus stated that the plaintiff was formerly known as GE Capital Woodchester Home Loans Limited. The company changed its name to Pepper Finance Corporation (Ireland) Limited on 11th October, 2012. She exhibited a copy of the certificate of

incorporation on change of name issued by the Companies Registration Office on 11th October, 2012.

5. Ms. Loftus averred that by loan offer dated 27th April, 2007, the plaintiff, under its previous name, had agreed to provide the defendants with a term loan facility in the sum of €175,000 for a term of fifteen years, to purchase the property set out in the schedule to the civil bill. The said loan facility was subject to interest at variable rates as specified in the letter of offer and was repayable in monthly instalments. The said term loan facility was subject to the terms and conditions detailed therein and to the mortgage conditions set out in the deed of charge.
6. Ms. Loftus went on to set out that the loan offer had been accepted by the defendants on or about 1st May, 2007. The said term loan facility was drawn down by the defendants on or about 8th May, 2007. A copy of the loan agreement and acceptance thereof were exhibited to the affidavit.
7. Ms. Loftus went on to state that the first named defendant had been registered as full owner of the property known as No. 4 Ardmore, Carnew Road, Gorey, Co. Wexford as contained in folio 32744F, County Wexford, on 31st January, 2002. She exhibited a true copy of the Land Registry folio.
8. By deed of charge dated 9th May, 2007 (hereinafter referred to as 'the charge'), the first named defendant, as registered owner, or as the person entitled to be registered as owner, charged the property with payment of the secured monies and assented to the registration of the charge. A true copy of the indenture of mortgage was exhibited to the affidavit sworn by Ms. Loftus.
9. Clause 11.07(a) of the charge provided that the mortgagee could at any time transfer, or enter into contractual agreements, concerning all or part of the legal or equitable benefit of the mortgage, including the security created on the mortgage property, without notice to the borrower, or any other person on such happening. Clause 11.09(i)(a) of the charge provided that the borrower irrevocably consented to all or any future transfers of the legal and equitable benefit of the mortgage, including the security thereby created on the mortgaged property.
10. Ms. Loftus stated that by letter dated 25th October, 2012, the defendants were notified of the change of name of the plaintiff company from GE Capital Woodchester Home Loans Limited to Pepper Finance Corporation (Ireland) Limited. A copy of the letter was exhibited to the affidavit.
11. Concurrently with the change of name of the plaintiff company, securitisation of the debt by the plaintiff to Windmill had occurred. The mortgage sale deed between GE Home Loans, Windmill Funding Limited, Pepper Netherlands and TMF Trustee Limited dated 28th September, 2012, was exhibited to an affidavit sworn by Ms. Loftus on 15th March, 2018.

12. Clause 2.3 of the mortgage sale deed provided that the seller, GE Home Loans, as it was then called, agreed as follows: -
- "The Seller hereby confirms and acknowledges that on and following Completion and until perfection in accordance with clause 5 of this Deed, it will hold legal title to the Mortgage Loans sold hereunder, together with the Related Security and the benefit of the Relevant Insurance Policies as bare trustee for the Issuer..."*
13. Upon execution of the mortgage sale deed, the loan the subject matter of these proceedings, along with its associated security, became the subject of a securitisation transaction whereby the plaintiff retained legal title, as bare trustee, and until perfection in accordance with the aforementioned mortgage sale deed. Clause 5.1 of that deed provided that the sale and purchase of the mortgage loans and their related securities provided thereunder, would be perfected by the seller as soon as possible following a demand by the issuer or note trustee which may be in any circumstance. In her affidavit sworn on 15th March, 2018, Ms. Loftus confirmed that on the date of swearing thereof, neither the issuer, or the note trustee, had served a demand in accordance with clause 5.1 of the mortgage sale deed. She stated that the plaintiff held legal title to the loan and its related security as bare trustee for the Issuer, pursuant to the securitisation transaction provided for in clause 2.3 of the deed.
14. Ms. Loftus stated that clause 3.2 of the charge executed by the first named defendant, provided that all monies remaining unpaid and secured by the charge should become immediately repayable on demand on the occurrence of an event of default. Clause 10.01(a) of the charge defined an event of default as being default of payment of any monthly, or other periodic payment, or in payment of any other of the secured monies.
15. The accrual of arrears on the loan account was dealt with in a number of affidavits sworn by Ms. Loftus. She stated that in breach of the loan agreement and in breach of the terms of the charge, the defendants failed to pay the monthly instalments as they fell due. She stated that since in or about 8th November, 2008, the defendants had defaulted in payment of the monies due to the plaintiff. As of 4th November, 2014, the arrears were €45,895.25 and the total debt due at the time was €193,935.51. She exhibited bank statements in respect of account number M20032165 for the period 21st October, 2011 to 4th November, 2014.
16. At para. 16 of her affidavit sworn on 18th November, 2014, Ms. Loftus outlined how the plaintiff had complied with provisions of the code of conduct on mortgage arrears (the 'CCMA') as issued by the Central Bank of Ireland. By letters dated 24th January, 2014, the plaintiff had written to the defendants in accordance with the CCMA and notified them that no alternative repayment arrangement could be offered to them, on the basis that the mortgage was unsustainable. That letter, which was exhibited to the affidavit, detailed that the mortgage arrears resolution process (MARP) no longer applied to the defendants. It outlined that the defendants had a right to appeal the plaintiff's decision. It notified them that legal proceedings could issue three months from the date on which the letter was issued, or eight months from when the arrears arose, whichever date was later.

17. Ms. Loftus outlined how by letters dated 6th May, 2014, the plaintiff wrote to the defendants and demanded repayment of all sums outstanding, including arrears, within seven days thereof. The letter, which was exhibited, outlined that the outstanding arrears at that time, stood at €39,252.74, with the total balance owed being €190,971.59, together with continuing interest, which was accruing at the daily rate.
18. By letters dated 30th May, 2014, Messrs Ronan Daly Jermyn, Solicitors, upon instructions from the plaintiff, wrote to the defendants and demanded that they deliver up possession of the property to the plaintiff within seven days of the date thereof, in default of which proceedings seeking an order for possession of the property would be issued against the defendants without further notice. The relevant demand letters were exhibited to the affidavit sworn by Ms. Loftus. The plaintiff stated that despite the said letters, the defendants failed to pay the said monies, or to deliver up possession of the property.
19. The plaintiff's solicitors, having regard to para. 58 of the CCMA, wrote to the defendants on 28th August, 2014, to notify them of the plaintiff's intention to immediately institute Circuit Court possession proceedings. A copy of the said letter was exhibited to the affidavit sworn by Ms. Loftus on 18th November, 2014.
20. In her affidavit sworn on 17th June, 2015, Ms. Loftus outlined that at that date, no appeal had been received by the plaintiff from the defendant's decision in relation to the non-applicability of the MARP. It was stated that the plaintiffs remained in contact with the defendants in an effort to find a resolution. However, no sustainable solution had been identified. As of 15th June, 2015, the arrears owing on the loan amounted to €53,713.24, which represented a total of 46 missed monthly payments. The total indebtedness amounted to €197,306.80. The last payment to the account had been received on 30th May, 2015 in the sum of €135.00. A civil bill seeking possession of the property was issued on 25th November, 2014.
21. The issue of continuing arrears on the loan account, was dealt with in a number of subsequent affidavits sworn by Ms. Loftus. In an affidavit sworn by her on 4th December, 2017, it was noted that as of 29th November, 2017, the sum of €100,717.59 was owed to the plaintiff in respect of arrears. The total sum due by the defendants to the plaintiff at that time, amounted to €223,774.83. As of 15th May, 2018, the arrears stood at €109,257.36 and the total sum due to the plaintiff by the defendants on the loan account was €228,595.41.
22. In subsequent affidavits, Ms. Loftus stated that as of 25th January, 2019, the monthly mortgage repayment was €1,271.98; with arrears standing at €123,084.46 and the total debt due at that time was €236,342.19. By March 2020, Ms. Loftus stated that the arrears stood at €147,566.81 and the total debt was €249,655.52. Ms. Loftus confirmed that the last payment into the account was made on 30th May, 2015 in the sum of €135.00.
23. Finally, in response to the defendant's assertion that the plaintiff lacked *locus standi* to seek an order for possession of the property, due to the fact that the debt had been the

subject of a securitisation agreement with Windmill and that therefore Windmill should be a party to the proceedings, Ms. Loftus referred to the mortgage sale deed dated 28th September, 2012 and the portfolio management agreement of the same date, which had been exhibited to her affidavits sworn on 15th March, 2018 and 16th January, 2020, respectively. She submitted that pursuant to the terms of the said agreements, unless and until the sale of the first named defendant's loan and related security was perfected, the plaintiff was entitled to bring these proceedings in its own name and on its own behalf. Accordingly, it was denied that the plaintiff lacked *locus standi* due to the securitisation agreements that had been entered into by it.

Submissions on behalf of the defendants.

24. A number of affidavits have been sworn by the first named defendant, on behalf of both defendants. These affidavits are somewhat repetitive in nature. Some of the arguments and submissions made therein were somewhat convoluted. However, it would appear that the following are the main reasons as to why the first named defendant states that an order for possession should not be made against her in respect of the property. Firstly, the defendant submitted in her affidavit sworn on 16th June, 2015, that the plaintiff did not have *locus standi* because the Circuit Court had failed to adequately establish that the court had jurisdiction to make the order for possession on 10th March, 2020. The first defendant stated that the monetary jurisdiction of the Circuit Court was limited to €75,000 and that she did not consent to the proceedings being commenced in, or continued in, the Circuit Court, based on the fact that the property was above the monetary jurisdiction of the court. The defendant stated that the plaintiff could not claim jurisdiction pursuant to the Land and Conveyancing Law Reform Act 2013, as no Act of the Oireachtas can be retrospective in its effect.
25. Secondly, the defendant submitted that she had no contract with the plaintiff, as the mortgagee had transferred the mortgage, the legal title and all related security, to Windmill Funding Limited, as a result of the sale which had occurred on 28th September, 2012. She submitted that as a consequence, no legally enforceable rights were held by the plaintiff. In an affidavit sworn on 30th November, 2017, the first named defendant stated that the sale of the mortgaged portfolio and related security to Windmill demonstrated the separate identities of the mortgagee and the plaintiff.
26. In support of this submission, the defendant referred to practice direction CC17 entitled "Proceedings for possession or sale on foot of a mortgage". In particular, she referred to para. 3(H) thereof which stated that where the rights of the mortgagee under the mortgage had been transferred or assigned to another party, proof was required of the instrument of transfer, or assignment. The defendant submitted that an instrument of transfer must be presented to the court in order to ensure that all pre-trial matters had been finalised. A copy of practice direction CC17 was exhibited by the defendant.
27. Thirdly, in an affidavit sworn on 15th March, 2018, the defendant exhibited the statutory financial statements of Windmill dated 31st December, 2012, in order to confirm the purchase price of the mortgage portfolio by Windmill. She submitted that at no point did the statutory declaration declare that GE Capital Woodchester Home Loans Limited, was a

wholly owned subsidiary of the Pepper group. In this regard, the defendant submitted that the mortgage sale deed was a contract between GE Capital Woodchester Home Loans Limited, as a wholly owned subsidiary of the GE Group and Windmill, therefore it could not be a subsidiary of the Pepper Group and Windmill. The defendant claimed that the plaintiff could not rely on the term "securitisation" in its action, due to the fact that the plaintiff did not initiate securitisation and did not acquire any rights to the mortgage portfolio based on the purchase of share capital only. She submitted that the plaintiff had no locus standi in court. She asked the court to remit the matter to plenary hearing.

28. Fourthly, the defendant submitted that GE Capital Woodchester Home Loans Limited had sold everything in the securitisation process and had merely retained a bare trust. She stated that that was what the plaintiff bought. The defendant submitted that due to the nature of a bare legal trust, namely that a bare trustee could not make any independent decisions of any consequence, the plaintiff had no control over the mortgage unless instructed by the special purpose vehicle (SPV). In this instance, the defendant submitted that the relevant party was Windmill Funding DAC. She submitted that the sale had extinguished the contractual relationship between the borrower and the original lender; with the SPV, as owner, becoming the party that was in privity of contract with the borrower, in this case, the defendants. In this regard, the first defendant referred to the decision of Binchy J. in *Pepper Finance Corporation v. Jenkins* [2018] IEHC 485.
29. In her affidavit sworn on 2nd December, 2019, the defendant requested that the court should refer a question to the Court of Justice of the European Union pursuant to Art. 267 of the Treaty on the Functioning of the European Union, in particular, as to whether the plaintiff's claim would stand up to scrutiny by that court, given that the plaintiff itself had admitted that it merely held its interest as a bare trustee on behalf of Windmill.
30. Finally, the defendant submitted that while she did not dispute the change of name of the plaintiff company, nor did it seem that she disputed the failure to make repayments on foot of the loan agreement as alleged by the plaintiff; she submitted that the civil bill seeking possession of the property, was flawed as Windmill was the entity who should have initiated proceedings in this case. On that basis, the first defendant urged the court to refuse the order for possession sought by the plaintiff in respect of the property, or in the alternative, she asked that the court would remit the matter to plenary hearing.

Conclusions.

31. The key submission which runs through all of the affidavits that have been sworn by the first defendant in this matter, is to the effect that the plaintiff is not entitled to an order for possession of the property, due to the fact that it had entered into a securitisation agreement with Windmill and that that company is the entity which should be seeking an order for possession. It was submitted that as they are not a party to the proceedings, the plaintiff is not entitled to an order for possession of the property.
32. Before looking at the effect of a securitisation agreement, it is necessary to look at the underlying basis on which the plaintiff brings the present proceedings. The defendants do not dispute the content of the loan agreement as asserted by Ms. Loftus in her affidavits.

They do not deny that they received the monies on foot of the letter of loan offer, which they had accepted. Nor is it disputed that they have been in default of the repayment obligations under the loan agreement. They do not dispute that the last payment under the loan was made by them on 30th May, 2015 in the sum of €135.00.

33. The first named defendant does not dispute that she furnished a charge over her property by way of the deed of charge dated 9th May, 2007. Nor is it disputed that that charge was registered on the folio on 17th May, 2007, as per the folio exhibited to the affidavit sworn by Ms. Loftus.
34. Section 62(7) of the Registration of Title Act, 1964, makes provision for the summary disposal of an action seeking possession of registered land. Section 62(7) was repealed by the Land and Conveyancing Law Reform Act 2009 and was replaced by s.97(2) of that Act. However, s.62(7) was expressly saved by s.1 by the Land and Conveyancing Law Reform Act 2013, as respects mortgages created prior to 1st December, 2009. Accordingly, s.62(7) of the 1964 Act is the relevant section for the purposes of this application. It is in the following terms: -

"When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."

35. The matters that must be established by a plaintiff in order to establish an order for possession pursuant to s.62(7) of the 1964 Act, were considered by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, where Baker J, delivering the judgment of the court, stated as follows at paras. 49 and 50:

"49. *The owner of a charge who seeks to obtain possession pursuant to s. 62(7) has to prove two facts:*

- (a) *That the plaintiff is the owner of the charge;*
- (b) *That the right to seek possession has arisen and is exercisable on the facts. 50. The summary process is facilitated by the conclusiveness of the Register as proof that the plaintiff is the registered owner of the charge is a matter of the production of the folio, and, as the Register is by reason of s. 31 of the Act of 1964 conclusive of ownership, sufficient evidence is shown by that means: see the discussion in the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352. The judgment of the Court of Appeal inter alia held that the correctness of the Register cannot be challenged by way of defence in summary possession proceedings, and that a court hearing an application for possession pursuant to s. 62(7) of the Act of 1964 is entitled to grant an order at the suit of the registered owner of the charge, or his or*

her personal representative, provided it is satisfied that the plaintiff is the registered owner of the charge and the right to possession has arisen and become exercisable.”

36. The court must now consider whether the plaintiff is entitled to an order for possession of the property. The court is satisfied that the plaintiff is *prima facie* so entitled.
37. The essential points necessary to ground such an order in favour of the plaintiff are not in dispute. It is accepted by the defendants that they applied for and received the loan, which underpins the charge in this case. The court accepts the evidence set out by Ms. Loftus in her affidavits that the defendants have defaulted on repayment of the loan in the manner set out therein. The court is further satisfied that upon a default in the repayments being made by the defendants, the necessary letter of demand seeking repayment of the entire loan was sent to the defendants and was refused by them. The court is further satisfied from the matters set out by Ms. Loftus in her affidavits, that the necessary demand for delivery up of possession of the property was made of the defendants and was refused by them.
38. The deed of charge, as exhibited to the affidavit sworn by Ms. Loftus, clearly sets out in clause 3 thereof, that the borrower covenanted with the lender to pay to the lender on demand the secured monies and any incidental charges connected therewith. Clause 5 of the deed provided for the charging of the property by the defendant as security for the loan. The lender's powers in respect of entry into possession of the mortgaged property were set out in clause 8 of the deed. Clause 9 provided that the mortgagee's powers would not be exercised until any of a number of events should occur, including a default in payment in any of the monthly or other periodic payments, or a default in payment of any of the secured monies under the deed. Clause 11.07 provided that the lender may at any time transfer all or any part of the legal or equitable benefit of the mortgage. Clause 11.09 stated that the borrower thereby irrevocably consented to all or any future transfers of the legal or equitable benefit of the mortgage including the security thereby created on the mortgaged property. The court has had regard to all the terms and conditions of the deed of mortgage in reaching its decision herein.
39. The court is satisfied that the charge, having been validly created, was duly registered in the manner described by Ms. Loftus in her affidavit. Section 31 of the Registration of Title Act 1964 provides that the entries on the register shall be conclusive in relation to ownership of the charges specified therein. The court is satisfied that GE Capital Woodchester Home Loans Limited was the registered owner of the charge as appearing on the folio as of 17th May, 2007.
40. As set out at para. 5 of the affidavit sworn by Ms. Loftus on 15th March, 2018, GE Capital Woodchester Home Loans Limited ('GE Home Loans') was sold to Pepper Netherlands Holding Cooperatie U.A. ('Pepper Netherlands') effective on 28th September, 2012. GE Home Loans changed its name to Pepper Finance Corporation (Ireland) Limited. The company was re-designated as a designated activity company pursuant to the Companies Act 2014 and is now Pepper Finance Corporation (Ireland) DAC.

41. Section 30(6) of the Companies Act 2014, provides that where a company changes its name, the rights and liabilities of the company remain the same and attach to the company in its new corporate name. Accordingly, the court is satisfied that the charge that was created by the deed of charge dated 9th May, 2007, which was subsequently registered on the folio on 17th May, 2007 in favour of GE Capital Woodchester Home Loans Limited, is now owned by the plaintiff.
42. The court is satisfied that all essential elements have been properly established by the plaintiff in this matter. The existence of the contract of loan has been established; the creation of the charge as security for repayment of that loan has been established, the registration of the charge in favour of the plaintiff has also been established and the court is satisfied that default in repayment of the loan and the calling in of the entirety of the loan and the making of a demand for possession of the property, have all been properly proved. The court is thus satisfied that the plaintiff is *prima facie* entitled to an order for possession of the property.
43. I turn now to deal with the various grounds of defence that have been put forward on behalf of the defendants. The main ground of defence raised by the defendants is that following the securitisation agreement entered into between the plaintiff and Windmill, the plaintiff only became a bare trustee of the legal title on behalf of Windmill and that as such, Windmill ought to have been added as a plaintiff to the proceedings.
44. The nature and effect of a securitisation agreement was considered in Peart J. in *Wellstead v. Judge Michael White and Fetherstonhaugh* [2011] IEHC 438 where the learned judge stated as follows: -

"But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors."

45. In *Freeman & Anor. v. Bank of Scotland plc & Ors.* [2014] IEHC 284, McGovern J stated as follows at para. 8: -

"It is an important principle in securitisation transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank. Where customers have provided their consent as part of the standard mortgage terms and conditions, they are not specifically notified that their mortgage has been securitised."

46. In *Pepper Finance Corporation (Ireland) DAC v. Hanlon* (Unreported, High Court, 11th January, 2018), Ní Raifeartaigh J. (then sitting in a judge of the High Court) had to

consider the same securitisation agreement as arises in the current proceedings. In the course of an ex tempore judgment she stated as follows: -

"So the reality is that Pepper Finance stepped into the shoes of Woodchester, the original lender. It was simply a name change and despite the fact that the mortgage had been securitised to Windmill, Woodchester became Pepper Finance, retained at all times the legal title to repossess the mortgage and so they did have title to bring the proceedings in the Circuit Court."

47. In *Pepper Finance v. Jenkins*, the court had to consider precisely the argument that was raised by the defendants in these proceedings. In the course of his judgment, Binchy J. (then sitting as a judge of the High Court) noted that while the authorities referred to above, had affirmed the entitlement of a lender to bring proceedings following upon the securitisation of a loan, where the lender had retained legal title to that loan, they did not address the more nuanced question raised by the defendants in the case before him, as to how the plaintiff should formulate the proceedings and/or whether or not it was necessary for the beneficial owner of the loan to join in the proceedings also. He noted that it appeared from the decisions referred to, that that discreet issue had not been raised, or argued in those cases.

48. At para. 23 of his judgment, Binchy J. noted that the question that had been raised before him and which appeared to have been raised for the first time in this jurisdiction, was whether or not the owner of the legal title to the loan and related mortgage security must bring forward the proceedings in such a way as to make it clear that it was doing so as trustee for the beneficial owner, or alternatively require the beneficial owner to join in the proceedings. The learned judge gave his answer to that question in the following way at paras. 30 and 31: -

"30. It seems to me that it is wholly unrealistic to argue that an assignee such as Windmill could, in circumstances where no notice of the assignment has been given to the debtor, successfully bring forward any claim against a debtor such as the defendants in this case. Windmill has very deliberately structured its arrangements with the plaintiff so as to enable the plaintiff to receive repayments from the defendants, and to take such enforcement proceedings arising from non-repayment of the debt as the plaintiff considers appropriate. More importantly, both the plaintiff and Windmill have chosen not to give notice of the assignment or securitisation of the debt to the defendants. This is knowledge that they have gleaned from other sources. Although the decisions of the courts in this jurisdiction as regards the effects of securitisation of debt, to which I have referred above, do not enter upon a consideration as to the rights and entitlements of an assignor and an assignee of a chose in action, they give effect to the manner in which the securitisation was intended to operate by the parties thereto which, it must be said, is in no way prejudicial to the rights of the borrowers. Furthermore, unless borrowers are specifically put on notice of such an assignment I consider that the risk that a borrower could be subjected to more than one suit in respect of the

same debt is more illusory than real and I do not believe that the courts would countenance such a proposition.

31. *For all of these reasons, I consider that the plaintiff was not obliged either to join Windmill to the proceedings or to declare its status as trustee of Windmill in the proceedings. The plaintiff is therefore entitled to succeed and the appeal should be allowed.*"

49. The court is satisfied that it is bound by the decision in the *Jenkins* case. Accordingly, the court holds that where there has been an assignment of the beneficial interest between the lender and a third party, without notice of that assignment being given to the borrower, it is not necessary for the assignee of the beneficial interest to be named as a plaintiff in the proceedings. Essentially, the fact of the securitisation agreement in relation to the underlying loan and the charge created as a security in respect of the loan, are immaterial to the plaintiff's cause of action and right of remedy in the present proceedings.
50. Subsequent to the hearing of this matter on 11th November, 2021, a judgment was delivered by Egan J. on 3rd December, 2021 in *Pepper Finance Corporation (Ireland) DAC v. Moloney* [2021] IEHC 761. The plaintiff sent a letter to the court enclosing a copy of that judgment and asked that the court should consider it in the course of its deliberation in this case. Having considered the judgment, the court did not think it necessary to reconvene the hearing, so as to enable counsel for the plaintiff to address the court on this judgment. This was due to the fact that the *Moloney* case dealt with a different point altogether.
51. In the *Moloney* case, Egan J., having referred to the judgments in *Wellstead v. Judge Michael White*; *Freeman v. Bank of Scotland* and *Pepper v. Hanlon*, held that in the case before her, the plaintiff was not entitled to the order sought, due to the fact that the grounding affidavit had contained averments as to the content and effect of the securitisation agreement, but the underlying agreements had not been exhibited to those affidavits. On that basis, the learned judge held that the plaintiff was not entitled to an order pursuant to O.42, r.24 granting leave to execute a judgment beyond the period provided for in the Rules of the Superior Courts.
52. Those considerations do not apply in this case, because, as already noted, the mortgage sale deed, which formed the basis of the securitisation agreement, was exhibited to the affidavit sworn by Ms. Loftus on 15th March, 2018 and the portfolio management agreement was exhibited to her affidavit sworn on 16th January, 2020. Accordingly, the rationale for the basis of the decision in the *Moloney* case, does not apply to the circumstances of this case.
53. Finally, one can deal fairly briefly with a number of ancillary submissions that were made by the first named defendant in defence of the claim for possession made by the plaintiff herein. Firstly, it was submitted that as the jurisdiction of the Circuit Court is generally set at €75,000, the Circuit Court did not have jurisdiction to entertain the original action. The

court is satisfied that this submission is not well founded. Section 3 of the Land and Conveyancing Law Reform Act 2013 extended the jurisdiction of the Circuit Court to mortgages created prior to 1st December, 2009. The provision came into effect on 31st July, 2013. The section provides that proceedings to recover possession of such properties can be brought in the Circuit Court. As the proceedings in the present case were issued on 25th November, 2014, the court is satisfied that the Circuit Court had jurisdiction to deal with the application at first instance.

54. Secondly, the defendant referred to the provisions of practice direction CC17 and in particular to para.3 thereof, which set out the proofs that are required in proceedings for possession, or sale on foot of a mortgage. The practice direction provided that when applying for an order for possession, the following proofs are required as a minimum: "*(h) where the name of the mortgagee company has changed, or the rights of the mortgagee under the mortgage have been transferred or assigned to another party, proof (as the case may be) of the name change (e.g. as recorded in the Companies Registration Office) or of the instrument of transfer or assignment.*"
55. The court is of the view that this ground of defence is without substance. Firstly, practice direction CC17 does not apply to the present proceedings because it provides at para.7 thereof "*this direction shall commence in effect on the 17th day of August, 2015 and shall apply to proceedings instituted on or after that date*". Accordingly, as the present proceedings were commenced in November 2014, the practice direction does not apply to them. Secondly, the court is satisfied that in any event, the plaintiff has provided proof of the change of name as recorded in the Companies Registration Office and has established that it has retained legal title to the loan and the underlying security.
56. Thirdly, in an affidavit sworn by the first defendant on 2nd December, 2019, she applied to the court to be granted legal aid. This is not a defence to proceedings seeking possession of property. The Circuit Court did not have jurisdiction to grant legal aid in a civil matter to the defendant. Insofar as the defendants wished to obtain legal aid to fund their defence of the within proceedings, they were obliged to apply for that in the usual way to the Legal Aid Board. Insofar as the first named defendant repeated her request to be granted legal aid by this Court; similarly, this Court does not have jurisdiction to grant her legal aid in the matter.
57. Fourthly, the defendant asked the court to refer the matter for a decision of the Court of Justice of the European Union. The court declines to make any such reference on the basis that there are no issues of European law that arise for determination in this case.
58. Fifthly and finally, in the course of the hearing before this Court, the first defendant handed in to the court a document headed "Further Particulars", which appear to relate to registration of an Irish deed of charge dated 30th July, 2021 between Balbec Loan IE IV Limited (the 'chargor') and Intertrust Trustee (Jersey) Limited (the 'security agent'). The document submitted, appeared to be particulars of the deed of charge. It purported to state *inter alia*, that pursuant to clause 3.2 of the deed of charge, as continuing security for the payment, performance and discharge of the secured liabilities, the chargor thereby

assigned and agreed to assign absolutely (subject to the proviso for redemption at clause 22 of the deed) to the security agent, all of its rights (but not obligations), title, benefit and interest in, to and subject in respect of: (a) the contracts; (b) the Windmill notes; (c) the security accounts and security account balances; (d) the insurance policies and insurance proceeds; and (e) the related rights. In the particulars the term "legal title holder" was defined as meaning Pepper Finance Corporation (Ireland) DAC.

59. This document was not proved by affidavit in the ordinary way. It was merely handed in to the court. It was not clear what relevance, if any, it may have to the proceedings herein. Ms. Connaughton Deeney BL, counsel for the plaintiff, stated that her instructions, as of the date of the hearing, were that the plaintiff remained the legal owner of the underlying debt and of the charge that appears to be comprised by the terms of the document handed in to the court. The court is not satisfied that this document raises any defence to the plaintiff's proceedings herein.

Decision of the court.

60. For the reasons set out in this judgment, the court is satisfied that the plaintiff is entitled to an order for possession of the property. Accordingly, the order of the court will be to dismiss the defendants' appeal and to affirm the order of the Circuit Court, but without any stay on the order for possession.
61. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on costs and on any other matters that may arise.