THE HIGH COURT

[2024] IEHC 499

[Record No. 2013/12852P]

BETWEEN

SAMANTHA SCRIVEN

PLAINTIFF

AND

GERARD SCRIVEN

AND (BY ORDER)

FENITON PROPERTY FINANCE DAC, LUKE CHARLETON, MICHAEL COTTER AND PEPPER FINANCE LIMITED DAC

DEFENDANTS

JUDGMENT of Mr Justice Kennedy delivered on the 15th day of August 2024.

Introduction

1. This is an application for directions. It does not determine the substantive issues in the proceedings. The first defendant's Notice of Motion sought the following reliefs against the second, third and fourth defendants:

"*1. An Order pursuant to Order 25 of the RSC by way of a preliminary determination that the Second Named Defendant did not engage in absolute legal assignment as required by Section 28(6) of the Supreme Court Judicature Act 1877 and as relied on by the defendants, consequently the transaction is ineffective as a legal assignment and the legal chose in action to act as Plaintiff and/or Defendant in legal proceedings is unavailable to the Second Named Defendant.*

2. An Order pursuant to Order 25 of the RSC by way of preliminary determination that the Second Named Defendant (and or its successors) as security trustee only (legal title holder) has no locus standi or legal entitlement to enforce legal charges for valuable consideration as provided by the Registration of Title Act 1964.

3. An Order pursuant to Order 25 of the RSC determining that the Second Named defendant (and or its successors) as security trustee only (legal title holder) are not entitled to advance a novation deed and/or appoint receiver(s) (or otherwise) for redemption of any relevant debts on behalf of or for the third party loan owners.

4. An Order pursuant to Order 25 of the RSC determining that the Third and Fourth Named Defendants are not entitled to accept a novation and/or receivership appointment (or otherwise) for redemption of any relevant debts on behalf of or for third party loan owners.

5. An Order pursuant to the Order 15, rule 4 or the inherent jurisdiction of the High Court to join the Property Registration Authority (Tailte Éireann) to the proceedings regarding the First Defendant's challenge to the Property Register regarding the transfer of legal charges (for valuable consideration) to the Second Named Defendant (or its successors).

6. An Order prohibiting all the Second Named Defendant (and or its successors) as well as the Third and Fourth Named Defendants custody, use and (unconsented) further use of the First Named Defendant's personal data in circumstances where a relevant loan or loans is separated from the legal charges and further, where there are undisclosed data controllers/processors with custody and use of the First Named Defendants personal data property, and the First Named Defendant is thus entitled to invoke the right to object pursuant to Article 21 of GDPR.

…

7. A declaration that the Second Named Defendant did not engage in an absolute legal assignment as and thus, the legal chose in action relied on by the defendants pursuant to the 1877 Judicature Act is unavailable in such circumstances.

8. A declaration that the Second Named Defendant was not and is not the loan owner of the First Named Defendants' alleged debts and consequently, as a security trustee only are not entitled to enforce the attached security on behalf of a third party.
9. A declaration that given the foregoing and in such circumstances the Third and Fourth Named Defendants are deemed trespassers in law on the First Named Defendants' private property."

The Parties to this Application

2. Unusually, this application is between co-defendants, rather than between plaintiffs on the one hand and defendants on the other. The Plaintiff has paid no part in the application which is brought by the first defendant against the second, third and fourth defendants (the alleged charge-holder and receivers) who, unusually and for reasons explained below, were added as defendants *on their own application*. In addition, the second defendant's alleged successor in title, Pepper Finance Limited ("Pepper"), was later added, again on its own application, as a fifth defendant.

3. The multitude of related proceedings would render it confusing to refer to parties as plaintiffs or defendants without identifying the proceeding. Accordingly, for, simplicity, I will refer to the first defendant in these proceedings as the Applicant, the second, third and fourth defendants as the Respondents and, when I refer to the fifth defendant, Pepper, as well as the Respondents, I will refer to them collectively as the Finance Defendants. If I do refer to parties as "the Plaintiff", etc., it will be by reference to their role in these proceedings, unless I specify otherwise in the particular context.

4. The second and fifth defendants claim to be successors in title to the mortgagee's interest in properties ("the Properties") which are the subject of these proceedings and to have appointed the third and fourth defendants as receivers. The fifth defendant was not named as a respondent to the motion. However, since all Finance Defendants were jointly represented, and

no objection was taken by the Respondents on that ground, it appears that no issue arises in that regard.

The Judgment of O'Moore J.

5. The background to these proceedings was helpfully summarised by O'Moore J. in a 23 November 2023 judgment (which was not appealed) in respect of the joinder of the fifth defendant, and it is worth considering his decision at length, because, as well as setting out the context of the litigation, his summary of points raised on that occasion also directly address themes arising (again) on this application:

> "*4. These proceedings were issued on the 22nd November, 2013. Initially, the only defendant was Gerard Scriven. By order of the 16th November, 2016, the existing second, third and fourth defendants were joined as defendants to the claim. In an amended statement of claim dated the 26th July, 2019…it is pleaded that the plaintiff is "the lawful spouse…" of the first defendant, Mr. Scriven. It was also pleaded that the plaintiff's "marriage is in difficulty and some of this difficulty can be ascribed to these instant proceedings."*
>
> *5. The amended statement of claim goes on to plead that there are debts due by Mr. Scriven to Ms. Scriven, and that these arise "from agreements reached between the plaintiff and the first named defendant, from monies advanced by the plaintiff to the first named defendant and also arising from work carried out by the plaintiff for the first named defendant while she was in his employment."*
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> *6. Importantly for the current application, the amended statement of claim goes on to assert that: -*
>
> > *"It was at all times agreed between the plaintiff and the first named defendant that in return for the said credit i.e. monies advanced by the plaintiff to the first named defendant, and unremunerated work, that the plaintiff would be entitled to the first named defendant's entire beneficial interest in the properties specified in the First and Second Schedule of the plenary summons herein (the Properties)."*
>
> *7. The statement of claim further asserts (at para. 19): -*
>
> > *"By reason of the matters aforesaid, the plaintiff asserts that the second named defendant has no legal title and the mortgages/charges executed by the first named*

defendant in favour of BOSI and as such, the second named defendant has no claim or entitlement to the properties and is wrongfully in possession thereof."

8. It is then pleaded that the appointment of the third and fourth defendant as receivers over the properties is invalid and unlawful.

9. It is clear that the amended statement of claim delivered on behalf of the plaintiff makes claims which fundamentally affect the position of the second, third and fourth named defendants with regard to the properties covered by these proceedings. That is put beyond doubt when one considers the actual reliefs claimed by the plaintiff. The relevant reliefs, for the purpose of the current application, are as follows: -

"3. An order declaring that [the plaintiff] is the rightful and lawful owner of the properties the schedules attached to the Indorsement of Claim.

4. An order declaring the agreements (if any), between the first defendant and the second defendant cancelled and have no legal effect …

15. An order directed to the chief registrar of the Property Registration Authority to register the plaintiff as sole owner of such of the properties as are registered in the Property Registration Authority free from encumbrances."

10. In their defence and counterclaim, the second, third and fourth defendants assert that Mr. Scriven (the first defendant) was at the time of the pleading indebted to the second defendant on foot of loans taken out in April, July and August 2007 in the sum of €2,500,000, €3,000,000 and €1,200,000 respectively. It is further pleaded that Mr. Scriven granted to his financier at the time "a first rank in charge over each of the properties listed the plaintiff's indorsement of claim in these proceedings …", that the ownership of the loans and the relevant charges transferred from BOSI to Bank of Scotland plc on the 31st December, 2010, and the loans and relevant charges were further transferred to the second defendant by deed of assignment dated 20th November, 2015. Importantly, it is pleaded (at para. 23 of the defence and counterclaim of these defendants) that: -

"23. Each Relevant Charge is registered on the folio for the associated Relevant Property, and the second named defendant is the registered owner of each relevant charge."

11. The defence to counterclaim reads as follows: -

"The Plaintiff is a stranger all of the matters pleaded at paragraphs 19 to 28 of the Counterclaim of the Defendants and the Defendants and each of them are full on full proof (sic) of each of the matters pleaded therein."

12. That is where the pleadings rest. The current application is brought grounded on an affidavit of Lorraine Fairley, a senior portfolio manager with Pepper. In this affidavit, Ms. Fairley gives evidence about the transfer of the loans and the charges to Pepper. This evidence has been severely criticised by Mr. Scriven, and I will briefly describe the nature of these criticisms later in this judgment. However, importantly, Ms. Fairley gives evidence that the registered ownership of the relevant charges has been transferred to Pepper "and this is in the course of registration" - see para. 13 of Ms. Fairley's affidavit.

13. In a second affidavit filed on behalf of Pepper in support of the current application, Mr. Seamus Dowling (senior operations manager with Pepper) swears that: -

> *"At paragraph 7 of Ms. Fairley's affidavit, each of the twelve relevant properties were listed, and exhibited the folio for each. At paragraph 13 of Ms. Fairley's affidavit, she noted that in addition to the assignment deed, Feniton had executed and delivered a Form 56 to transfer ownership of the relevant charges to Pepper, which was then in the course of registration. That registration has now been completed for all twelve Relevant Charges, as may be seen in the updated copied folios for the relevant properties (listed in the following table) upon which, marked in the manner set out in that table in each case, I have signed my name prior to the swearing hereof."*

While there is, at least on the face of it, a significant dispute in these proceedings about the assignment of either the loans or the security to Pepper, there is no dispute about the fact that the ownership of the charges by Pepper is now registered in the Land Registry in respect of each of the properties which are the subject matter of Ms. Scriven's claim.

14. In my view, this is critical. Given the reliefs sought by Ms. Scriven in these proceedings, it would be impossible for them to be properly considered by this court without the joinder of Pepper. In particular, the final relief sought by Ms. Scriven (to the effect that she is the lawful owner of the relevant properties free of any encumbrance) is one on which Pepper is entitled to be heard. ...

16. I accept the submission made on behalf of the moving parties that this is an exceptional situation, in that Pepper is now the registered owner of the charges which Ms. Scriven seeks to have set at naught. Given that, pursuant to s. 31 of the Registration of Title Act, 1964, the register (on which Pepper's interests appear) is conclusive evidence of its contents, to paraphrase the language of Ryan J. (as he then was) the legal and proprietary rights of Pepper (arising from these registrations) would be materially

affected by the outcome of the litigation should Ms. Scriven establish her claim to the properties free from incumbrances.

…

19. The position of Mr. Scriven, as the first defendant, was far more trenchant. He stressed what he claimed were contradictions between the affidavit of Ms. Fairley and the affidavit of Mr. Dowling both (as I have indicated earlier in this judgment) sworn on behalf of Pepper. He raised the argument that a credit servicing agent (which is what he says Pepper is) can neither appoint receivers nor participate in the novation of receivers already appointed. He makes this submission by reference to the Credit Servicing Firms Act, 2015. He submits that there is no evidence of "relevant loans or a transfer of possible data in Ms. Fairley's affidavit…". He complains about the extent of the redaction of the documentation relied upon by Pepper, and he also made submissions based on the splitting of legal and beneficial interest during the course of certain of the transactions.

20. This account of various arguments raised by Mr. Scriven gives a flavour of the nature of his opposition (both in his affidavit and in his written submissions, as well as his oral presentation to the court) to the application that Pepper be joined as a party to the proceedings. As was accepted by Ms. Scriven's solicitor, and not seriously disputed by Mr. Scriven, the bar to be met by Pepper on the application under O. 17 is a low one. In as much as there is potentially any merit to the arguments made by Mr. Scriven as to why Pepper should not be joined as a party pursuant to O. 17, these appear to me to be matters for the trial of the action as opposed to the current application. For example, the issue raise by Mr. Scriven about the impact of the Credit Servicing Firms Act, 2015 is one that is tailor made for the trial, it is not one to be determined on applications such as this. However, it is also important to note Mr. Scriven's responses to two questions raised by me during the course of his submission.

21. These two questions were: -

> *(a) given that Pepper is the registered owner of the charges, should they not be a party to the proceedings in light of the claims made by the plaintiff;*
>
> *(b) as far as Mr. Scriven is concerned what adverse impact could there be on him as a result of the joinder of Pepper?*

During the course of Mr. Scriven's submissions, I asked: -

> *"But if you take Mr. Whelan's point that Pepper is the registered owner of the charges and, clearly, that's an essential role to play given the claim made by Mrs.*

Scriven in the case. Don't Pepper have to be in the case if only to address that fact?

Mr. Scriven: My opposition to Pepper coming into the case is not for the benefit of the plaintiff. My opposition is that I felt there was a capacity for me - and Mr. Whelan did actually reference it - where I have engaged extensively with the plaintiff to settle these proceedings, but where now, a number of years on, Feniton are here, are not trying to exit. We're now in a set of proceedings with defendants, me being the first defendant. Mr. Charleton, a Receiver, as a defendant. Under the Supreme Court undertaking that he had to give there - he is only entitled to collect rent or has been for the last number of years. Mr. Cotter is retired and there is a deed of discharge even though he is still a part of the proceedings. Feniton, who want to stay in the proceedings, are in liquidation, and one of the queries is: why are Legado not here looking to join?"

22. The continuation of the existing defendants was addressed by Mr. Whelan in the reply, where he indicated that Mr. Scriven had delivered notices of indemnity and contribution against these defendants, and there would therefore have been difficulty in seeking to release them from the proceedings. In as much as Mr. Scriven suggested that the joinder of Pepper would compromise his ability to settle the proceedings, that seems to make little sense. While it is the case that Mr. Scriven clarified (later in his submission) that he was talking of settling with Ms. Scriven, that focus is unreal given that there are other parties who claim an interest in the relevant properties. As to the joinder of Pepper, it seems to me that including in the action a party which (rightly or wrongly) claims to have acquired the debt would ensure that every party asserting an interest in the properties would be focused on this claim, which is likely to make settlement easier rather than harder.

23. The status of Pepper as the registered holder of the charges was taken up again with Mr. Scriven a short time later. I asked: -

"Well Mr. Scriven we're all focused a great deal on the application under Order 17. There's also an application under Order 15, I think, which is that Pepper is an appropriate party to the proceedings. Given that they're registered charge holders, doesn't that make them appropriate parties to the proceedings?"

Having parried the question somewhat, Mr. Scriven answered: -

> *"And I don't want to be disagreeable. What I am saying is that if they've come in declaring they are a credit servicing firm then they are not in a position to be even owning the charge."*
>
> *24. This completely evades the question put to Mr. Scriven. Notwithstanding the provision of his affidavit, his oral submissions and his written submissions (which ran to over 6,000 words) Mr. Scriven has put up no coherent submission as to why Pepper should not be joined as an additional defendant to this claim given its status as the registered owner of the charges which form a central part of these proceedings. The argument contained in Mr. Scriven's submissions (that the charges registered in Pepper's name do not necessarily indicate anything about the underlying debt) makes no sense. The fact is that Pepper is the registered owner of the charges, and the action brought by Ms. Scriven seeks to declare the relevant properties free of encumbrances. Equally, while it is not in any way influential in deciding this application, I note that Mr. Scriven has provided any plausible reason as to why he has gone to such lengths to resist the joinder of Pepper. The reason offered by Mr. Scriven (which is that he would find settlement more difficult) is not credible. A more likely reason is that his resistance to what should be a fairly straightforward application (whichever way it is decided) has resulted in a motion which has caused considerable delay in bringing this action to trial. This delay is, in turn, frustrating enforcement measures being taken against Mr. Scriven in respect of very substantial sums borrowed by him which he has not yet repaid.*
>
> ***Decision***
>
> *25. … given its status as the registered owner of charges in respect of the relevant properties, Pepper should be joined as a co-defendant to these proceedings. This will be done pursuant to O. 15, r. 13. To use the language of that rule, the presence of Pepper is "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter …"*" [*sic*].

6. As appears from the foregoing passage, and from the evidence before the Court on this application and an application between the same parties in related proceedings (which I discuss below): (i) in 2007, the Applicant executed a mortgage ("the Mortgage") over a number of buy-to-let residential properties, to secure his substantial borrowings; (ii) the Plaintiff asserts an unregistered equitable interest in nine of those properties (the Properties) (based on a

handwritten agreement which she claims to have entered into with the Applicant, her now estranged husband, and which, she claims, takes priority over the mortgage); (iii) I have seen no evidence as to whether the alleged equitable interest was disclosed to the mortgagee before the Mortgage was entered into; it seems vanishingly unlikely that the security would have been acceptable if it had been; (iv) the Applicant has been in default under the loan facilities since 2009; €8,116,777.63 was owing as of 9 February 2024; (v) the second and fifth defendants claim to be successors in title to the mortgagee, but the Applicant disputes their title; and (vi) in 2013/2014, the second defendant appointed the third and fourth defendants in these proceedings as receivers over the Properties.

7. The first four reliefs sought in the Notice of Motion are orders for the preliminary determination of various issues and were the main focus of the application. Before dealing with those reliefs, I will deal with the other parts of the Notice of Motion.

The Application to join Tailte Éireann

8. Firstly, the Applicant indicated that he was not pursuing the application to join Tailte Éireann at this time. Cogent reasons would be required to convince the Court of the need to join additional parties at this late stage in such long running and advanced litigation. Even if there were a possible basis to join such a party – and I make no such finding – it would be necessary to determine whether they should be joined to the proceedings at this late stage. In the event, the issue does not arise, as the relief was not pursued.

Reliefs 6 to 9 of the Notice of Motion

9. Reliefs 6 – 9 seek declaratory or injunctive relief. For several reasons, I consider that there is no entitlement to such relief. Firstly, they seem to be substantive reliefs dependant on

the outcome of the litigation as a whole, rather than interlocutory orders designed to preserve the status quo pending trial.

10. Secondly, to be proper matters for interlocutory relief, the Applicant must show an arguable cause of action which might entitle him to such relief if he succeeded at trial. However, the Applicant has not asserted a cause of action against the Respondents. Therefore, he has no entitlement to seek seeking interlocutory relief against them. He cannot claim to be seeking to preserve his entitlement to pursue a substantive cause of action and obtain permanent relief in corresponding terms at trial. On the face of the pleadings, there is no *lis* between them in these proceedings. Therefore, by definition, that part of the application cannot meet the *Merck Sharp & Dohme Corporation v Clonmel Healthcare Ltd* [2020] 2 IR 1 ("*Merck*") criteria for injunctive relief.

11. I have considered the possibility that the "declarations" were intended to frame the parameters of an Order 25 hearing, mirroring reliefs 1-4 to some extent. However, even if I were to take such a benevolent interpretation of the Notice of Motion, I would still have to refuse the relief sought because such a preliminary hearing would not be in respect of discrete questions of law. Nor would the preliminary issues be capable of being based on agreed facts (or on the basis of proceeding on the basis of the facts as alleged by the Respondents). Nor would an Order 25 hearing along such lines be likely to lead to aggregate savings of either time or money. It would be more likely to have the opposite effect in the circumstances.

Reliefs 1 – 4

12. These reliefs require more detailed analysis, both by reference to the recent decision of O'Moore J. as noted above, and by reference to the affidavits exchanged on the application.

The Affidavits

13. The affidavit grounding the application essentially impugns the second defendant's claim to be the mortgagee's successor in title (and, consequently, that of the fifth defendant and also the basis for the appointment of the receivers). Curiously, the Notice of Motion is not addressed to and does not expressly refer to the fifth defendant. However, the logic of many of the Applicant's objections would seem to apply to it (and a successful challenge to the second defendant's title would necessarily impact its title as well).

14. The Applicant says at (and following) para. 6 that:

> "*I was unaware of the issue of Feniton's locus standi during the earlier course of these proceedings. I say it was all but taken for granted and indeed set out by Feniton that the transfer of registered legal charges was a result of purchasing the loans from Bank of Scotland Plc. However, this is not the case.*
> *7. I say Feniton and or its purported successors, are already possibly proceeding as if they are so entitled to avail of the full panoply of rights of a sole Mortgagee. However, the Mortgagee is a party to whom the First Named Defendant would have contracted a mortgage credit arrangement and it was not just a 'holder of legal title' (charge) in trust.*
> *8. I say it now appears from an as of yet, earlier undecided application within these proceedings, that the legal charges (title) were and are separated from the loan/mortgage contract and thus, the relevant known owner(s) (possibly ELQ Investors as named in the earlier application referred to) are not privy or party to these proceedings.*
> *9. I say the situation as it is now understood, is that an absolute legal assignment as relied on by the Second Named Defendants did not (in fact or in law) take place. Consequently, the legal chose in action to act as a defendant and/or a plaintiff in legal proceedings or at all, regarding a debt and associated security is substantially in question.*"

15. The grounding affidavit refers to the "*hello*" and "*goodbye*" letters sent to the Applicant on the changes of mortgagee (which were also referenced in the hearing before O'Moore J.),

arguing that those and other documents showed that the requirements of the Judicature Act 1877 for assignments had not been met, contending at para. 11 that the process was:

> "*hardly effective in circumstances where the debts are separated from the legal charge (title). I say that the First Named Defendant could hardly be notified of the correct position as to the loan owner where the security trustee purports to be the owner of both the debt and the legal charges. Put simply, a party is entitled to know to whom the debt would be owed to and the party who is entitled and obliged to give good discharge to any such debt. In these circumstances, it is not Feniton and in that event, the chose in action of Feniton (and its successors) assumed could not be legitimately transferred by law.*
> *12. I say that the 1877 Judicature Act is specific in that legal assignment must be absolute. Put simply, the legal transfer/assignment cannot be by legal charge only. Section 28(6) is explicit in this regard. Yet, the assignment on which Feniton rely is unsupported by Section 28(6) of the 1877 Judicature Act. The Second Named Defendant's possession is I say in question, from several aspects of the law including the Registration of Title Act 1964 and the 1881 Land Act in that they seeking to be a party entitled to call on debts as landowner and as sole mortgagee for charges registered for precise valuable consideration.*
> *…*
> *16. I say that Feniton is not exposed to a debt and yet, they assume the security for such debt on behalf of the party who is exposed. It is difficult to accept that the Second Named Defendant relies on the 1887 Act to legitimise these transactions as legal assignment where that assignment is not absolutely required by that law. They separate the security (legal charge) from the mortgage loan contract which is in effect contrary to the general law of assignment. This is a transaction the aforementioned official liquidator took issue with regarding tax implications. I say the Second and indeed the Third and Fourty Defendants in these proceedings are thus obliged to address locus standi in this regard. Feniton's purported successes Pepper, do not deny that they hold 'legal title' (charge) only on behalf of third party loan owner(s). At this juncture, this defendant's challenge in this regard remains uncontroverted.*" [*sic*]

16. The affidavit also challenges Pepper's status as a security trustee on the basis that it has been identified as a credit servicing firm, governed by the Credit Servicing Act, and that, as a

result of the separation of the relevant loans from the charges, it is not entitled to enforce the loans as acting servicing agent (an issue already ventilated before O'Moore J.).

17. The affidavit also impugns the alleged novation at (and following) para. 22:

"*evidence was provided that questions the capacity of the novation of a receivership, itself being an act of enforcement for debts, for to a servicing agent (Pepper) who simply does not have the legal entitlement to carry out the legal enforcement activities.*
23. I say there is no evidence before the court within these proceedings of any notification of any kind of further transfer of loans to any agency other than to Pepper.
24. I say that the relevant loans could not have transferred to Pepper as claimed by their notification letter and as asserted by them on sworn Affidavit. Pepper as successor to the Second Named Defendant are the holder of an interest only and a servicing agent of the loans on behalf of another, who introduced themselves to the equation only by the obligation to notify a data subject of their data controller status.
25. I say in 2022, I was sent a notification from Pepper that Lagado Assets IE IV" (Lagado) owned the relevant loans. This announcement is in stark contrast to evidence on affidavit that Pepper as assignee emphatically claim that they are owners of the debt and security. The applicant Pepper claimed on affidavit that… "the Relevant Charges (<u>and the underlying loans</u>) have been assigned to it" (Pepper). The 2022 letter however, on Pepper headed paper, claims that (as lawfully obliged by Data Protection Act 2018 (GDPR))) that "you were advised of the <u>transfer of your Loan(s) to Pepper Finance Corporation (Ireland) DAC</u> ("Pepper") and following the transfer Pepper became the full legal title holder of your loans"…"From the transfer date, Pepper assumed full responsibility for the management and administration of your loans and continues to be a point of contact regarding your loans'.
26. I say that this is a far cry from legal notifications that (originally) Feniton and now Pepper are the loan owners. On the one hand, we are asked to accept that Feniton's' purported successor Pepper are the loan owner and duly transferred/assigned legal charges for valuable consideration. Pepper seeks to collect money on that precise basis. Two years later however, this defendant received different notification claiming that Lagado is the loan owner and Pepper are holders of an interest in a legal charge, but continue as servicing agent of Lagado." [*sic*]

18. The grounding affidavit raises data protection issues (presumably with reference to relief 6 in the Notice of Motion) which, in my view, would be manifestly unsuitable for a preliminary hearing, by virtue of their complexity and the need to ascertain the underlying facts and circumstances and which were not seriously agitated during the oral hearing.

19. The grounding affidavit proceeds to suggest that a preliminary trial of the various issues would be largely dispositive of the proceedings, or at least capable of substantially refining them, and to avoid substantial costs. In particular such a hearing would:

> "*identify all participating parties to the transaction from a legal perspective and further for legal transparency purposes so the defendant may engage their fundamental rights regarding private and personal property. It is ofcourse noted, if legal impediment is determined regarding the Third and Fourth Named Defendants standing and activities (and I say there is) the First Named Defendants private properties are subject to trespass for a great many years, which caused substantial economic inertia and damage.*
> *34. I say it should be noted that the Second, Third and Fourth Named defendants are not merely interested spectators so to speak in these proceedings, but active Defendants with both defences and amended defences and counterclaims made by them. I say the within application is decisive and dispositive of critical elements of this case and/or will at least establish whether Feniton and its successor have a legal chose in action assigned in the circumstances as set out.*" [*sic*]

20. The Respondents' affidavit notes that the Properties are subject to charges granted by the Applicant to secure his total indebtedness on certain loan accounts and that the loans were subsequently acquired by, firstly, the second defendant, and then by the fifth defendant, following a cross-border merger between Bank of Scotland plc and the original mortgagee. He notes that the Respondents applied in 2016 to be joined as defendants in these proceedings to challenge the Plaintiff's claim to an interest in the Properties which would, on her case, have rendered the relevant charges ineffective. After detailing the history of the transfer of the mortgagee's interest, the replying affidavit references the subsequent litigation, complaining that the Respondents:

"*have been stymied in their efforts to enforce the security of the Relevant Properties by these proceedings and by the various lis pendens registered by Mrs Scrivens over her borrower-husband's properties in reliance on these proceedings. In this way, these proceedings constitute a direct challenge to the Relevant Charges and their owners.*"

21. The affidavit criticised the Applicant's conduct of the various proceedings and also noted that the current application was framed as if the Applicant were a plaintiff, rather than a co-defendant who was not asserting a cause of action against the Respondents in these proceedings. The affidavit compared the current application to the Applicant's unsuccessful opposition to the recent application to add the fifth defendant in the proceedings, referencing the judgment of O'Moore J., including the passage set out above. The affidavit contended that the application was misconceived because no facts were agreed between the parties which could form a basis for a preliminary hearing and because the Applicant had not pleaded any *lis* against the Respondents. He had served a notice of indemnity of contribution, but the issues raised in this application were not pleaded therein. The Applicant was seeking, *inter alia*, to impugn the assignment of his debts and the underlying security but:

"*These are matters of fact, which are entirely in dispute between the parties, as is set out in the judgment of O'Moore J. referred to above. They are matters to be proven at trial in the ordinary way.*"

22. The affidavit also responded to para. 31 of the grounding affidavit that:

"*21. Far from raising issues of law, Mr Scriven seeks evidence from the Finance Defendants pertaining to matters not pleaded by him in his pleadings, rather matters pleaded by his wife, the plaintiff in these proceedings.*

22. It is therefore difficult to ascertain what point of law Mr Scriven seeks to have determined in circumstances where Mr Scriven now appears to be advancing new factual arguments in this application, not pleaded in his Defence (nor his Notice of Indemnity and Contribution) which facts are squarely in dispute, yet has not identified any legal issue to be decided by way of preliminary hearing pursuant to Order 25, as requested at paras. 1, 2, 3, 4 of the prayer of his notice of motion".

23. The affidavit noted at para. 24 that:

"*the Plaintiff has in fact put squarely within the dispute between her and the Finance Defendants, the matters now raised by Mr Scriven in his motion. Again, these are matters of fact that require evidence to be adduced by the Finance Defendants and are not simply issues of law, which is the preserve of an application pursuant to Order 25. In addition, and arising from the foregoing matters, this motion will not serve to reduce the cost of these proceedings but will certainly increase the same. In circumstances where no matters of law are put in issue and the facts of the matters as pleaded by the plaintiff and the Finance Defendants are still squarely at issue and in no way agreed, the full plenary trial must proceed to a conclusion notwithstanding the outcome of this motion.*"

24. The Applicant's replying affidavit disagrees with the Respondents' contention as to the extent of factual disputes, observing at para. 19 that:

"*There are clear issues extrapolated concerning the facts already pleaded. Legal issues arise as to the facts established and submitted by the Joined Defendants in relation to these proceedings. Mr O'Regan now disputes those facts by proposing without supporting evidence (other than a relied Deed of Conveyance and transfer of security interest), that his clients are the owners of both the loans and related security. This is extraordinary given his client's correspondence (already provided by this Deponent) that his clients could not be the loan owners. I say it is hardly unfair to assume this factual dispute is strategic in nature to undermine the extant motion as misconceived and/or premature.*

20. I say that this O25 motion is pursuant to existing pleadings and documentation provided by both involved parties. Given the relied paperwork and correspondence provided to this Deponent regarding the facts, clear issues of law arise to be determined. If the Joined Defendants are not the absolute full assignee of the Assignor, then as a matter of law, what standing (if at all) does a 'partial assignee' have in these entitled proceedings?

21. I say it is evidenced in the pleadings provided by the Joined Defendants that the proposed Defendant Pepper Finance (Ireland) DAC is not the full assignee. Their predecessor Feniton was not the full assignee either. Yet, all of these Defendants rely on an absolute assignment to discharge the original mortgagee lender from their contractual burden and rights to assume that Assignor's rights. Thus, clear issues arise

as to the locus standi of these Defendants who have adopted the position of full assignee to register themselves as charge owner ('legal title holders') to assume and use the full suite of statutory rights of a full assignee mortgagee."

25. The Applicant's contentions as to the beneficial ownership of the loans appear central to his attack on the validity of the assignment and the issues which he hoped to resolve as preliminary issues. He states at para. 30:

"*30. The position is hardly in question where Mr O'Regan claims that the proposed Defendant Pepper is full assignee loan and security owner, and yet, that Defendant wrote to this Deponent to claim that the entity Lagado is the owner of what they refer to as the relevant loans. Furthermore and incredibly, the proposed and Defendant as well as the Joined Defendants exhibited aforementioned the Purchase Deed, and redacted the identity of participating parties to the loan sale transaction.*

31. I say it was hardly necessary to redact a relied on document unless there were different parties participating in the sale of relevant loans. Thus, a change of ownership of legal charge is not a consequence of a loan sale to the Defendant Pepper (or Feniton in 2015). I say in such circumstances, this Deponent is entitled to raise a separate and preliminary trial of the legal consequences of such activities and the legal effect of these unsupported transactions within the ambit of property law, assignment law, privity of the contract, personal property rights, the law of maintenance and the right to intervene in a private legal matter between the Plaintiff and the Defendant without a bona fide 'horse in the race'. At best, the said Defendant appears to be a 'representative' of an actual entitled indebted party. There is no explanation, precedent or legal basis however, that this Deponent can find permitting a representative (other than a licensed Solicitor/Barrister) to represent another and/or claim the entitled benefit of their legal remedy. There is no explanation or legal basis provided for how a 'partial assignee' of a mortgage (with one single intention) may advance their position as sole mortgagee assignee.

32. I say the said Joined Defendants (now to include Pepper) are not entitled to registration of legal charges while not being indebted to a party. They are not the full assignee mortgagee. The legal basis for their position requires inquiry given a claimant's obligation even in a summary process to prove indebtedness to claim the right of the provided legal remedy. I say further, the law of assignment serves the law of

maintenance, where one could in fact attempt to litigate on behalf of another, and where an applicant has no bona fide interest or share in the proceeds and outcome of the case. Put simply, the proposed Defendant Pepper are a debt collection agency only on behalf of the loan purchaser(s). They should not have registered as owner of the legal charges as some entitled procedural nicety to serve the needs of the commercial imperative."

26. The Applicant argued that the resolution of the Respondents' standing as a partial assignee would dispense with a substantial issue for the remaining parties and argues that the Court's decision on the application to join Pepper:

"*is not dispositive of the legal issues at hand, which were clearly identified by O'Moore J. as 'trial issues'. It is now a matter for the Court to decide if the trial issues can be disposed of on a preliminary basis given the existing pleadings and facts.*"

The Litigation Context

(a) The Nature of these Proceedings

27. These proceedings cannot be seen in isolation if I am to identify the most appropriate procedures, with a view to the fair resolution of the issues in controversy and for the saving of costs and avoidance of delay. I also need to consider the interrelated litigation because there are several separate but related proceedings between the parties (other than the Plaintiff), including, in particular, possession proceedings initiated by the receivers ("the Receivers' Proceedings") to which I will refer below. I will first summarise the position in these proceedings before considering the position in the Receivers' Proceedings.

28. In these proceedings, it is significant that the Respondents applied to be joined as defendants and that their application was unsuccessfully opposed by the Plaintiff and by the Applicant, who was the sole defendant at the time (and O'Moore J. has noted, in the passage set out above, his view of the motivation for the Applicant's similar opposition to the subsequent application to join the fifth defendant). This motion appears designed to challenge, once again, the basis for the Finance Defendants' participation in the proceedings. However,

the rationale for their inclusion as named defendants is clearly outlined in the passage from the judgment of O'Moore J. set out above. The Plaintiff originally issued these proceedings against the Applicant, her estranged husband. She claims be entitled to his "*entire beneficial interest*" in the mortgaged Properties on the basis of an agreement which she allegedly reached with him prior to his mortgaging the Properties. She alleges that the Applicant breached his agreement with her by mortgaging the Properties without her knowledge or consent and that the mortgage is subject to her prior equitable claim.

29. If the Plaintiff's claim was to be substantiated at trial, then, unless the Applicant had disclosed the equitable interest to the original mortgagee at the outset (and there was no suggestion that he had done so), it would raise serious issues as to the *bona fides* of his original engagement with the mortgagee and the integrity of his actions in raising substantial funds on the basis of a charge over the Properties despite the fact that, if the Applicant's wife is to be believed, he had no equitable interest therein. In any event, since the Plaintiff's purpose is to assert ownership of an equitable interest in the Properties, an outcome which might have eliminated the value of the security granted by the Applicant, the Finance Defendants were understandably concerned to contest the Plaintiff's claim, and there has been no appeal against the orders adding them to the proceedings.

(b) The Receivers' Proceedings

30. In 2013/2014, the second defendant appointed the third and fourth defendants as receivers of the Properties. The receivers issued proceedings seeking orders for possession and obtained interlocutory injunctions, effectively giving them control over the Properties which they have retained ever since. The Applicant has counterclaimed in the receivers' proceedings, alleging that the receivers have not managed the Properties properly, keeping them in good

repair and maximising rental income and value. The Applicant unsuccessfully appealed the interlocutory injunction obtained by the receivers.

(c) The Supreme Court judgment on the Receivers' Interlocutory Injunction

31. The Supreme Court judgment is relevant to the current application in several respects. Firstly, although the appeal was unsuccessful, the Court concluded that, by virtue of the nature of some of the reliefs sought, the higher standard of the test for interlocutory injunctions (strong arguable case) should have been applied, insofar as it relates to mandatory reliefs. While the Court was satisfied that the lower standard had been met and the prohibitory reliefs were rightly granted, it was less convinced, in the absence of full argument, that the higher standard had been met. It largely maintained the original order, allowing the receivers to continue to collect the rent for the Properties pending trial (the primary relief they appear to have been seeking), but only on foot of undertakings from the receivers not to sell the Properties pending the determination of the proceedings. Clarke C.J. observed, at paragraph 6.11, that an interlocutory injunction was appropriate:

> *"but only one which was sufficient to ensure that the monies were paid over to and retained by the Receivers pending the trial of the action."*

32. The Supreme Court judgement noted, at paragraph 7.3, that, even then (2019):

> "*it would have been possible to have had a full trial of this matter well before now so that the question of the technical argument as to the validity of the appointment of the Receivers could have been finally resolved*".

33. The Supreme Court criticised the delay in the Receivers' Proceedings, noting that interlocutory injunctions are designed to hold the situation pending a full trial and that a party obtaining such relief must bring the matter on for hearing rather than resting on their laurels. The Chief Justice noted that if the recipient of such an order failed to bring the matter to trial

expeditiously, the Court might reassess the appropriateness of interlocutory relief – such orders are intended to be temporary, rather than for prolonged periods.

34. I recently heard the Applicant's application to dismiss the Receivers' Proceedings for want of prosecution. Although I criticised the plaintiffs' delay in those proceedings, I was not minded to dismiss the proceedings, but I required satisfactory assurances as to their future progress. Although I indicated my provisional conclusions, the parties agreed that I should refrain from finalising and delivering my judgment pending an anticipated Supreme Court decision which may affect the principles applicable to such applications. I agreed to defer the judgment temporarily but stipulated that the proceedings should be progressed expeditiously in the meantime (which has apparently indeed been the case).

35. While my formal decision on the want of prosecution application accordingly remains pending, I will briefly summarise some pertinent issues arising on that application because the fair and efficient case management of the issues in dispute is the fundamental question on this application. In that context, it is necessary to have regard to the significant delays which have beset the wider litigation for which both sides blame the other (with justification on both sides). For present purposes, my concern is that any directions on this or any other application should avoid further delays.

36. The following table outlines some key events in the litigation:

Pre-2007	The Applicant allegedly agrees to vest the entire equitable interest in the Properties in his wife.
2007	The Applicant obtains loan facilities secured by mortgage over the Properties.
2009	The Applicant defaults on the loan facilities.
2013	• Last repayment by the Applicant. • The Plaintiff issues these proceedings against the Applicant, claiming an equitable interest in the Properties and lodging *lis pendens* against them.

7 August 2013 & 4 June 2014	Receivers are appointed. The Applicant does not yield up the Properties and resists the Receivers' attempts to collect rents.
23 July 2014	The receivers issue proceedings to secure possession of the Properties.
22 August 2014	The receivers obtain interlocutory injunctions, gaining control of the Properties pending trial.
30 October 2014	A Statement of Claim is delivered in the Receivers' Proceedings.
16 November 2016	The alleged charge holder and receivers successfully apply to be joined as defendants to these proceedings.
27 February 2017	The Plaintiff is required to deliver a Statement of Claim in these proceedings (on the Respondents' application)
3 August 2017	The third defendant retires but the Applicant resists his removal as a party to the various proceedings.
22 November 2017	The respondent delivers a defence and counterclaim in the Receivers' Proceedings.
2014 - 2019	Delays (outside the control of the parties) with the hearing of the interlocutory injunction appeal occur in the Receivers' Proceedings.
8 May 2019	The Supreme Court judgment in the Receivers' Proceedings dismisses the appeal of the 2014 injunction
15 May 2019	The Applicant serves a notice of indemnity and contribution on the Respondents in these proceedings.
3 July 2019	The receivers deliver a reply and defence to counterclaim in the Receivers' Proceedings.
23 September 2020	The Applicant registers a *lis pendens* against the Properties.
15 March 2023	The Plaintiff and the Applicant unsuccessfully oppose the Respondents' application to join Pepper, the latest alleged assignee of the mortgage, as a defendant to these proceedings.
12 July 2023	The Applicant issues the current application seeking trial of preliminary issues in these proceedings.
16 October 2023	The plaintiffs send the defendant a certificate of readiness in the Receivers' Proceedings, indicating their intention to set the matter down for trial.

20 October 2023	The defendant claims that the Receivers' Proceedings are not ready for trial and references his application to dismiss for want of prosecution.
11 April 2024	The application to dismiss the Receivers' Proceedings for want of prosecution is heard; directions are agreed to progress those proceedings to trial.
12 July 2024	The application for a trial of preliminary issue in these proceedings is heard.

37. At the "want of prosecution" hearing, the receivers conceded, appropriately in my view, that there had been an inordinate nine-year delay in progressing their proceedings. They argued that the delay was excusable and that the Applicant's actions in both proceedings had delayed and obstructed the litigation. Examples of the Applicant's actions which the Respondents characterised as unhelpful included: (i) his refusal to agree to amend those proceedings to reflect the first plaintiff's retirement, with no coherent reason being advanced for the Applicant's position; and (ii) his opposition to what would have normally been uncontroversial applications to join the Respondents and, subsequently, Pepper, as parties to these proceedings, a point commented on by O'Moore J. in his judgment.

38. As noted above, at the conclusion of the "want of prosecution" hearing, I indicated my provisional views (while reserving my right to enlarge upon or change the same) and confirmed that, as agreed, my written and conclusive judgment would issue following the anticipated Supreme Court clarification of the jurisprudence. However, to avoid further delay, I encouraged the parties to agree a timetable designed to progress the matter. The Receivers' Proceedings have progressed since then. While reserving my position to revisit the issues in the light of the anticipated Supreme Court ruling, I informed the parties that my provisional conclusions were that: (a) there were significant periods of inexcusable delay (particularly a 53-month delay following the Supreme Court judgment); (b) the Applicant was not blameless.

He did not appear to have been anxious to progress the proceedings; (c) the Applicant had not been significantly prejudiced by the Respondents' inexcusable delay; and (d) on balance, the proceedings should be allowed to continue, but the receivers would be unwise to expect any further indulgence from the Court. Although I was not inclined to immediately dismiss the proceedings, I was highly critical of the way the receivers had conducted (or had failed to conduct) the proceedings, particularly their failure to take on board the Supreme Court's observations. I reiterated the then Chief Justice's warning in the Receivers' Proceedings that interlocutory relief could be withdrawn for delay or default by the beneficiaries of such intervention. As the observations of O'Donnell J. (as he then was) in *Merck* show, the rationale for interlocutory orders is that they are temporary measures to preserve the status quo pending an anticipated trial and are granted on the basis that the action will be progressed to trial. That said, I accepted that responsibility for the delay was shared (although greater culpability rested with the receivers). The remaining receiver was encouraged to volunteer his personal undertaking to the Court with regard to the future conduct of the proceedings. His solicitor did likewise. I am pleased to note that those proceedings have progressed more expeditiously since then and I have confirmed my intention to case manage them going forward.

The Legal Principles Relevant to the Current Applications

39. Order 25 of the Rules of the Superior Courts provides as follows:

> "*1. Any party shall be entitled to raise by his pleading any point of law, and nay point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.*
> *2. If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground o f defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such toher order therein as may be just.*"

40. The parties largely agreed as to the applicable legal principles, which are comprehensively summarised in Chapter 14 of *Delany and McGrath on Civil Procedure* (5th ed., 2023). The parties also referenced a variety of authorities dealing with Order 25, including *McCabe v Ireland* [1999] 4 IR 151, *BTF v Director of Public Prosecutions* [2005] 2 IR 559, *Weavering Macro Fixed Income Fund Limited v PNC Global Investment Servicing (Europe) Limited* [2012] 4 IR 681, *Ryan v Minister for Justice* [2000] IESC 33, *Campion v South Tipperary County Council* [2015] 1 IR 716 ("*Campion*"), *LM v Commissioner of An Garda Síochána* [2015] 2 IR 45.

41. While I have gratefully taken account of those submissions and reviewed each of those authorities in detail, I see no benefit in summarising them, as I could not improve on Delany and McGrath's learned review or, in particular, the succinct summary provided by McKechnie J. in *Campion*, on which I have placed particular reliance in identifying the correct approach to this application.

42. The Applicant also relied on the following authorities as a basis for his submission that questions for law arose which were appropriate for preliminary determination: *Stapleford Finance Ltd (as substituted) v Lavelle* [2016] IECA 104; *Ballyhea Developments Ltd (in voluntary liquidation) v Companies Act 2014* [2023] IEHC 261; and *Start Mortgages v Rabbitt*. (I was unable to identify the latter authority in the absence of a full citation. Perhaps the Applicant intended to refer to *O'Mahoney v Start Mortgages [2022] IEHC 629* but I do not consider that that decision is of assistance in any event.)

Discussion

43. Firstly, to deal with a preliminary point, the Applicant objected that the affidavit on behalf of the Respondents was sworn by their solicitor. The Respondents submitted - and I agree - that the choice of deponent was appropriate in the circumstances and in view of its

contents. The affidavit largely dealt with legal and procedural issues and the conduct of the litigation. The course adopted was in accordance with normal practice and legitimate in the circumstances of the procedural motion. It did not raise substantive factual issues for determination which might have required first hand evidence.

44. Secondly, I should mention at the outset a curious aspect of the current application. Essentially, the Applicant is saying that the Respondents have no business remaining as defendants in these proceedings. There is an irony in his attempt to remove all Respondents as defendants since he previously rejected a request – which would normally have been seen as both reasonable and uncontroversial – for the fourth defendant's removal as a party on the occasion of his retirement. There was no obvious point of principle or rationale for the Applicant's refusal to accede to the Respondents' request in that regard (on terms which would have ensured that he was not prejudiced since the co-receiver remained in situ), and his refusal to accede to a perfectly reasonable request is inconsistent with his current position that none of the Respondents should be parties to these proceedings.

45. Turning to the substance of the application, I consider that preliminary trials could not be granted in the terms envisaged in paragraphs 1-4 of the Notice of Motion or as sought by the Applicant in his affidavits and his written submissions, because they do not relate to discrete legal issues and do not arise from agreed facts. There is no doubt from the affidavits that there are significant differences as to the factual position which would need to be determined to address the issues as framed in the Notice of Motion and that the same issues will need to be ventilated at trial. I have had regard to the range of authorities helpfully furnished by the Applicant in support of his submissions. I do not propose to review each of those items individually, as to do so could almost constitute a preliminary ruling in itself, albeit one without the benefit of sufficient evidence or submissions. I will content myself with the observation that, even leaving aside the point that the status of some of those materials would need to be

established, since not all are authoritative precedents or "hard law", even a cursory examination of those materials will determine the need for detailed argument and submissions, rather than discrete questions of law (such as a narrow limitation point), which might be suitable for a preliminary hearing. Accordingly, a consideration of the affidavit evidence and submissions from the Applicant alone would satisfy me that the broad and complex issues raised by the Applicant are inherently unsuited for an Order 25 preliminary hearing divorced from the main proceedings. This conclusion is reinforced by the extensive authorities cited by the Applicant, as well as by the affidavits and submissions on the Respondents' behalf.

46. With two possible exceptions (which I address below), the points proposed as preliminary issues do not arise from any common understanding of the underlying factual background. To the contrary, there is a stark divergence between the parties on many issues, which can only be resolved by oral evidence, cross examination and legal submission at plenary hearing. This is evident from the Applicant's own wide ranging and discursive affidavits and submissions in support of the current application.

47. Many of the Applicant's submissions focussed on the validity of the various transfers of the mortgagee's interest by assignment or novation and many of his objections hinged on the consequences of any divergence of legal and beneficial ownership of those interests. I consider that the facts and circumstances surrounding such assignments and novations, including the extent of any divergence of the legal and beneficial interests, would require oral evidence and cross examination before the significance (if any) of any such divergence can be properly determined. In this respect and in others, points which the Applicant wishes to agitate are not solely discrete questions of law. To the contrary, the facts are in controversy and the legal issues can only properly be determined in conjunction with an assessment of associated factual and evidential issues. To attempt to resolve such issues in a vacuum could ultimately

be unfair to one side or another, or counterproductive if the same battles had to be refought at the plenary hearing.

48. The Applicant also failed to satisfy me that a preliminary hearing would be likely to reduce the time and cost involved in the litigation as a whole. I consider that it would be more likely to increase costs by requiring two (possibly duplicative) hearings rather than one. In my view, a reduction of costs would be better achieved by sending all issues to trial together in the normal way and without further procedural delay. Indeed, the evident overlap between points currently agitated by the Applicant and those which he has already ventilated before O'Moore J., such as the "credit servicing firm" argument, persuade me that an additional hearing is more likely to increase than to reduce costs.

49. There was far greater substance to the Applicant's narrower submission, which largely evolved in the course of oral argument, to the effect that, if the Respondents' standing in the litigation depended on the validity of the assignment or novation of the mortgage to the second defendant, then it would be theoretically possible for a preliminary hearing to be confined to considering whether, on the face of those particular documents and the mortgage terms (and assuming due execution, etc. for the purposes of the motion) the documents relied upon by the Respondents were capable of establishing a valid assignment or novation, an issue which goes to their entitlement to enforce the mortgage and the rationale for their joinder as defendants in these proceedings.

50. For example, the Applicant submitted that the novation issue depends on the construction of a single clause in the mortgage terms to determine whether the mortgagor's written consent was an essential prerequisite to the particular novation and reiterated his submission that the assignment depended on whether the entirety of the assignor's legal and beneficial interest needed to be transferred in order to effect a valid assignment. I accept the Applicant's submission that a preliminary hearing narrowly confined to such issues and the

four corners of specific documents might, in principle, be possible, to the extent that they can be divorced from factual controversy and confined to those narrow questions of legal interpretation and construction. However, having reviewed the Applicant's affidavits and having presided over two contested interlocutory hearings, and having noted the terms of the decision of O'Moore J. and the extent to which the same issues appear to be raised on the present application, I remain highly sceptical as to whether the issues could be so confined in practice. I accept that the Applicant has identified serious factual and legal issues which he wants to resolve, but I consider that a plenary hearing is the appropriate forum to resolve them.

51. Nor, in the light of the history of these and related proceedings, am I sufficiently convinced that the issues are so likely to be dispositive as to merit a preliminary hearing. In my view, such issues would be better (and more comprehensively) dealt with at trial in conjunction with the other, related, issues raised by the Applicant (and which the Applicant will doubtless wish to pursue in any event).

52. I accept the possibility that a favourable determination of either of the two net issues might theoretically narrow the scope of the proceedings (possibly to a significant degree), but they would not on any scenario obviate the need for a further hearing (in view of the Plaintiff's claim against the Respondents, which would still need to be resolved in any event). Even leaving the Plaintiff's claims to one side, I am concerned that, if the preliminary issues were decided against the Applicant, the same issues would ultimately be relitigated at trial in any event. This would defeat the intended purpose of such a hearing. Arguing the same issues twice is wasteful and unsatisfactory from the viewpoint of both the Court and the parties. Conversely, the resolution of a preliminary issue can, with hindsight, prove unsatisfactory to a Court and prejudicial to a party if an issue is deemed foreclosed which might have been better made on foot of the evidence which emerged at plenary hearing. I am satisfied that a preliminary hearing (even in respect of the two narrower points) would be more likely to lead to potential injustice

or to increase the aggregate time and cost involved in resolving the proceedings than to reduce it.

53. My conclusion that the trial of a preliminary issue is neither necessary nor appropriate is reinforced by the absence of any indication of support for the application from the Plaintiff. If there were an issue to be disposed of in that way in respect of the issues as between the Plaintiff and the Respondents, then it is the Plaintiff or the Respondents, rather than the Applicant, who should be suggesting that course. Furthermore, if the Respondents were successful at a preliminary trial, then they would be presumptively entitled to their costs, presumably against both the Plaintiff and the Applicant (depending on the position they respectively took at any such hearing). Therefore, the Plaintiff's potential cost exposure could be increased by an additional hearing which she had never sought, which is yet another factor militating against such a procedure.

54. A further factor weighing against a preliminary hearing is the fact that, if the Respondents were unsuccessful at such a preliminary trial, they would presumably still be required participants at the main trial (by virtue of the Plaintiff's claim against them). Accordingly, the application would lead to increased expense and delay.

55. I also consider that, in exercising my discretion, I am entitled to have regard to the absence of any evidence that, given his straitened financial circumstances, the Applicant would be able to meet the Respondents' costs if he were unsuccessful at such a preliminary hearing. It would be unfair that the Respondents should be exposed to costs of an additional hearing if their recoverability from the unsuccessful party appears doubtful. I do not think that the parties' ability to bear the costs of any such hearing should necessarily be a determinative factor in all cases, but it is a factor to be balanced in exercising the judicial discretion (although I would have reached the same decision in this case irrespective of that factor).

56. I should also note that since the Plaintiff – rather than the Applicant - is the party asserting substantive causes of actions against the Respondents, I am not convinced that the Applicant necessarily has a legitimate basis to intervene in respect of the way the Plaintiff's claims against the Respondents are litigated. The Applicant's notice of indemnity and contribution does not advance matters since it only operates if the Plaintiff succeeds against the Applicant, in which event he would assert a right of indemnity or contribution against the Respondents. Indeed, the service of such a notice would appear to raise further complications in the context of the current application because the Applicant seeks to assert such a right of contribution against the Respondents while seeking to curtail their involvement in the proceedings as parties in their own right.

57. Both parties agreed with my observation that, in considering this application and in giving any directions, I should have regard to the litigation as a whole (rather than confining my focus to these particular proceedings). There is a significant overlap between the different proceedings. The validity of the transfer of the mortgagee's legal and/or beneficial interest is a recurring theme which, as the Applicant's own oral and written submissions have so eloquently demonstrated, spawn a variety of subsidiary factual and legal issues. That overriding issue will need to be determined to resolve the issues between the Applicant and the Respondents (including Pepper). It seems to me that it would be sensible to resolve the issues between those parties in the first instance before adjudicating the Plaintiff's claim in these proceedings. That seems the more efficient use of judicial resources and the course most likely to reduce delay and expense for the parties.

58. Although, for the reasons outlined above, I would have been inclined to reject this application in any event, I am concerned that the Applicant has already unsuccessfully opposed the joinder of the Respondents as defendants in these proceedings. I would be concerned that the effect of the current application would be to circumvent the decision of O'Moore J. on the

recent joinder application ("recent" is a relative term in the context of this litigation). In fairness, the Applicant has explained that he previously did not raise the points he is currently agitating because he was not aware of them. However, I am not satisfied that the factual or legal position has changed sufficiently to justify reopening the question of the Respondents' participation in these proceedings and I am concerned to avoid any collateral attack on earlier rulings. In any event, even if there had been further legal or factual developments – which is always a possibility in ongoing litigation – it would be inefficient and undesirable to reopen previously decided interlocutory issues without very good reason. The Courts will be loath to do so, unless very significant developments truly justify it. I am not convinced that there are such dramatic developments here.

59. The best way to reduce the time and delay involved in all these proceedings is to bring them to plenary hearing as soon as possible. I propose to give directions in the various proceedings to that end. As part of any such case management, I am open to submissions as to whether some or all of the various actions should be consolidated, linked or heard together or sequentially. Alternatively, it may make sense for one or more of the actions to be expedited and others stayed in the hope that the initial trial will lead, if not to the resolution of the other proceedings, at least to a significant narrowing of the issues in those other cases, simplifying and expediting their subsequent resolution. I have made clear that the Court will not entertain an attempt to have the same parties litigate the same factual and legal issues more than once at first instance. The appropriate course is to aim for the substantive determination of the factual and legal issues by plenary hearing as fairly, quickly and cheaply as possible. I look forward to the parties' proposals (preferably on an agreed basis) for further directions to this end, and the Court will hold all the parties to any such directions.

60. Finally, for completeness, I note that, given the history of this litigation, it is possible that if there were a preliminary hearing on issues which are extremely important to both sides,

then the unsuccessful parties would understandably wish to exercise their rights of appeal (as they fully entitled to do). If the Court of Appeal should need to adjudicate the issues arising in these proceedings, it would be preferable that there should be a single appeal from a comprehensive first instance judgment. It would be a suboptimal use of the resources of the Court of Appeal to require it to deal with separate but overlapping appeals arising out of essentially the same facts. Furthermore, such a scenario would impose extra financial burdens on the parties and lead to further delay in the resolution of the issues in the litigation which both sides confirm they wish to avoid. It would also be unsatisfactory if a pending appeal was to delay the progress of the litigation to preliminary hearing. It could also be prejudicial for the appellant if the trial at first instance were to proceed before the appeal had been dealt with. It would also be unsatisfactory in terms of the first instance plenary hearing as, if the appeal were successful, it could mean that the hearing had proceeded on a false premise. It might be said that these concerns arise on the trial of any preliminary issue, but I would disagree. The more discrete the issue, the more readily it can be compartmentalised and tried as a preliminary issue. Where, as here, the issues are more pervasive, such compartmentalisation carries far greater risk of unforeseen consequences and potential injustice, risks that can be obviated by a plenary hearing at which all parties can call and challenge all the necessary evidence and make comprehensive submissions.

Conclusion

61. Although, in fairness, his submission was not advanced on this basis, it appears that the Applicant has endeavoured to propose for trial of preliminary issues the points in the proceedings which he may regard as his strongest points, presumably in the hope that decisions in his favour would enhance his prospect of a successful outcome in the proceedings. While such a rationale may be understandable, such litigious advantages are not the basis on which

the Court will determine the appropriateness of the trial of preliminary issues. The Court will only order such a trial where it is satisfied that there are discrete questions of law which can be determined on the basis of agreed or assumed facts, and that the adoption of that course is likely to lead to significant cost and time savings and will not be unfair or unduly prejudicial to any of the parties and that such directions will best serve the interests of justice with regard to the fair and efficient conduct of the proceedings.

62. I am satisfied that the proper resolution of the points raised by the Applicant will in fact require plenary hearing, so the underlying facts and circumstances can be confirmed by oral evidence and cross examination. Once all necessary predicate facts can be determined, the Court can make a fully informed decision, with the benefit of detailed legal submissions on all issues. Unless there is a truly discrete issue, such as a narrow limitation point, then a piecemeal approach is less likely in practice to lead to a comprehensive and fair resolution of the issues and more likely to lead to increased cost and delay.

63. Deferring these issues to the plenary hearing will not be prejudicial from the Applicant's perspective. He will have the full right to call evidence and cross examine opposing witnesses. He can make whatever legal submissions he wishes, in respect of whatever issues he deems appropriate, just as would be the case with any other litigant. However, the most efficient way of bringing this long running litigation saga to a conclusion is at plenary hearing. A single plenary hearing is far more likely to save time and money and, more importantly, lead to a just result than would be the case if I were to direct a preliminary or modular hearing. It seems to me that the granting of the current application (which would necessitate a further – but likely inconclusive – hearing) would not be in the interests of justice or of the parties as a whole and that the proper course is to case manage the proceedings as I have outlined. In this regard, I would have regard to the Supreme Court's reference, in a rather different context, in *A.A. v The Medical Council* [2003] 4 IR 302 to:

> "*the rule of public policy "based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever…"*."

The Court will accordingly case manage the proceedings to ensure the resolution of the outstanding issues without further unnecessary delay. The application will be refused. The Respondents are presumptively entitled to their costs and my initial view is that they should be awarded their costs on a party and party basis, to be adjudicated in default of agreement. However, if any party wishes to contend for any alternative order in respect of costs, then they may file written submissions (maximum length 1500 words) on or before 20 September 2024, failing which the costs will be dealt with on the basis I have indicated.