



Who should sue – a bare trustee or a beneficial owner?

Pepper Finance Corporation (Ireland) DAC v Jenkins & anor [2018] IEHC 485

November 2018

In the recent case of [*Pepper Finance Corporation \(Ireland\) DAC v Jenkins & anor*](#), the High Court determined who should initiate enforcement proceedings where the legal and beneficial interest in a loan has been divided between two parties.

Background

The borrowers entered into a loan arrangement and provided security by means of a mortgage over their family home in favour of Pepper Finance Corporation (Ireland) DAC (“**Pepper**”). The loan was subsequently sold as part of a loan sale portfolio and purchased by a third party, Windmill Funding Ltd (“**Windmill**”) which resulted in Windmill holding the beneficial interest in the loan and Pepper retaining the legal title as a bare trustee for Windmill.

The borrowers did not dispute the entitlement of Pepper to bring the proceedings provided that Pepper did so together with Windmill or alternatively that Pepper made it clear on the face of the proceedings that they were taking proceedings in their capacity as trustee and on behalf of Windmill. The borrowers

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claimed that they could otherwise be exposed to the risk of being sued for the same debt twice.

Pepper claimed that until the sale of the borrower's loan and related security was perfected, it was entitled to bring the proceedings for recovery of the debt in its name. Pepper submitted that it was settled law in this jurisdiction that a securitisation transaction does not invalidate or affect the entitlement of a holder of the legal title to security to enforce that security to the benefit of the beneficial owner.

Issue for Determination

The court noted that while it is clear that the holder of legal title to a loan may bring enforcement proceedings, the more nuanced issue of how such proceedings must be formulated had not yet been contemplated in this jurisdiction. Consequently, the question to be answered by the court 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 is doing so as trustee for the beneficial owner, or alternatively require the beneficial owner to join in the proceedings also?”

High Court decision

The court held that Pepper was not obliged to declare its status as trustee for Windmill or join Windmill to the proceedings.

Mr. Justice Binchy noted that the borrowers had not received notice of the equitable assignment of the loan and therefore the risk that they could be subjected to more than one action in respect of the same debt was more illusory than real.

Comment

It is not uncommon in loan portfolio sales for the economic or beneficial interest in certain loans to pass to the buyer but for the legal interest to remain with the seller. A legitimate feature of such an arrangement can be that the seller alone remains the correct party to enforce the loan. This case confirms that this approach is a sound one.

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