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Supreme Court looks at the requirement for registration of ownership of charges – Ruling in ‘Tom Kavanagh & Bank of Scotland PLC v Patrick McLaughlin & Roseann McLaughlin’ [2015] IESC 27 (Judgment delivered 19 March 2015)

These proceedings arose in the context of the appointment of a receiver by Bank of Scotland plc (“BOS”) over properties that had originally been secured in favour of Bank of Scotland (Ireland) Limited (“BOSI”) by the borrowers, Patrick McLaughlin and Roseann McLaughlin (the “Appellants”).

On foot of a cross-border merger all the assets and liabilities of BOSI were transferred to BOS on 31 December 2010, whereupon BOSI then ceased to exist. By deed of appointment dated 6 June 2012 Tom Kavanagh of Kavanagh Fennell (now of Deloitte) was appointed receiver (the “Receiver”) over two of the Appellants’ properties. One of the properties was Land Registry title and secured by a mortgage and charge dated 31 March 2006 (the “2006 Charge”).

The Supreme Court Appeal

In appealing to the Supreme Court against the orders granted in the High Court, the Appellants sought to rely on a number of grounds. One of those grounds was that the trial judge erred in finding that the transfer of assets, including the 2006 Charge, from BOSI to BOS on foot of the cross-border merger did not require that BOS be registered as the owner of the 2006 Charge on the relevant folio

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before BOS or the Receiver could take enforcement action on foot of the 2006 Charge. The trial judge had held that following the cross-border merger BOSI had merged into BOS by absorption and, therefore, in the space where BOSI once stood now stood BOS without any further requirement.

The Supreme Court Decision

In delivering judgment, the Supreme Court (comprising Mr Justice Clarke, Ms. Justice Laffoy and Ms. Justice Dunne) dismissed the appeal. In her judgment Ms. Justice Laffoy addressed the registration of charge issue and whether the appointment of the Receiver was valid. Laffoy J was satisfied that BOS, as successor in title to BOSI, had a contractual entitlement to appoint the Receiver which contractual power was granted in the 2006 Charge and arose independently of the provisions of the Registration of Title Act, 1964 (the “1964 Act”). Accordingly, she found that the Receiver was validly appointed.

However, in reaching her decision Laffoy J also found that notwithstanding the manner in which the 2006 Charge became vested in BOS by virtue of the 2008 cross-border merger regulations, in accordance with the provisions of s. 62 of the 1964 Act if BOS wished to avail of the statutory rights conferred on charge holders by s. 62 of the 1964 Act in order to enforce the 2006 Charge BOS must comply with the requirement that it be registered as owner of the charge on the folio.

Laffoy J noted that in other pieces of legislation the Oireachtas had provided for exemptions to compliance with s. 62 of the 1964 Act and referred to acts including the Central Bank Act 1971, the Trustee Savings Bank Act 1989 and the NAMA Act 2009. In the BOSI to BOS transfer by way of cross-border merger it was significant that the 2008 cross-border merger regulations did not specifically dis-apply this mandatory obligation.

Laffoy J's comments were made *obiter* but will nonetheless have significant authoritative value on this particular issue. Her judgment is of particular importance where enforcement proceedings are brought or anticipated in respect of a property comprising registered land and where the party enforcing the security wishes to avail of the rights conferred by s. 62 of the 1964 Act. In circumstances where the provisions on foot of which assets or security were transferred do not expressly relieve the statutory obligation under the 1964 Act to become the registered owner of the charge, then it is necessary that the entity holding the debt is registered as the charge holder on the relevant folio if that charge holder wishes to have the benefit of the powers to a charge holder under the 1964 Act. Those powers to a charge holder include the power of sale, power to summarily apply for possession and the power to ‘overreach’ subsequent judgment mortgages.

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