THE HIGH COURT

CHANCERY

[2017 No. 6137 P.]

BETWEEN

MICHAEL BLANCHFIELD, LARRY O'GARA, ZITA McDERMOTT, STEPHEN FAHERTY, EAMON HUSSEY, MAIREAD SHANNON and EMER GIBSON

PLAINTIFFS

- AND -

EDMUND GARVEY and THE CONGREGATION OF CHRISTIAN BROTHERS

DEFENDANTS

No.2

RULING of the Hon. Ms. Justice Stewart delivered on the 8th day of May, 2018.

1. This is a ruling on an application brought by the plaintiffs seeking to have the Board of Management (BOM) of Clonkeen College added as a co-plaintiff to these proceedings. The facts giving rise to this application are identical to those outlined in the Court's first ruling in this matter, dated 27th March, 2018, in which I refused to substitute the BOM for the current plaintiffs pursuant to O. 15, r. 2 of the Rules of the Superior Courts. The application currently before the Court is brought pursuant to O. 15, r. 13, which provides as follows:-

> "13. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

2. Order 15, rule 13 allows the Court, either on an application by the parties or of its own motion, to add or subtract the parties joined to an action before it. The plaintiffs contend that the BOM is a necessary party to the action in light of the defendants' motion to dismiss the plaintiffs' claim as disclosing no cause of action. In effect, their justification for bringing this further application rests in the alleged attempts by the defendants to bring these proceedings to an end through procedural tactics, thereby avoiding the substantive issue being adjudicated upon by the Court. The defendants contend that the BOM is the only body that holds the necessary locus standi to enforce any promise found to be enforceable by the Court and the action brought by the current plaintiffs should be struck out on that basis. Although the defendants' motion is first in time, both sides agreed that the Court should hear and determine the plaintiffs' motion first.

3. The plaintiffs' version of events is as follows: a resolution was passed by the BOM on 19th June, 2017, to litigate this dispute. Following that meeting, Beauchamps Solicitors were instructed by the BOM to institute proceedings on their behalf. As evidence of that intent, reference is made to para. 1 of the Statement of Claim and the General Endorsement of Claim in the Plenary Summons. The plaintiffs also highlight that the defendants' interactions with the plaintiffs throughout this dispute have always been premised upon their status as members of the BOM. Case management of these proceedings was sought by the defendants but the plaintiffs say that no such case management took place. They say that the hearings in this matter that took place before Baker J., which the Court referred to in its ruling on the O. 15, r. 2 application, were not related to case management. Rather, they related to a discovery dispute which was ruled in their favour on 2nd November, 2017.

4. In the plaintiffs' submission, O. 15, r. 13 provides the grounds on which the Court can amend the parties joined to the proceedings at any stage prior to the conclusion of the proceedings and the making of final orders. It is submitted that the addition of the BOM as a plaintiff is necessary in order for the Court to fully adjudicate upon and settle the questions raised in these proceedings. They rely on Murphy J.'s decision in *Allied Irish Coal Supplies Ltd v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519 as a statement on the rule's purpose, which is to alleviate hardship caused by the rigid application of legal technicalities. They note that the application of O. 15, r. 13 is not as stringent as in O. 15, r. 2, per Clarke J.'s (as he then was) decision in *Wicklow County Council v. O'Reilly and Ors* [2006] IEHC 265, and that doing justice is a primary consideration, *per* Edwards J.'s decision in *Waldron v. Herring* [2013] IEHC 294. The facilitative and enabling nature of the rule was referred to by Haughton J. in *Re CTO Greenclean Environmental Solution Ltd* [2017] IEHC 246, which the plaintiffs also rely on. In their submission, where the presence of a party may be necessary, it is appropriate that they be so joined. The plaintiffs also rely on Haughton J.'s decision in stating that the possibility of issuing separate proceedings does not serve as a bar to simply joining the relevant party. In conclusion, the plaintiffs submit that the Court should not tolerate the defendants' attempt to engineer their way out of a plenary hearing by preventing the addition of the BOM as a plaintiff and striking out the current plaintiffs' claim for lack of standing.

5. The defendants submit that the consent of the party to joinder is a necessary ingredient for securing relief under O. 15, r. 13 and that no such consent from the BOM has been put before this Court. They refer to the sixth-named plaintiff's affidavit, which outlines conversations that took place during the BOM meeting on 19th June, 2017, but does not exhibit a record of that meeting's minutes. During the course of the reply to the defendants' submissions on this application, the plaintiffs submitted an affidavit sworn by Sharon Delaney, dated 20th April, 2018. Counsel for the defendants strenuously objected to the addition of further affidavit evidence at this late juncture and, in the interests of concluding the application, the Court accepted the affidavit *de bene esse*. I will address the admissibility of this evidence later in this ruling. Ms. Delaney states that she is an employee of Beauchamps (her role is not specified) and that she makes this affidavit with the authority and consent of both the current plaintiffs and the BOM. Correspondence from the first-named plaintiff is exhibited to the affidavit, which purports to serve as evidence of instructions being given to Beauchamps by the BOM. Exhibit SD2 purports to evidence the BOM's formal consent to joining this action.

6. The issue of the BOM's capacity to consent arose in the written submissions for this application and for the defendant's strike-out application. The defendants argue that the provisions establishing the BOM under the Education Act 1998 confine the activities of the BOM to the supervision and control of the school's patron, ERST. The defendants rely on *Ui Chroinin v. Minister for Education* [2010] 4 I.R. 99 as a statement on how the relationship/role of the patron and the BOM is to be construed under the 1998 Act. In their submission, the primary and antecedent role of the patron, along with ERST's opposition to these proceedings and the BOM's status as a body derivative of the patron, directly impedes the BOM's ability to join these proceedings and progress this claim. The defendants also rely on ERST's Memorandum of Association, the Articles of Management of Catholic Secondary Schools, the affidavit evidence of Sr. Eithne Woulfe and the Supreme Court's decision in *Doherty v. South Dublin County Council* [2007] 1 I.R. 246 as a statement on the BOM's capacity to advance these proceedings.

7. Notwithstanding the issues arising from the 1998 Act, the defendants submit that the BOM cannot consent because the provisions governing the BOM require its members to recuse themselves from decisions in which they have a personal interest. It is submitted that this application gives rise to just such a personal interest because the current plaintiffs are seeking to limit their costs exposure. If all the current plaintiffs recuse themselves from the decision to consent to joinder, the decision cannot be made because the relevant meeting would lack a *quorum*.

8. The defendants also refer to the broader principles outlined in the Supreme and High Court decisions in *Allied Irish Coal Supplies*. Such principles would include a demonstration by the moving party of a stateable case in respect of the party sought to be joined. Where that case is difficult to sustain but not un-stateable, the Court can consider the prejudice that would be caused by such joinder to an individual or group. The Court also enjoys a general discretion when deciding whether or not to join a new party. Refusal can also be grounded on lack of necessity for or futility in the joinder.

9. The defendants submit that the issues with capacity outlined above impact upon the BOM's ability to state a case and, per the principles in *Allied Irish Coal Supplies*, the prejudice that would be visited upon them by the joinder of the BOM falls to be considered. They refer to this Court's findings on the subject of prejudice, as set out in my decision dated 27th March, 2018. In making this argument, the defendants refer by analogy to various authorities on the amendment of pleadings. In submitting that the joinder of the BOM is not necessary, the defendants refer to the precise language employed by the plaintiffs in their affidavits. It is submitted that the plaintiffs seek to protect the interests of the students and the school, not any interest of their own or of the BOM. Questions are raised as to who precisely it is suggested the alleged representation was made to, the BOM or the whole school. In the latter case, the defendants submit that the BOM is not a necessary party. Further use is made of the amendment-of-pleadings analogy.

10. The defendants also allege that this r. 13 application is an abuse of process because similar applications are being made on an incremental basis. This approach to litigation was condemned by Hardiman J. in *A.A. v. Medical Council* [2003] 4 I.R. 302, wherein he referred to the rule in *Henderson v. Henderson*. In the defendants' submission, it is not open to the plaintiffs to litigate what is effectively the same application already ruled on by this Court on 27th March, 2018. Reference is also made to the defendants' submissions in their strike-out application, where it is submitted that the continuation of these proceedings is futile and no purpose can be served by joining the BOM to a doomed case. Clarke J.'s decision in *Hynes v. Western Health Board* [2006] IEHC 55 is relied on in this regard. The defendants also state that ERST has already contracted to facilitate the sale, has circumvented the difficulties caused by these proceedings and has, on a practical level, rendered this matter pointless as a matter of fact.

11. Finally, the defendants submit that the manner in which this case has been litigated thus far is indicative of an attempt by the plaintiffs to prevent the sale of the lands to Durkan Builders. A chronology of the events that transpired since these proceedings were issued has been appended to the defendants written submissions on this motion, so as to substantiate this allegation of delay.

Decision

12. There are a great many factors that can influence a court's decision when adjudicating upon a case. The backgrounds facts fall to be considered, as do the nature of the claim, the content of the pleadings, the submissions made and the authorities referred to. In reviewing all of these issues, there is another factor in the background that the Court cannot ignore, and which comes into even greater focus in equitable claims such as this: the behaviour and attitude of the parties in litigating the action. Suffice it to say that the Court has taken an extremely dim view of the manner in which both parties have behaved over the course of this action.

13. It is clear that a third entity which is not a party to this action, namely ERST, has sought to influence the BOM's actions and participation in this case. In so doing, the defendants acted in conjunction with this third entity. In principle, no objection can be taken with this, given the primary and antecedent role of the patron *vis a vis* the BOM. However, there seems to be a mis-conception that the BOM's power to partake in litigation is subject to the control of the patron. Section 14(2) of the Education Act 1998 provides as follows:

> (2) A board established in accordance with subsection (1) shall fulfil in respect of the school the functions assigned to that school by this Act, and, except in the case of a school established or maintained by an education and training board, each board shall be a body corporate with perpetual succession and power to sue and may be sued in its corporate name.

While it is possible that the patron's supervisory role is sufficiently all-encompassing as to circumscribe the BOM's statutory power to sue, the 1998 Act and Articles of Management for Catholic Secondary Schools do not definitively set out that position. The relationship between the patron and the BOM seems to pertain primarily to the school's ethos, culture, values, conduct, management and financial administration. I have yet to be convinced that litigation to recover for wrongs committed against the BOM by its (now-former) patron, which could also confer a benefit on the school, comes under that relationship. There is no doubt that the powers of the patron are extensive and, as outlined in the Manual for Boards of Management of Catholic Voluntary Secondary Schools, decisions related to school buildings and land are primarily a matter for the patron. It is alleged that, in 2006, the patron made a decision and then made a representation to the then-chairperson of the BOM. The issue before this Court, assuming I am satisfied on the balance of probabilities that such a representation was made, is what the consequences of that decision are, if any, and whether or not it is still binding on the defendants *vis a vis* the school and its functioning.

14. Even if the defendants are correct in their submissions that the BOM is incapable of pursuing litigation of which its patron dis-approves, there is a long line of authority regarding the standing of plaintiffs with a *bona fide* interest or concern in the case, particularly in circumstances where the body impacted by the wrong is, for whatever reason, incapable of pursuing the claim by itself. Bearing this in mind, it is questionable whether the addition of the BOM is necessary to progress this case. But that is not the standard required. Order 15, rule 13 seeks to address scenarios where joinder may be necessary. I will return to this issue later on in my ruling. Suffice it to say, these are complicated legal issues and tensions between the parties are fraught.

15. As for the plaintiffs, the situation is just as serious. The first-named plaintiff avers at para. 22 of his affidavit dated 18th April, 2018, that these proceedings were issued in the individual names of the members of the BOM, acting in their capacity as members of

the BOM. This choice was reasoned and deliberate, as this Court has already found in its earlier ruling. It is now quite plain that there was no mistake, *bona fide* or otherwise, in issuing these proceedings as presently constituted. It would appear that the plaintiffs originally sought to advance a position of a *bona fide* mistake and this Court previously concluded no such mistake occurred.

16. Turning to the affidavit accepted *de bene esse*, the following exercpt from the transcript is relevant. This exchange took place at 11:35AM on Day 10 of the hearing, during the defendants' submissions and 3.5 hours before the affidavit was eventually put before the Court during the course of the plaintiffs' reply:-

> **"MR. BLAND**: ...Judge, if I move on then to my second point, and that is that the Plaintiffs have not provided nor cannot provide any written consent that is valid from the Board of Management to act as plaintiff.
>
> **MR. DWYER**: Judge, I hate to interrupt my friend but I do actually have an affidavit exhibiting the written consent.
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> **MR. BLAND**: Judge, we have seen in Order 15 Rule 13 and if Mr. Dwyer wishes to indicate to me where there is a minute or resolution of the Board of Management, Judge, I will be happy to accept that I am mistaken in this point. But I have read the papers a few times and I can't find [it]."

17. It is clear from the above exchange that counsel for the defendants mis-understood what was being communicated to him. He clearly believed that counsel for the plaintiffs was referring to some document that was already contained in the papers put before the Court. The plaintiffs did not correct that mistake and make it clear that reference was being made to a new affidavit, of which this Court and the defendants had not yet had sight. The defendants' submissions were concluded before the plaintiffs produced this new evidence.

18. While the plaintiffs' motivations may have been honourable, in that they were seeking to out-maneuvre the forces they perceived to be attempting to undermine these proceedings, the ends rarely justify these means. Had the evidence that has now been put before the Court been included in the original O. 15, r. 2 application, and preferably, had relief under O. 15, r. 13 been sought in the alternative at that time, the Court would have had little hesitation in granting the reliefs sought. The O. 15, r. 2 application was refused because there was no evidence of a *bona fide* mistake. The Court now has a fuller picture of the situation and, in addition, enjoys a wider discretion under O. 15 r. 13. In effect, the Court is faced with a different scenario. A large amount of trouble and expense could have been avoided by the bringing of this application at an earlier stage.

19. The value of a frank and honest approach to litigation cannot be under-estimated. I have no doubt that all the parties believe that they are in the right and that they have borne the best interests of the school in mind. However, by resorting to improper tactics, they have placed this Court in a most invidious position. There is a clear discretionary element to the reliefs sought and, in seeking to determine how to exercise that discretion, the Court is being undermined by the defendants on one hand and misled by the plaintiffs on the other. In doing so, the parties have recruited eminent and highly respected counsel to act as the unwitting maestroes in this song and dance routine through the provisions of O. 15. This is the second preliminary ruling made in this case, with at least one more to follow regarding the defendants' strike out application. Once again, I must state that I am at a loss to understand why issues such as substitution/joinder of non-parties and dismissal of the claim were not progressed at an earlier juncture. The issues giving rise to all these interlocutory applications have been evident for months. These proceedings have clearly been crying out for case management and it beggars belief that the parties did not seek to have matters regularised sooner. As it stands, a plenary hearing that was due to commence in mid-March has been delayed for almost two months, while the denouement of this unfortunate affair (the expiry of the licence and, presumably, the sale of the playing fields in September, 2018) creeps ever closer.

20. Had one party acted in this fashion, it would have heavily militated against deciding the application in their favour. However, in this case, one party is as problematic as the other. In the circumstances, the Court will, reluctantly, overlook the improper activity that has taken place and deal with the application in its entirety. In that renewed spirit, the affidavit that was accepted *de bene esse* will be admitted into evidence. However, I must urge the parties to regularise their behaviour and progress this litigation in earnest.

21. Turning to the jurisprudence governing O. 15, r. 13, there is ample case law directly related to this rule and it is un-necessary to consider by analogy the authorites on the amendment of pleadings. The starting point is the decision in *Allied Irish Coal Supplies*. A number of guidelines can be distilled from that judgment; the types of parties coming under O 15, r. 13 are those that ought to have been joined or those whose presence before the Court may be necessary to completely and effectively deal with the case. Such parties must meet the standard of a stateable case. A dispute as to fact should be resolved in favour of the party seeking the joinder. The Court can refuse to add parties where such joinder is sought for the purposes of introducing a new cause of action or where the joinder would serve no useful purpose at all. The text of the rule also makes it clear that a non-party must consent to being added as a plaintiff to proceedings.

22. In applying these guidelines, a number of other authorities fall to be considered. As stated by Clarke J. in *Wicklow County Council v. O'Reilly (supra),* the Court's juridiction under O. 15, r. 13 is more general than under O. 15, r. 2 and the ordinary principle of joining all necessary parties applies, with the consequences of joinder being addressed by appropriate directions and/or at the costs stage of the hearing. As reiterated by Edwards J. in *Waldron*, justice is the primary concern and a wrongdoer should not be allowed to escape liability for the technical legal reason that a relevant person is not a party to the proceedings, even though they ought to be. As highlighted by Haughton J. in *CTO (supra)*, O. 15, r. 13 is facilitative, enabling and does not require a definitive determination on necessity.

23. The defendants have argued that the BOM cannot hold a proprietary interest in the school it manages and that it cannot progress this litigation against the will of its patron. As outlined above, I have yet to be satisfied that the BOM's power to sue comes within the ambit of ERST's supervisory role. The provisions of the 1998 Act and the Articles of Management, as they were explained to this Court, do not seem to suggest the BOM is subservient to its patron is every single respect. Rather, it would appear that there are specific areas in which the BOM must bend to ERST's greater authority. If the act envisaged comes outside those specific areas, it would appear that the BOM can behave as it wishes (assuming, of course, that said act is *intra vires*). Final determinations on these questions will be made at plenary hearing, as will determinations on the specific question of whether the patron can circumscribe the BOM's statutory power to sue.

24. As for the BOM's interest in property, the primary authority relied on by the defendants is s. 15(3) of the 1998 Act, which states that "...nothing in this Act shall confer or be deemed to confer on the [BOM] any right over or interest in the land and buildings of the school for which that board is responsible." But the proprietary interest alleged does not arise from the 1998 Act and was not conferred by the 1998 Act. It was allegedly conferred in 2006 by the BOM's then-patron. I did not understand the defendants'

submissions to suggest that, by virtue of the BOM's statutory nature, the BOM is entirely incapable of holding any interest in property whatsoever. Section 15(3) also does not prohibit the BOM from being conferred a right or interest in school land/buildings. Rather, it simply states that no provision of the 1998 Act should be construed as conferring such a right or interest. Final determinations on all of these issues will also be made at plenary hearing.

25. Based on the authorities opened to the Court at this juncture, it would seem that legal questions arise in this case that have yet to be fully determined by any court. Therefore, I am of the view that joining the BOM may be necessary in order to enable the Court to fully address the questions involved, particularly those questions related to legal capacity and the vesting of proprietary interests. I am also satisfied that the BOM has a stateable case against the defendants, as the alleged representation was made to its then-chairperson and the BOM was the body who made the decisions that allegedly give rise to reliance and detriment. The one impediment to joinder would be where adding this new plaintiff would introduce a new cause of action. I referred to this issue in my first ruling delivered on 27th March, 2018, beginning at para. 16:-

> *"16. ...the proposed recasting of the proceedings would, in reality, amount to fresh proceedings. The BOM holds different standing, a different contract and a different equity to that of the plaintiffs currently named.*
>
> *17. ...Given the considerations outlined above regarding the fourth limb of the Southern Mineral Oil test, I am satisfied that the making of the order sought would visit prejudice upon the defendants."*

I reached those conclusions based on the evidence that was before me at the time. As outlined above, the plaintiffs took very deliberate action when they issued these proceedings. Faced with a scenario in which other parties sought to ensure their case never made it to hearing, it seems that they devised a legal articfice through which they could progress this action by availing of their own personal capacity and the BOM's *locus standi*. Overlooking the viability of that approach, it was most foolhardy to seek to mislead this Court during the O. 15, r. 2 application, instead of simply explaining the reality of the situation and asking for the Court's protection (a protection which, based on the evidence currently before the Court, it would have readily provided). Had the documentation currently before the Court been available to me from the outset, I may very well have never reached the findings quoted above.

26. In any event, it is now apparent that the joining of the BOM to these proceedings would not introduce a new cause of action. Indeed, it would seem that the the BOM's role and involvement in these proceedings has always been contemplated and considered by both parties. There can be no question that the defendants would be significantly taken short or prejudiced by the BOM's involvement, as it is clear from the submissions and the affidavit evidence that they are well prepared to defend against the BOM's claim. The facts are the same and the reliefs being sought are the same. The only question is whether the elements necessary to secure the reliefs sought are present in this case, which was the entire purpose of the plenary hearing in this matter from the outset, regardless of who the plaintiffs are. It seems to me that it would be inimical to the interests of justice if this cause were defeated by reason of the non-joinder of the BOM.

27. Independent of any dispute as to whether O. 15, r. 13's legal benchmark has been met, the defendants raise a number of procedural objections to granting the reliefs sought. These include delay, an attempt to avoid costs and a breach of the rule in *Henderson v. Henderson*. Dealing with the latter first, the rule in *Henderson v. Henderson* proscribes the making of successive and substantially similar applications. I am not satisfied that this application necessarily runs afoul of that rule. In *Waldron*, Edwards J. engaged O. 15, r. 13 to join the new plaintiff, Permanent TSB Plc, and strike out the old plaintiff, Tony Waldron, thereby effectively performing a substitution. Had the plaintiffs asked the Court to perform a similar exercise, the application would be in breach of the rule in *Henderson v. Henderson.* However, they have not asked the Court to do that. Rather, they have only sought to have the first step performed, that being the addition of the BOM. Bearing in mind this distinction, my earlier findings in this ruling and the Court's more general jurisdiction under O. 15, r. 13, I am satisfied that the rule in *Henderson v. Henderson* does not impede the granting of the reliefs sought.

28. As for the argument of delay, both parties have brought applications that are extremely late in time. For the reasons outlined above at para. 21, I am satisfied to overlook the unusual approach they have taken to these proceedings, provided that these irregularities cease and their behaviour going forward is entirely above board. This would include overlooking the delay in bringing these applications.

29. As for the abuse of procees argument grounded in an alleged attempt to avoid costs, the addition of the BOM would not strike out the current plaintiffs or discharge them from their liability for these proceedings. Upon the conclusion of the hearing, it remains open to the Court to make an award of costs in favour or against any of the first through seventh-named plaintiffs. I am also of the view that it would be inappropriate, at this early juncture, to express an opinion on any costs ruling the Court may make in these proceedings. For obvious reasons, my conclusions on this issue also negative any argument made by the defendants that some personal interest attaches to the current plaintiffs that would prevent a quorum from being attained for the BOM to make a decision consenting to joinder.

30. The final issue to be considered is whether the BOM has in fact consented to joinder, as required by O. 15, r. 13. The affidavit of Ms. Delaney, which the Court had accepted *de bene esse* and has now been admitted into evidence, purports to exhibit the necessary consent. The evidential threshold on an O. 15, r. 13 application requires that the Court must presume that the plaintiffs will be able to prove fully at the final hearing the assertions made at this interlocutory hearing. I have no doubt that all of these matters will be interrogated at the plenary hearing. Any errors subsequently uncovered in this process are capable of being dealt with by way of an appropriate costs order. At this juncture, I am staisfied that the Court has been furnished, albeit very belatedly, with *prima facie* evidence that the BOM has consented to its joinder as a co-plaintiff in this action. I should also point out that the BOM is joined as of the date of this order. Clearly, what has occured in the proceedings to date is between the parties as constitued heretofore.

31. As stated by Clarke J. in *Wicklow County Council v. O'Reilly*, the Court's jurisdiction under O. 15, r. 13 is more general and it enjoys a broader discretion in applying it. This was perhaps the primary factor in reaching my decision on this application, along with the desire to see justice done. For the reasons set out above, I propose grant the reliefs sought under O. 15, r. 13 and make an order joining the BOM to this action.