THE COURT OF APPEAL

[Appeal No. 508/2012]
[Appeal No. 12/2014]
[Article 64 Transfer Cases]

Finlay Geoghegan J.
Birmingham J.
Irvine J.

Between/

Irish Bank Resolution Corporation Limited

Plaintiff/Respondent

V

Patrick Halpin

Defendant/Appellant

Judgment of the Court delivered on the 10th day of December, 2014 by Ms. Justice Finlay Geoghegan

1. This judgment is given in two identical applications brought by notice of motion dated the 30th July, 2012, by Kenmare Property Finance Limited ("Kenmare") seeking primarily an order that it be substituted for Irish Bank Resolution Corporation Limited (in special liquidation) ("IBRC") the plaintiff/respondent in the within proceedings and two appeals, such that the proceedings including the appeals be carried on between the defendant/appellant (Mr. Halpin) and Kenmare as plaintiff/respondent.

2. Alternative relief is sought in the notice of motion and in the course of the hearing, counsel for Kenmare clarified that if the court was not prepared to make the order for substitution as sought it was seeking to be added as a party to the appeal.

3. The High Court proceedings giving rise to the two appeals is a single proceeding commenced by summary summons in 2012 (2012 No. 2559 S.) in which IBRC sought summary judgment against Mr. Halpin in the sum of €25,560,423.26 as guarantor of facilities granted by Irish Nationwide Building Society ("INBS") to Crossplan Investments Limited. Proceedings were entered to the Commercial List and on the 4th October, 2012, the High Court (Kelly J.) ordered and adjudged "that the plaintiff do recover as against the defendant the sum of €20,000,000 (€20 million)...". The court also made an order that the balance of the plaintiff's claim be adjourned to plenary hearing.

4. On the 7th November, 2013, following the plenary procedure and oral hearing, the High Court (Cooke J.) ordered and adjudged "that the plaintiff do recover against the defendant the sum of €6,338,369.09...". Each High Court order also awarded costs in favour of the plaintiff against the defendant.

5. On the 12th November, 2012, Mr. Halpin issued a notice of appeal against the High Court order and judgment of the 4th October 2012, the grounds of appeal include that the court erred in granting judgment on the summary summons when there was an arguable defence.

6. On the 9th January, 2014, Mr. Halpin issued a notice of appeal against the judgment of the 7th November, 2013. The grounds include that the plaintiff was not entitled to judgment against the defendant in the sum of €6,338,369.09 or any amount.

7. These two notices of motion were issued and made returnable before the Supreme Court on the 17th October, 2014. On the 29th October, 2014, prior to the hearing of the motions, the Chief Justice, with the concurrence of the other judges of the Supreme Court issued the direction under Article 64.3.1 of the Constitution specifying the classes of appeals pending before the Supreme Court to be transferred to the Court of Appeal. It is not in dispute that these two appeals fall into a class of appeal so transferred.

8. The facts upon which Kenmare's motions are grounded are set out in the affidavits sworn by Karen McCrave and Jonathon Hanley, each of whom made the affidavits as directors of Kenmare. In short, the facts relied upon are that by an agreement in writing of the 18th March, 2014, the Special Liquidators of IBRC agreed to transfer and assign to Kenmare in exchange for valuable consideration the entirety of IBRC's "rights and benefits under and in, inter alia, the facilities the subject matter of the within proceedings". Further that that agreement was completed on the 23rd May, 2014, when the Special Liquidators of IBRC executed a Deed of Transfer in writing whereby it is deposed:

> "IBRC as 'Assignor' absolutely transferred to, transmitted to and assigned unto Kenmare as 'Assignee' the entirety of those rights, title, interests and advantages hitherto conferred upon IBRC pursuant to the facilities entered into between IBRC on the one part as lendor and the Defendant on the other part as borrower on various dates, including the facilities the subject matter of the within proceedings."

9. In support of their averments the deponents have exhibited to their affidavits copies of the Agreement of the 28th March, 2014, and Deed of Transfer of 23rd May, 2014, albeit with significant redactions which, they depose, have been required by the Special Liquidators of IBRC by reason of "commercial sensitivity and banker/client confidentiality" and "by virtue of the ongoing nature of the sale of IBRC's loan book".

10. It is further deposed that in accordance with the definition of "assets" transferred pursuant to clause 2 of the loan sale deed of the 23rd May, 2014, there is included "Ancillary Rights and Claims" as defined which in turn include "all rights, title and interest of whatever nature in any judgment of the Vendor [IBRC]".

11. Ms. McCrave and Mr. Hanley deposed to the notice given to Mr. Halpin of the assignment of the rights previously held by IBRC in the facilities, the subject matter of these proceedings and the proceedings to Kenmare.

12. Mr. Halpin in his replying affidavits relied upon correspondence from the Special Liquidators of October 2013, in which they invited submissions from him as to how his loans might be sold and his replying submission. He further deposes that there was no response to his letter of submission to the Special Liquidators and his request to be considered as a "qualified bidder" and for the loans to be sold individually. Mr. Halpin seeks to rely upon that exchange of correspondence as setting up a contract requiring the Special Liquidators to consider his submission and by implication reply to him prior to his loans being sold. He seeks to challenge the validity of the assessment to Kenmare on that basis.

Submissions
13. On those facts, Kenmare accepts that it had no interest in the facilities or causes of action of IBRC against Mr. Halpin on either the 4th October 2012, or the 7th November, 2013, when judgment was given by the High Court in favour of IBRC against Mr. Halpin. It simply asserts that since the 23rd May, 2014, it is the person who is entitled to the benefit of the underlying facilities to the proceedings and of the 2012 and 2013 High Court judgments and should now be substituted for IBRC as plaintiff and that the proceedings, including the two appeals now before this Court should proceed between itself and Mr. Halpin.

14. Counsel for Kenmare submits that this Court pursuant to O. 86A, r. 2(1)(a) has jurisdiction to make the orders which the High Court may make to substitute parties in proceedings and in particular relies upon O. 17, r. 4 and O. 15, r. 14 of the Rules of the Superior Courts. He draws attention to the decisions of the High Court Kelly J. (Ex Tempore), *Irish Bank Resolution Corporation v. Comer* (Unreported, High Court, Kelly J., 30th July, 2014) and *Irish Bank Resolution Corporation v. John Morrissey* (Finlay Geoghegan J., 10th November, 2014) (2014 IEHC 527) in which orders for substitution of an assignee of IBRC pursuant to a similar Deed of Transfer were made. However, it is accepted that the procedural stage in the proceedings in Comer or Morrissey were different to the present application insofar as judgment had not yet been obtained in the High Court in either.

15. Counsel for Kenmare in submission also relied upon the decisions of the Supreme Court that it is entitled to add a party to proceedings at an appeal stage. In particular reference was made to the judgment in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Counsel also referred to the fact that on the 31st October, 2014, in proceedings entitled "*IBRC v. Frank Burke and Lorna Burke*, 363/2010" the Supreme Court made an order for substitution on an application brought by Launceston Property Finance Limited in an appeal against an order for possession in respect of secured property. However, Counsel informed the court that the application was not opposed and the defendants did not make any submissions to the court.

16. Counsel for Kenmare also referred to a decision of Laffoy J. in the High Court in Bank of *Ireland Finance Limited v. Browne* (Unreported, High Court, Laffoy J., 24th June, 1996) in which after a substantive order for possession had been made a substitution order was made in order that the order for possession could be enforced by a party to which the relevant charge had been transferred.

17. Counsel for Mr. Halpin accepted that the Supreme Court and by analogy the Court of Appeal as an appellate court has jurisdiction to add a party at appeal stage. However, he drew attention to the condition attached to the order made in *O'Keeffe v. An Bord Pleanála* and to the refusal of the Supreme Court to make such an order in *O'Cearbhaill v. Bord Telecom Éireann* [1993] ELR 253. He submitted that there was no authority to support the application of Kenmare to be substituted as plaintiff at the appeal stage. He pursued the objection of the defendant to the validity of the assignment to Kenmare upon the basis of an alleged agreement arising out of the communications from Special Liquidators deposed to by Mr. Halpin.

Conclusion
18. The Court of Appeal has jurisdiction pursuant O. 86A, r. 2(1)(a) to make orders which the High Court may make pursuant inter alia, to O. 15, r. 14 and O. 17, r. 4 of the Rules of the Superior Courts. However, as decided by the Supreme Court *O'Keeffe v. An Bord Pleanála* and *O'Cearbhaill v. Bord Telecom Éireann* it must do so in a manner consistent with its appellate function. In O'Keeffe, which was an appeal against an order of the High Court quashing a decision by An Bord Pleanála to grant planning permission, the Supreme Court granted liberty to Radio Tara, which it considered would be affected by the result of the appeal to be added as a party, but "subject to the restriction that it should not be entitled to raise any additional ground of opposition to the plaintiff's claim that had not been raised by the defendants in the High Court".

19. In *O'Cearbhaill v. Bord Telecom Éireann* [1993] E.L.R. 253 the Supreme Court (in an ex tempore judgment delivered by Finlay C.J.) refused an application by the Communication Workers Union to be added as a party in an appeal in proceedings brought by 147 employees claiming a number of declarations relating to the terms and conditions of their contracts of employment and also injunctive relief. The Union in its application made clear that it wished to advance grounds which had not been advanced and which had not been decided upon by the trial judge in the High Court. The Supreme Court determined it would be unjust to the plaintiffs and possibly also to the defendant to permit the Union to intervene at the appellate stage and raise matters which had never been decided by the trial judge in the High Court. At p. 256 Finlay CJ then stated:-

> "Quite apart from what I am satisfied would be the very substantial injustice which an order permitting the union to enter into the appeal and argue these grounds would be to the plaintiffs it is clear in my view that it is quite inconsistent with the appellate jurisdiction of this Court that there should be any question of an issue which was not tried in the High Court being determined on the appeal. It is of significance that in the only apparent instance, certainly in recent times, in which this Court has permitted a party to intervene for the first time in an action on the hearing of an appeal to this Court namely, the case of O'Keeffe v. An Bord Pleanála, it was a specific condition that the person so intervening be confined to making submissions consisting of the grounds which had been filed by the existing appellants all being matters which had been determined in the High Court."

20. Even if the Court of Appeal has jurisdiction to substitute as distinct from add a party at the appeal stage, on the facts of this application, the Court considers it should exercise its discretion so as to refuse this application for substitution for the following reasons.

21. In the two appeals in which these applications are brought, the issues in the appeals are respectively:

> (i) whether or not the High Court was correct in its decision made on the 4th October, 2012, to grant on that date summary judgment in favour of IBRC against Mr. Halpin; and
>
> (ii) whether or not the High Court was correct following the plenary hearing on the 7th November 2013, to grant judgment in favour of IBRC against Mr. Halpin in the sum of €6,338,639.09.

22. On each appeal, this Court will only be concerned with the facts as they existed and the evidence before the High Court on the 4th October, 2012 and the 7th November, 2012, respectively. The determination which must be made by this Court on appeal is whether or not IBRC was entitled to judgment against Mr. Halpin on each of the respective dates on the basis of the evidence then before the High Court. The events upon which Kenmare rely in its application to be substituted for IBRC as plaintiff only occurred in March and May 2014. It is not suggested on its behalf that the events upon which it now relies give it any entitlement to be considered either in October 2012, or November 2013, as entitled to judgment against Mr. Halpin. What it asserts is that if Mr. Halpin fails in either or both of his appeals, it is entitled by way of the assignment which took place in May 2014, to the benefit of the 2012 and 2013 judgments obtained by IBRC against Mr. Halpin.

23. It follows from this analysis that what is sought to be upheld on the appeals are the High Court judgments of October 2012 and November 2013 in favour of IBRC as plaintiff in the proceedings. If it is sought to uphold those judgments then IBRC must remain a plaintiff in the proceedings. It is true that the judgments given by the High Court were expressly awarded in favour of the plaintiff. However, they were granted to IBRC as plaintiff by reason of it having established by factual evidence to the satisfaction of the High Court its entitlement to such judgment. If this Court were now to make the order of substitution as sought by Kenmare, its effect would be to replace Kenmare for IBRC as plaintiff in the proceedings and accordingly, permit Kenmare as plaintiff to be considered (subject to the outcome of the appeals) as entitled to have been granted judgment in its favour against Mr. Halpin in the High Court on the 4th October, 2012, and the 7th November, 2013. Kenmare had no entitlement to be granted judgment in its favour on those dates and does not contend otherwise.

24. The application by Kenmare for an order of substitution at appeal stage requires quite a different consideration to that given in the High Court by Kelly J. in *IBRC v. Comer* and by me in *IBRC v. Morrissey*. In each of those applications, the plaintiff had not yet obtained judgment against the defendant. The Comer proceedings were still at a relatively early stage. In Morrissey they were almost at the final stage of the hearing in the High Court, but importantly, there had been no determination as to the entitlement of IBRC as plaintiff to judgment against the defendant. It permitted the approach taken in Comer and followed in Morrissey of only requiring the applicant on the procedural application for substitution to adduce evidence in a prima facie fashion of its entitlement by reason of the purported assignments to pursue the existing claim on the underlying facilities alleged to have been transferred to it against the defendants. It was made clear in each judgment that the effect of the application and order for substitution was to take IBRC out of the proceedings and permit the applicant as plaintiff to pursue the proceedings for judgment against the defendant, leaving over to the trial judge the determination of the questions as to whether the new plaintiff by reason inter alia of the alleged assignment of rights to the facilities could at the relevant future date establish its entitlement to judgment against the defendants. The procedural substitution application did not determine the issue of the validity of the assignment from IBRC to the assignee/applicant (or the entitlement to rely upon the Deed of Assignment as redacted before the Court). These matters were left over for the trial judge.

25. It was also made clear in each judgment that IBRC in either joining in the substitution application or consenting to same was foregoing its right to pursue the existing proceedings to judgment.

26. Contrary to that position in these appeals it is sought to uphold judgments already granted in favour of IBRC at a time when Kenmare had no right to obtain judgment. IBRC cannot be let out of the proceedings if as appears, it is sought to uphold the High Court judgments in its favour. Hence substitution must be refused.

Addition of Kenmare as a plaintiff

27. The same difficulties do not arise on the alternative application to join Kenmare as a second plaintiff and respondent to the appeals. If such an order is made IBRC would remain a plaintiff and the only one in whose favour the High Court judgments were granted.

28. Kenmare has put before the court evidence on a prima facie basis that pursuant to the Deed of Transfer of the 23rd May, 2014, it is entitled from that date to the benefit of the facilities underlying the claim against Mr. Halpin as guarantor in these proceedings and also to the judgments obtained by IBRC against Mr. Halpin in October 2012 and November 2013. As such it is a person with a material interest in the outcome of the two appeals before this Court. Hence it is in the interest of justice that Kenmare be added as a party to the proceedings and permitted to participate as a respondent in the hearing of the appeals, but confined to any argument advanced by IBRC in the High Court or which it may properly advance on the appeal in reliance upon the evidence before the High Court on the respective dates. It appears appropriate that Kenmare be added as a plaintiff in the proceedings and a respondent to the appeal. In making this order the Court is not determining the claimed entitlement of Kenmare to the judgments obtained by IBRC. It is simply determining that it has put forward evidence on a prima facie basis that would entitle it to be joined as a co-plaintiff in the proceedings for the purpose of pursuing its claim either to the facilities which it contends have been transferred or to the judgments which it contends have been transferred or assigned.

29. Subsequent to the hearing and determination of the two appeals, depending on the outcome of same, if either judgment is set aside, there may be matters remitted to the High Court for further hearing and determination in which case Kenmare as a second named plaintiff will be entitled to pursue its claim against the defendant and establish its entitlement to judgment in the High Court at a future date. If that were to occur, there may be a further application to the High Court to strike out the IBRC as a plaintiff in the proceedings. This decision does not in any way seek to prejudice any such future application.

30. If on the other hand, on the hearing of the appeals, they are dismissed, then the existing High Court judgments in favour of IBRC will remain in place. Kenmare as a second named plaintiff in the proceedings will then be entitled to pursue any application in the High Court for execution of the judgments in favour of IBRC and on such an application, the alleged entitlement of Kenmare as assignee or transferee of the judgments to enforcement can be determined at first instance as is appropriate.

Order

There will be an order in each appeal that Kenmare Property Finance Limited be added as a second plaintiff in the proceedings and as a respondent to the appeal with a restriction that it may only advance any argument on the appeal capable of being advanced by Irish Bank Resolution Corporation Limited (in special liquidation). There will be a consequential order amending the title to the proceedings and the Court will hear Counsel on the necessity for the filing or delivery of any amended pleading.