Neutral Citation No. [2016] IEHC 395

THE HIGH COURT

CIRCUIT APPEAL

[2016 No. 29 C.A.]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LTD.

PLAINTIFF

AND

CONOR KENNEDY AND CECILY KENNEDY

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered the 6th day of July, 2016

1. This is an appeal from the order and judgment of the President of the Circuit Court of 3rd September, 2015 refusing an application made *ex parte* for an order pursuant to O. 22, r. 4 of the Circuit Court Rules substituting the applicant, Mars Capital Ireland Ltd. as plaintiff in the above entitled proceedings in lieu of Irish Bank Resolution Corporation Ltd. and an order substituting the same applicant as plaintiff in lieu of Irish Nationwide Building Society, Anglo Irish Bank Corporation Ltd. or Irish Bank Resolution Corporation Ltd. as appropriate in similar type proceedings described in a Schedule exhibited at exhibit "CM1" to the grounding affidavit of Mr. Colin Maher sworn 20th December, 2015.

2. Order 22, rule 4 of the Circuit Court Rules provides:

> "Where, by reason of the death, or bankruptcy, or any other event occurring after the commencement of an action, proceeding or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, proceeding, or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the court upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

3. Any order obtained under O. 22, r. 4 must be served upon the continuing parties or their solicitors under rule 5. A person who is served under rule 5 may apply to the court to discharge or vary the order at any time within ten days from the service thereof under rule 6.

Background

4. The case between the plaintiff and the defendants is one of 583 proceedings which arise on foot of loans advanced by Irish Nationwide Building Society (INBS) and the other plaintiffs to the defendants. On 1st July, 2011 a transfer order was made by the High Court pursuant to s. 34 of the Credit Institutions (Stabilisation) Act 2010 whereby the assets and liabilities including mortgage loans of INBS were transferred to Anglo Irish Bank Corporation Ltd. (Anglo).

5. On the 14th October, 2011 Anglo Irish Bank Corporation Ltd. changed its name to Irish Bank Resolution Corporation Ltd. (IBRC).

6. By a "loan sale deed in respect of Project Sand – Tranche 4" dated 31st March, 2014 (the loan sale deed) IBRC agreed to sell and the applicant Mars Capital Ireland Ltd. agreed to purchase *inter alia* all rights, title interests, benefits and obligations of IBRC under a number of assets as identified in the loan sale deed (the assets).

7. The transfer of the registered charges associated with the mortgages of registered land which IBRC agreed to transfer to the applicant under the loan sale deed was completed by a deed of transfer form 56 dated 6th June, 2014.

8. A deed of conveyance and assignment of unregistered property dated 6th June, 2014 was also executed in respect of the mortgages of unregistered land which IBRC agreed to transfer to the applicant under the loan sale deed.

9. The completion of the transfer of all IBRC rights, title interests, benefits and obligations subject to the borrowers' right of redemption in the assets (other than those consisting of registered charges or mortgages of unregistered land), was achieved by a deed of transfer also dated 6th June, 2014.

10. The defendants in these proceedings were notified by letter dated 10th June, 2014 of the transfer of their loan facility obligations and related rights from IBRC to the applicant on 6th June, 2014. It is stated in the grounding affidavit that each of the remaining defendants in similar type proceedings was sent a letter of notification in the same terms as the letter exhibited in respect of the defendants in these proceedings. Mr. Colin Maher deposes that he is advised and believes that the defendants and each defendant in the similar type proceedings' debts and related rights against, and obligations to, IBRC were legally assigned to the applicant from the date of these letters.

11. It is submitted on behalf of the applicant that it is necessary or desirable that the applicant be substituted in lieu of IBRC as plaintiff in these proceedings and in all similar type proceedings. It is submitted that it is appropriate to make an omnibus order with a view to saving costs and judicial and administrative resources and that it would be appropriate for the court to permit the applicant to be substituted as plaintiff in place of INBS, Anglo or IBRC, as appropriate, in each of the other similar type proceedings on foot of the *ex parte* docket by way of a single application.

12. The following exhibits are contained in Mr. Maher's affidavit:

(a) A schedule setting out the party details and record numbers for each of the similar type proceedings in respect of which the applicant was made;

(b) The transfer order made pursuant to s. 34 of the Credit Institutions (Stabilisation) Act 2010 whereby the assets and liabilities including mortgage loans of INBS were transferred to Anglo Irish Bank Corporation Ltd. on 1st July, 2011 (McGovern J.);

(c) A true copy of the certificate of incorporation on change of name from Anglo to IBRC issued by the company's registration office;

(d) The Loan sale deed between IBRC and the applicant dated 31st March, 2014;

(e) A redacted copy of a deed transfer of registered charges associated with the mortgages of registered land which IBRC agreed to transfer to the applicant dated 6th June, 2014;

(f) A redacted copy of deed of conveyance and assignment of mortgages of unregistered land which IBRC agreed to transfer to the applicant under the loan sale deed;

(g) A redacted deed of transfer completing the transfer of all IBRC rights, title interests, benefits and obligations subject to the borrowers' rights of redemption in the assets other than those consisting of registered charges or mortgages of unregistered land dated 6th June, 2014;

(h) A true copy of the letter dated 10th June, 2014 by which the defendants in these proceedings were notified of the transfer of their loan facility obligations and related rights from IBRC to the applicant which took place on 6th June, 2014;

(i) A copy of a standard letter sent to all defendants, in the similar type proceedings, the subject matter of this application which is in similar terms to that sent to the defendants herein though each such letter is not exhibited.

13. The letter sent to the proposed defendants was in accordance with the obligations of the applicant pursuant to the loan sale deed.

14. In *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671 a similar application was made to the High Court. An assignment or transfer or disposal of assets under a loan sale deed had occurred and it was sought to substitute the assignee for the assignor as plaintiff in various proceedings. Notification of the assignment of interest was furnished in writing to the defendants. The relevant deed also contained a redacted copy of the agreement by which the vendor agreed to sell the assigned accounts or convey and deliver the assets to the purchaser subject to the subsisting rights of redemption and the purchaser thereby agreed to purchase the assets and assume the vendors' rights and obligations. The Court was satisfied that the document which had been exhibited when read in respect of the material which was unredacted demonstrated that there had been a sale and an assignment, the notice of which had been given by letter dated 6th June, 2014. The assignment appeared to comply with s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877. It provided that:-

> "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

15. Kelly J. (as he then was) was asked to substitute a new plaintiff, the assignee of various contracts signed by IBRC, as plaintiff in proceedings then constituted between IBRC and the defendants subject to proof at trial that there had been a valid sale of the underlying assets, a valid assignment of the chose in action and a valid notice given. The question to be determined was whether the court could be satisfied that there was *prima facie* evidence that this had occurred.

16. In that case a decision was made to put the defendants on notice and the learned judge concluded that "in the circumstances that was the wise thing to do" because if the order had been sought and granted *ex parte* it might have given rise to an application to discharge it. Though some criticism might be made of the self editing of documents which were the subject of redaction without any explanation, the learned judge concluded that there was no identifiable disadvantage to the defendant as a result of the order proposed. The Court placed considerable emphasis on the fact that the onus of proof in a procedural motion of this kind is different to that which is required at the trial of the action. This decision did not concern the validity of the underlying sale agreement or the assignment effected or notice of the assignment. The learned judge substituted the assignee as plaintiff in the proceedings in lieu of Irish Bank Resolution Corporation Ltd. in special liquidation. This was subject to the assignee demonstrating at trial that its entitlement to succeed in the proceedings and to bring the action on foot of the documents which were exhibited in the application. At the trial the defendants would remain free to raise whatever issues were appropriate in respect of any alleged imperfections or invalidity in any of the documents underpinning the bringing of the application and the order of substitution made by the court. An order was made under O. 15, r. 4 of the Rules of the Superior Court substituting the assignee for the plaintiff in the proceedings.

17. This decision has been followed in a number of other High Court judgments including *IBRC (in special liquidation) v. McCaughey* [2014] IEHC 517; *IBRC (in special liquidation) v. Morrissey* [2014] IEHC 527*; Lombard Ireland Ltd. v. Kevin Devlin Transport Ltd.* [2014] IEHC 653.

18. I am satisfied on the evidence set out in the affidavits submitted to the court and the exhibits therein contained that the applicant has adduced *prima facie* evidence that IBRC, the existing plaintiff, has by a deed of transfer assigned to the applicant all its rights, title interests and benefits in the facilities to the defendants in these proceedings and the defendants as outlined in the other pleadings. There is *prima facie* evidence that as a legal assignment it complies with the conditions set out in s. 28(6) quoted above and that there is prima facie evidence that IBRC were entitled to assign their interests. The court emphasises the procedural nature of this application: it is not making a determination on the substantive issues that may arise between the applicant as a newly installed plaintiff and the defendants in these proceedings or any of the proposed defendants in the related proceedings said to be similar in nature.

19. The recent economic downturn has produced a phenomenon whereby loan books or substantial tranches of loan contracts and

their related securities have been the subject of sales by financial institutions to other entities such as the applicant in this case, who then seek to enforce their newly acquired rights by having themselves substituted as plaintiffs in pending litigation. A number of such orders have been made by the High Court in summary proceedings concerning liquidated sums. In addition assignees have been substituted as plaintiffs in proceedings for possession of property. A number of applications have been made for administrative convenience following such assignment agreements in which the assignee has been substituted in dozens if not hundreds of proceedings. The format of the applications follows the format of the application in this case and the proofs set out therein. A lead case is chosen. The proofs are set out as they have been in this case in respect of the defendants, the affidavits submitted and a similar order substituting the assignee in a scheduled number of cases is sought. This results in savings for the Plaintiff in terms of costs and has proven to be administratively convenient in the High Court. It is also subject to an application to set aside the order, if that is thought to be appropriate. However, it is difficult to see, if the *prima facie* evidence is adduced and accepted by the court, what prejudice arises for the defendant. However, such prejudice is conceivable and it is open to a defendant to seek to set aside the order made. Similarly, the defendants rights are preserved in relation to the validity and effectiveness of the loan assignment agreement, various other steps including notice of the assignment are to be established at the hearing of the trial of the action.

20. I am satisfied that the principles outlined in *Comer* in relation to the substitution of the applicant as a plaintiff apply equally in the Circuit Court proceedings, the subject of this application, against Mr. and Mrs. Kennedy under Order 22, rule 4 with an important exception. The learned president was satisfied that the *prima facie* evidence set out on the affidavits submitted was sufficient as a matter of law to justify the substitution of the applicant for the present plaintiff IBRC. The question arose however, whether that substitution was in the interests of justice and whether it was necessary or desirable that the order should be made. This fell to be considered not only from the point of view of the costs that might be saved by the applicant but also the impact of such an order on the administration of justice in the Circuit Court and for the many hundreds of defendants who would be affected by the making of the order without notice. He was particularly concerned that the cases involved cases of repossession of property in a court of local jurisdiction involving steps to repossess family homes and businesses or rental properties with all the attendant distress that may accompany this form of application.

21. The application originally concerned 583 proceedings. It also involves the substitution of the applicant in proceedings involving IBRC, Anglo Irish Bank and Irish Nationwide Building Society as plaintiff. These proceedings have been initiated and conducted from Circuit Court offices throughout the country and although the learned president facilitated the making of the application temporarily assuming responsibility for the multiple Circuit Court jurisdictions involved in these applications, it is difficult to accept that any great administrative convenience for the various court officials and multiple Circuit Court jurisdictions will be achieved by the making of the order. They will have to deal not only with the enquiries that will inevitably follow from the respective defendants in these cases but also the various orders to be made in respect of each file. This Court does not have sight of, or access to, any of the files governed by this application. Unlike similar applications in the High Court in which the court has ready access to case histories in the course of the proceedings to date, this is not available to the court on this application nor were they available to the learned President sitting in Dublin. I am mindful that this Court made a similar order substituting a plaintiff in respect of multiple proceedings seeking orders for possession in the High Court but the centralised administration of the High Court facilitated the administrative court work necessitated by the order. Those cases were of course, appropriate to that court's jurisdiction. It seems to me that the making of such an extensive order governing 583 proceedings in multiple jurisdictions throughout the country is inconsistent with the orderly administration of courts of local jurisdiction and in particular the respective files in each case.

22. The court notes, as did the learned president, that the cases cited above involved the service of the defendants with notice of the application to make the substitution of the assignee in their respective cases. This is not a procedural imperative but was certainly viewed as a wise move by Kelly J. in *Comer* for reasons identified by the learned president.

23. The difficulties encountered in dealing with such a large number of applications are clearly identifiable in the affidavit of Mr. Nevin who carried out an extraordinary amount of work in reviewing all of the physical files relating to the similar type proceedings held by the applicant. He identified 473 matters in which the physical file was not currently held by the applicant but still remained with the solicitors who acted for the original plaintiff (two firms) and those now held by other panels of solicitors for the applicant. He liaised with each of these firms to confirm that the details set out in a schedule in respect of the similar type proceedings were correct. The revised schedule of similar type proceedings was furnished in his affidavit of the 3rd February, 2016. The original schedule had been inaccurate. Two matters had incorrect record numbers, seven had been discontinued by the plaintiff or a substitution of the applicant as plaintiff had already taken place and three matters were listed in the incorrect circuit area. This indicates to me that despite the considerable work done in bringing this application when one tries to consolidate this large number of cases throughout the State for this purpose, mistakes occur. I do not say this to criticise the work done. However despite best endeavours the information originally brought to court was inaccurate in a number of cases The up-to-date position as of that date was that the applicant sought to be substituted as plaintiff in 576 matters and not the original 583 referred to.

24. Mr. Nevin contacted each of the 26 Circuit Court offices concerned and confirmed many of the details which solicitors on record were unable to provide and sought to carry out a "spot check" to verify details of similar type proceedings. It seems to me that there is potential for still further confusion in the execution of any order that this Court might make in respect of the 576 remaining sets of proceedings. It seems to me that each of the court files involved will require extra work following the making of any such order by this Court. It is important that steps should not be taken (even if superficially attractive) which have the potential to confuse or disrupt the orderly local administration of each case whether in court or in the court office and that each of the 576 cases should be seen to be dealt with individually in its proper local jurisdiction.

25. The applicant has assumed an enormous burden in assuming the pursuit of these proceedings. However I am not satisfied that in effect a partial consolidation of these proceedings by making an omnibus order of the type sought is necessary or desirable or indeed in the interests or spirit of the local administration of justice in accordance with the Constitution. It is more appropriate that the applicant continues these proceedings within the circuit jurisdiction as defined by law.

26. This may well involve a further cost on the part of applicant which is a result of a commercial decision to assume ownership of these assets and which should not as a matter of course be visited on the defendants.

27. In the circumstances I find myself in agreement with the learned president of the Circuit Court who has enormous experience in these matters and I consider that these applications should proceed in the normal way in the Circuit Court. Though notice is not a requirement under the rules, it may prove to be a more satisfactory and efficient method of advancing the cases. That is a matter for the applicant.