THE HIGH COURT

[2013 No. 1829P]

BETWEEN

IRISH BANK CORPORATION LIMITED

(IN SPECIAL LIQUIDATION)

APPLICANT/PLAINTIFF

AND

PETER GAW

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 26th day of March, 2019.

1. In the underlying proceedings, the plaintiff claims judgment in the sum of €291,031.33 which it is alleged is due and owing by the defendant in respect of money paid to him under a mistake. A claim is also made, *inter alia*, for deceit and breach of trust. The claim arises in the context of the redemption of an Atlantic bond, at the request of Liberty Asset Management. In essence, the claim against the defendant is that he received monies to which he was not entitled under a mistake of fact and following demand has refused to return it.

2. The proceedings were commenced by way of plenary summons on the 22nd February, 2013. An appearance was entered on behalf of the defendant on the 13th March, 2013.

3. The plaintiff is the successor in title to Anglo Irish Bank Corporation plc. Anglo Irish Bank Corporation delisted from the stock exchange in 2009 and became Anglo Irish Bank Corporation Ltd. By special resolution dated 3rd October, 2009, Anglo changed its name to Irish Bank Resolution Corporation Ltd, with effect from the 14th October, 2011. Pursuant to the Irish Bank Resolution Act, 2013, the Minister for Finance made a special liquidation order providing *inter alia* for the orderly winding down of the plaintiff bank and pursuant to that order, Mr. Ciaran Wallace and Mr. Eamonn Richardson of KPMG, were appointed joint special liquidators.

4. The defendant has brought an application to dismiss the plaintiff's claim for want of prosecution, or on the grounds of inordinate and inexcusable delay in prosecuting the claim.

5. An issue arises, however, in relation to the title of the plaintiff as pleaded. The defendant maintains that it had no dealings with the plaintiff or its predecessor in title. The plaintiff contends that by reason of an error, the title of the plaintiff is incorrectly described as Irish Bank Corporation Ltd (in special liquidation). The word "*Resolution*" is omitted from the name of the plaintiff as described in the proceedings. The plaintiff maintains that its true, legal and real title is Irish Bank Resolution Corporation Ltd (in special liquidation); and that as a matter of fact and law the plaintiff as named in the title does not and never did exist.

6. When the defendant's motion came on for hearing, an application had not yet been made by the plaintiff to amend the title of the proceedings. Counsel for the defendant indicated that any such application would be opposed. Nevertheless, the parties were anxious to progress matters and in order to utilise court time as efficiently as possible it was agreed to proceed with the hearing of the defendant's motion but that the decision of the court would be deferred pending consideration of the plaintiff's application to amend. On the 9th October, 2018, the Court directed that the application to amend should be brought on notice to the defendant.

7. A notice of motion issued on the 23rd October, 2018, and the application to amend was heard on the 19th December, 2018. The plaintiff presented its case and counsel for the defendant responded. It was submitted by the defendant that there was insufficient evidence before the court, such that it could conclude that a clerical error had been made. In reply, and following an exchange with the court, counsel for the plaintiff, although not conceding that it was necessary, applied for an adjournment to facilitate the filing of a supplemental affidavit, the aim of which was to describe in greater detail how the clerical error occurred.

8. This decision is confined to a consideration of whether, at this stage, the plaintiff should be permitted to adduce additional evidence of Mr. Brian Quigley in his affidavit sworn on the 11th January, 2019. This is not a decision on the substantive application to amend the proceedings. If the court rules that the evidence should be admitted, the defendant has reserved its position regarding any further response which it might make, or as to how it might test that evidence.

9. To place this application in context, it is necessary to address certain background matters. The application to amend the proceedings is grounded on the affidavit of Ms. Mairéad McShea, sworn on the 23rd October, 2018. She avers that the proper and correct title of the plaintiff is Irish Bank Resolution Corporation Limited (in special liquidation). It was intended that this name be used in the title of the proceedings but that at the time of issue a mistake occurred as a result of a clerical error. Ms. McShea averred that it was intended to include the word '*resolution*', which was not done at that time and therefore a mistake was made. It is her belief that the mistake is amenable to correction pursuant to O. 63, r.1(15) and O. 28, r.12 of the Rules of the Superior Courts. She also states her belief that no prejudice will be occasioned to the defendant if the error is corrected and that it is clear that the defendant must have understood that the plaintiff was Irish Bank Resolution Corporation Limited (in special liquidation). To this end she exhibits a copy of the letter dated the 21st February, 2013 addressed to the defendant from the solicitors engaged by the plaintiff, the opening sentence of which states that the author was instructed by "*Irish Bank Resolution Corporation Limited (in special liquidation) (IBRC) as successor to Anglo Irish Bank plc*."

10. The defendant opposes this application. Mr. Sherry, solicitor for the defendant, in an affidavit sworn on the 13th November, 2018 avers that the plaintiff has been consistently and continuously referred to in correspondence as Irish Bank Corporation Limited (in special liquidation). He exhibits correspondence sent on behalf of the defendant in 2013 stating that the defendant had no knowledge of such plaintiff. There was then a lull in the proceedings until the 15th May, 2017 when the plaintiff's solicitor served a notice of intention to proceed. In the covering letter, the plaintiff was again referred to as Irish Bank Corporation Limited (in special liquidation). Mr. Sherry avers that the defendant would be prejudiced if the order sought is made.

11. When the application to amend came before the court on 19th December, 2018, counsel for the defendant submitted that Ms. McShea, in her evidence on affidavit, purported to state a legal conclusion in accordance with the wording of the relevant rule of

court, rather than to advance a reason as to how the alleged clerical error had occurred. Counsel for the plaintiff submitted that the circumstances giving rise to the mistake was adequately described in the affidavit of Ms. McShea and that no further evidence could be given.

12. A discussion ensued as to adequacy of the evidence adduced, despite Ms. McShea averring to the stated intention to name the plaintiff to the proceedings by its correct title. Following this exchange, and having considered the submissions of counsel, the court ruled that in the interests of justice, the motion should be adjourned and that the plaintiff be given liberty to apply to adduce additional evidence as to how the alleged mistake arose.

13. Application was made to the court by notice of motion dated the 11th January, 2019. An affidavit was sworn by Mr. Brian Quigley, solicitor, in support of the application. He had responsibility for carriage of the case since inception and was originally instructed by Anglo Irish Bank plc. Having investigated the records within the office, he outlines the position as follows:-

> (1) Having received instructions to institute proceedings against the defendant, he was conscious that the limitation period under the Statute of Limitations was due to expire on the 23rd February, 2013.
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> (2) He sent a letter of demand to the defendant outlining that his firm was instructed by Irish Bank Resolution Corporation Limited (in special liquidation) (IBRC).
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> (3) He consulted with counsel to ascertain his availability to act in these proceeding and to act in other proceedings, which it was intended to institute against another individual arising from the same set of circumstances.
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> (4) Counsel signalled his availability to act and on the 21st February, 2013, Mr. Quigley forwarded a letter of instruction to counsel by email, attaching relevant papers. These included a draft plenary summons to be settled in the proceedings intended to be instituted against the other individual. It was proposed that the draft would be adapted for use in proceedings against Mr. Gaw.
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> (5) The reliefs intended to be sought by the plaintiff against both parties were identical, albeit the amounts claimed differed. In the title of the letter to counsel, the words "*IBRC v. Peter Gaw*" appeared. On the other hand, the body of the letter referred to Irish Bank Corporation Limited (in special liquidation) (the bank).
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> (6) It is Mr. Quigley's belief that this is a typographical error and it was at all times intended to describe the bank as Irish Bank Resolution Corporation Limited, in both the letter of instruction and in the draft summons.
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> (7) The draft summons which was sent to counsel, was in the name Irish Bank Corporation Limited (in special liquidation). The summons was duly settled by counsel and Mr. Quigley points out that the draft plenary summons in respect of the other party contained the same mistake.
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> (8) In the process of transcribing the contents of the settled draft (in respect of the intended proceedings against the third party, into a summons for issuance in the intended proceedings against Mr. Gaw) the word "*Resolution*" was omitted in error, and was not noticed prior to the institution of the proceedings.
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> (9) Mr. Quigley was never instructed by an entity named Irish Bank Corporation Limited (in special liquidation); nor does he believe that any such entity existed at any material time. The letter of demand correctly described his client as Irish Bank Resolution Corporation (in special liquidation).
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> (10) Thus, he states, that the omission of the word resolution from the summons is a mistake which occurred in the physical process of putting down the name of the plaintiff on the summons. He further avers that the defendant could never have been in doubt about the identity of plaintiff. Thus, a clerical error arose at a time when instructions were sent to counsel for the purposes of settling proceedings against the defendant.

14. In a replying affidavit, Mr. Sherry contends that the plaintiff should not be permitted to adduce additional evidence. He avers that the fact that there was an address in the plenary summons at 1 Stokes Place, St. Stephen's Green, is not an indication of any knowledge on the part of the defendant as to the correct identity of the plaintiff. A search revealed that as of the 18th January, 2019, some 1081 companies were registered to the address in question. He also refers to correspondence and communications between the parties which refer to "*Irish Bank Corporation Limited*" rather than "*Irish Bank Resolution Corporation Limited*." and states that, to his knowledge, IBRC is not a registered entity within this jurisdiction. Mr. Sherry stresses that not alone was the motion to amend opened to the court, but counsel for the plaintiff had completed his submission and the presentation of the plaintiff's evidence prior to the adjournment. In any event, he avers to his belief that the additional evidence sought to be adduced does not advance the plaintiff's claim, it does not show that the mistake was clerical in nature, nor would the plaintiff suffer prejudice if that evidence was not adduced. Further, he avers that such evidence now sought to be adduced was available to, and within the knowledge of the plaintiff, at the time the motion to correct the title of the proceedings was heard.

15. Counsel have prepared written submissions. There is an element of agreement between the parties. As the court has not arrived at any conclusion or decision in relation to the application to amend the title in proceedings, it is accepted that the court has an inherent jurisdiction to admit additional evidence; a jurisdiction which should be exercised in the interests of justice. The parties disagree as to how that jurisdiction should be exercised in this case.

16. In considering the manner in which the court should exercise its jurisdiction and discretion, it is submitted by Mr. Murphy B.L. on behalf of the plaintiff, that the burden of proof, which is on him in respect of the correction of the title, must be discharged on the balance of probabilities. He contends that the bank has discharged that onus and has advanced as a very likely situation bearing in mind reference to the pre-action letter of claim which contains the correct title of the plaintiff, the fact that there is no entity called '*Irish Bank Corporation'* and also that the defendant has advanced no alternative version of what might have occurred. Further, it is submitted that the defendant has not sought to cross-examine the original deponent, Ms. McShea, and that no reason has been advanced for believing that the error was anything other than a simple mistake. Although he maintains that it is not necessary to bring this application, nevertheless, it is made in the interests of detail and clarity. He argues that if it is the defendant's position that the additional evidence sought to be introduced does not advance the plaintiff's claim, then a question arises of why the application is being opposed. He submits that this is a matter which ought to be considered in weighing the balance of justice.

17. Counsel argues that the evidence sought to be adduced will facilitate the court in its decision by reference of the full evidential picture of the circumstances in which the error was stated to have arisen. Further, the additional evidence does not depart from or

contradict the evidence already before the court, rather it embellishes and supplements it. He also submits the defendant is not in any way prejudiced, such as by having to meet a new case at a late stage in the proceedings. He stresses the general justice of the case as to the effect that the admission of the new evidence may have on the overall balance of justice between the parties. Finally, it is contended that the defendant has not put before the court even "*the slightest indication of any substantive defence to the claim*", and it would not be in the interest of justice not to permit the admission of the evidence.

18. Ms. Conneely B.L., on behalf of the defendant, submits that the evidence now sought to be adduced does not prove that the plaintiff intended to issue proceedings in the name of Irish Bank Resolution Corporation Limited. She submits that the plaintiff has failed to establish a *prime facie* case that a clerical error was made.

19. It is further submitted on behalf of the defendant that there are two exceptions to the general principle that a party should bring forward all of the evidence on which he or she intends to rely before the close of his or her case. The first is to enable a party to rebut evidence that arises *ex-improviso* and which could not have been anticipated. The second exemption concerns the introduction of formal or uncontentious evidence which was not adduced due to inadvertence or oversight. To the extent that the plaintiff may suggest that the evidence now sought to be adduced is uncontentious, by reason of the defendant not seeking to controvert it, it is submitted that the meaning of uncontentious in this context is not applicable to such evidence. In this regard reference is made to a number of decisions including *Clancy v. The Minister for Social Welfare* (Unreported, High Court, Budd J., 18th February, 1994) and *Re Salthill Properties Limited (In Receivership)* [2004] IEHC 145. Counsel submits that where an applicant opens and subsequently closes his or her case, and it is opposed by the other party, *inter alia*, on the ground that insufficient evidence has been adduced to entitle the applicant to the relief sought, then in the absence of surprise or inadvertence in proving a formal and uncontentious matter, the court should not adjourn the proceedings to allow the applicant to enhance its evidence. It is contended that in order to succeed in an application pursuant to O.63 or O.28, the plaintiff is required to bring its whole case before the court and it did not do so. She submits that it would be contrary to the promotion of finality in proceedings to permit an applicant to mend its hand once the respondent had put its case before the court.

Decision

20. There is clear authority for the proposition that, in exceptional circumstances, the court has jurisdiction to permit the introduction of additional evidence after the hearing has concluded and indeed, on occasion, when judgment has been delivered. This is evident from the decision of Clarke J. (as he then was) in *Re McInerney Homes Limited* [2011] IEHC 25, where he took the view that the balance of justice required that an issue be re-opened to permit the introduction of evidence which showed, in that case, that it was highly probable that the interests of two members of a banking syndicate in respect of loans would not be transferred to NAMA. The applicant company only became aware of this information in the days immediately after a judgment had been delivered. Clarke J. stated:-

> *"It is important to commence a review of the court's jurisdiction by noting that the timing of an application which is designed to seek to go behind a ruling of the court is a matter of some considerable importance".*

21. The court has been referred to other decisions where, in the interests of justice, additional evidence has been admitted in circumstances where a decision has not been arrived at. If the court has jurisdiction to entertain an application to admit evidence, albeit in somewhat exceptional circumstances and in the immediate aftermath of a decision, then, *a fortiori*, it enjoys such jurisdiction on an application such as this, made at this stage of the proceedings.

22. No authority or precedent setting out the principles according to which the court ought to exercise its inherent jurisdiction on an application such as this, has been opened to the court. It seems to me that while each case must be determined on its own facts and circumstances, in most cases the first matter to be addressed is whether prejudice will be occasioned to the opposing party. I am satisfied, however, that in circumstances which pertain in an application such as the one before the court, such prejudice ought to be measured by reference primarily to the manner in which the opposing party might be disadvantaged or labour under an inability or difficulty in contesting, contradicting or in otherwise dealing with such evidence by reason of the stage of the proceedings or the time at which it is sought to be introduced. It does not appear to me that any alleged prejudice ought to be measured against the potential influence which such evidence, otherwise properly admissible, may have on the outcome of the proceedings, if admitted. Further, if the prejudice relates, for example, to the opposing party being financially disadvantaged in the incurring of increased or unnecessary costs, then such prejudice may be addressed by the making of an appropriate costs order. Against this must be balanced the prejudice which the party seeking the introduction of such evidence is likely to suffer in terms of the overall presentation of its case, such as for example whether its case will or may fail *in limine*, if it is not permitted to adduce the evidence. Other factors are likely to involve a consideration of the nature of the application in which the evidence is sought to be adduced, the reason why such evidence was not originally adduced, whether such evidence was previously available and the stage of the proceedings or application at which it is sought to be so introduced.

23. On the balance of probabilities, I am not satisfied that it has been established, at this stage, that any prejudice, actual or probable, will be occasioned to the defendant should the evidence contained in Mr. Quigley's affidavit be admitted. If any potential prejudice exists, in my view, it is capable of being addressed by affording the defendant the opportunity to introduce evidence of rebuttal or by permitting the testing of such evidence in an appropriate manner. As to the other factors which ought to be considered, although the plaintiff is somewhat equivocal as to the necessity to seek to introduce the additional evidence, this is an application which relates to the title of proceedings, normally a straightforward application and one which in many cases proceeds without opposition. While it seems highly likely that the evidence outlined in Mr. Quigley's affidavit concerning how the error arose was available when Ms. McShea prepared her affidavit, I believe that in considering the balance of justice, I should take into account the potential effect of the error on the proceedings and the potential for their failure *in limine*. I am satisfied that on the consideration and application of these principles, that the balance of justice lies in favour of the admission of Mr. Quigley's affidavit, at least on a *prima facie* basis at this stage.

24. In principle and in the interests of justice, therefore, I conclude that the affidavit of Mr. Quigley sworn on the 11th January, 2019 and the exhibits contained therein, explaining how the clerical error arose, should be admitted on a *prima facie* basis, subject to the right of the defendant to test this evidence in such manner as it may wish to so do; and subject to any further order or ruling of the court in this regard. While the defendant has to a certain extent replied to the contents of the contested affidavit, and bearing in mind the submissions of counsel for the defendant on this aspect of the procedure, in the interest of justice the defendant should be permitted to take such steps as it may be advised in relation to the further contesting or rebutting of the contents of Mr. Quigley's affidavit.