Neutral Citation: [2014] IEHC 527

THE HIGH COURT

COMMERCIAL

[2011 No. 1548 S]

[2011 No. 86 COM]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

JOHN MORRISSEY

DEFENDANT

JUDGMENT (No. 4) on Application to Substitute LSREF III Stone Investments Limited as Plaintiff of Ms. Justice Finlay Geoghegan delivered on the 10th day of November 2014

1. This judgment is given on the application to substitute LSREF III Stone Investments Ltd. ("Stone") for the existing plaintiff, Irish Bank Resolution Corporation Ltd. (in special liquidation) ("IBRC") in these proceedings. The application is brought by motion issued on the 11th August, 2014, by Arthur Cox as solicitors for the existing plaintiff, IBRC, and the applicant, Stone. I will refer to these together as "the applicants".

2. The application was brought and pursued primarily pursuant to O. 15, rules 13, 14 and 15 of the Rules of the Superior Courts 1986. The applicants also relied upon Order 17, rule 4.

3. The application is grounded upon affidavits of Richard Willis, a partner in the firm of Arthur Cox. Mr. Black, solicitor for the defendant, has sworn affidavits in reply.

4. The background to the proceedings and full procedural history until the hearing of this motion on the 7th October, 2014, is fully set out in the judgment (No. 3) on Quantum herein, delivered on the 29th October 2014, and I do not propose repeating same in this judgment. It is, however, relevant and taken into account in this decision.

Facts

5. The facts relied upon by the applicants for this application are, in summary, as follows. These proceedings are for the recovery of monies allegedly due by the defendant to the plaintiff on facilities granted to the defendant in a facility letter accepted on the 5th February, 2009. That facility letter incorporated all the facilities granted by the plaintiff as Anglo Irish Bank Corporation Ltd. ("Anglo") to the plaintiff since 2000. Prior to February 2013, the plaintiff beneficially owned the debt due on the defendant's facilities and these proceedings were in being.

6. The General Conditions which form part of the terms of the facility letter accepted by the defendant on the 5th February, 2009, provided, at para. 18.2:

> "The Bank may, at any time, transfer, assign or dispose of the benefit of the Agreement and the Security Documents to any person on such terms as the Bank may think fit, whether as part of a loan transfer or securitisation scheme or otherwise without notice to the Borrower or any other person."

7. On the 7th February, 2013, on the making of the special liquidation order pursuant to s. 4 of the Irish Bank Resolution Corporation Act 2013 and the appointment of the joint special liquidators, the latter decided to continue these proceedings against the defendant. By an agreement dated the 31st March, 2014, IBRC (in special liquidation), as vendor, and the special liquidators, agreed to sell to Stone, *inter alia*, the credit facilities the subject matter of these proceedings. On the 11th July, 2014, the special liquidators executed a deed of transfer in which IBRC (in special liquidation), as assignor, assigned to Stone, as assignee, all right, title and interest of IBRC to the facilities granted to the defendant which are the subject matter of these proceedings.

8. Notice of the assignment was given to the defendant, initially, by giving notice to the receiver appointed by IBRC over certain assets of the defendant who, in turn, transmitted it to the defendant by email of the 23rd July, 2014.

9. Whilst the defendant disputes the effectiveness or validity of the agreement for sale and the deed of transfer and the appropriateness of the notice given to him, he does not dispute that the documents were entered into and that he did receive notice of the purported assignment of IBRC's interest in the facilities previously granted to him by Anglo which are the subject of these proceedings.

10. Mr. Willis, in support of the facts deposed to, exhibited a redacted copy of the deed of transfer of the 11th July, 2014. That redacted copy document identifies Irish Bank Resolution Corporation Ltd. (in special liquidation) as the assignor and Stone as assignee. The special liquidators are also joined. Clause 3, none of which is redacted, provides:

> "3. Transfer
>
> 3.1 Subject to the terms of Clause 3.2-3.4 and Clause (4) (Trust) below the Assignor unconditionally, irrevocably and absolutely transfers, conveys and assigns to the Assignee all such rights, title, interest, benefits, liabilities, duties and obligations as the Assignor may have in and to the Assets (subject to and with the benefit in each case of the related

Finance Agreement) with effect from the date of this Deed.

3.2 The Assignee agrees that it shall accept the transfer and assignment referred to in Claus 3.1.

3.3 The Parties agree that Assets that are Property Collateral governed by the laws of Ireland (excluding the Scheduled Assets) will transfer pursuant to the Irish Transfer Deeds.

3.4 The Parties agree that all Assets shall transfer under this Deed except to the extent they will transfer pursuant to the Irish Transfer Deeds, the Non-Irish Transfer Deeds, and Hedging Transactions Novation Deed, any Hedging Transactions Transfer Deed or any Receiver Novation Deed and excluding the Specified Hedging Agreements."

Clause 4 is redacted in its entirety.

11. 'Assets' are defined in clause 1.1 as meaning:

> "All the rights, title, interest and benefits in and to (and only such rights, title, interest and benefits as the Assignor may have:
>
> (a) all Facilities . . ."

'Facilities' is also defined as meaning:

> "All principal amounts, accrued interest, including capitalised interest and any other amounts outstanding and/or owing under our connection with all loans, facilities, credit accommodation advances, commitments, leasing, hire purchase, mortgages or other contracts or agreements as applicable and all other amounts payable by a Borrower . . ."

The defendant in these proceedings, Mr. Morrissey, is identified in an unredacted portion of Schedule 3 as being a Borrower and five account numbers are listed. It is not in dispute that those account numbers relate to the facilities which are the subject matter of these proceedings.

Submissions

12. The applicants submit that the Court should follow the approach of Kelly J. in *Irish Bank Resolution Corporation v. Comer*, (Unreported, *ex –tempore*, High Court, Kelly J., 30th July, 2014), as to the level of proof and evidence required to be put before the Court on this application. In that judgment, which concerns a similar application to substitute an assignee of IBRC, albeit pursuant to a different deed of transfer, Kelly J., having referred to the application brought under O. 15, and expressing the view that O. 15, r. 14 was the relevant rule, went on to state at para. 36:

> "I do not think that the rule contemplates an elaborate argument of the type which I have had to deal with this afternoon. I think what it requires is that there should be put before the court sufficient evidence to justify the making of the order leaving over to the trial of the action, the question of whether that evidence put before the court in a *prima facie* fashion is sufficient to bring home the plaintiff's claim at trial."

13. The applicants submit that they have put before the Court sufficient evidence, in at least a prima facie fashion, that the assignment provided for in the deed of transfer is lawful and effective to assign to Stone all IBRC's rights to the defendant's facilities, and that Stone is now the person entitled to the benefit of the facilities or the debt allegedly due by the defendant which is the subject matter of these proceedings. They also rely upon s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, and the decision in *O'Rourke v. Considine* [2011] IEHC 191, (Unreported, High Court, Finlay Geoghegan J., 10th May, 2011), and the four conditions identified therein for a valid assignment pursuant to section 28(6).

14. The applicants, in addition, rely upon s. 12 of the Act of 2013, if necessary.

15. They submit that as the entitlement of the plaintiff to judgment against the defendant in these proceedings has not yet been determined, that Stone, as the person to whom the relevant debts have been assigned, is now a necessary party to be joined in the proceedings in substitution for IBRC who retains no beneficial interest in the debt.

16. Counsel for the defendant submitted that the Court should not follow the decision in Comer and also sought to distinguish on the facts this application from that in *Comer*. The principal objections and grounds upon which *Comer* was sought to be distinguished were the following:

> (i) Order 15, r. 14 of the Rules of the Superior Court (if the applicable rule) should be construed and applied in accordance with O. 15, r.13 and, in particular, the Court should only make an order for substitution if satisfied that this is "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter". He submits it is not necessary to join Stone.
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> (ii) This application is distinguishable from Comer because of the point in time in the proceedings at which it is made.
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> (iii) The Court should not make the order sought as the special liquidators may not assign these proceedings as distinct from the debt, and this was not a point raised in Comer.
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> (iv) The Court should not make the order by reason of the alleged commission of the torts of maintenance and champerty by both applicants following the agreement for sale in March, 2014.

Conclusions

17. I respectfully agree with Kelly J. in the approach he set out in *Comer* as to the threshold to be met by the applicants in a procedural motion such as this. Insofar as the application is dependent upon facts, I agree that there should be put before the Court sufficient *prima facie* evidence to justify the making of the order leaving over to the trial of the action, or in this instance, any remaining issues to be tried, the question as to whether the evidence is sufficient to enable the substituted plaintiff obtain the reliefs sought in the proceedings.

18. As pointed out by Kelly J. at paras. 43 and 44 of the *ex- tempore* judgment in *Comer*, that it would not be "either appropriate, or indeed in the interests of justice that on a procedural motion of this sort, far-reaching decisions concerning the efficacy and validity of the underlying sale agreement or the assignment. . . should be made." Further, he expressed a view, with which I agree, that if one were to do this, it would turn the procedural application into a sort of mini-trial which is not envisaged by the Rules of Court, and in particular, the rules of the Commercial Division of the Court.

19. Accordingly, I propose applying the same standard of proof to the evidential burden which the applicants have to discharge in order to succeed on this application.

20. I am satisfied, on the evidence adduced by the affidavits of Mr. Willis and the exhibits thereto, that the applicants have put before the Court *prima facie* evidence that IBRC, the existing plaintiff, has, by deed of transfer of the 11th July, 2014, assigned to Stone all its rights, title, interest and benefits in the facilities to the defendant which are the subject matter of these proceedings. Further, that there is *prima facie* evidence that it is a legal assignment complying with the four conditions required by s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877. The applicants have adduced *prima facie* evidence of the entitlement of IBRC pursuant to the contractual terms *i.e.* clause 18.2 of the applicable General Conditions to assign the debts.

21. In determining, for the purposes of this application, that the applicants have satisfied the Court of the requisite *prima facie* evidential burden, I wish to emphasise that I am not making any determination as to the effectiveness or validity of the purported transfer or assignment of the debts pursuant to the deed of 11th July 2014. Further, I am not making any determination as to the entitlement of the plaintiff to pursue an application for judgment against the defendant in reliance upon the production to the Court and the defendant of a copy of the deed of transfer redacted in the form exhibited to the affidavit of Mr. Willis in this application.

22. By reason of this conclusion it is unnecessary to consider the applicants' reliance on s.12 of the Act of 2013.

23. I now turn to consider each of the objections made on behalf of the defendant to this application, even if the Court were to follow the approach of Kelly J. in *Comer* to the evidential burden and were to be satisfied that the applicants had discharged same in this application.

Order 15, Rules 13 and 14
24. Order 15, r. 13 and r. 14 provide:

> "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.
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> 14. Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court at any time before trial by motion or at the trial of the action in a summary manner."

25. For the purposes of this application, it is not necessary to determine whether in all applications which might be made to the Court pursuant to O. 15, r. 14, the Court would have to be satisfied, as required by r. 13, that the party to be added is a person whose presence before the Court "may be necessary in order to enable the Court effectively and completely adjudicate upon and settle all questions involved in the cause or matter". Even if this requirement is properly considered to govern an application under r. 14, I am so satisfied on the facts of this application. The basis of this application is that Stone is now the person entitled to the debt in respect of which judgment is sought in these proceedings. Further, that IBRC no longer has any interest in the debt. The defendant, as he is entitled to do so, continues to maintain that the plaintiff is not entitled to judgment against him. Stone, as the only person who is now maintaining an entitlement to be paid the debt the subject matter of these proceedings by the defendant, is clearly a person whose presence before the Court is necessary to determine the plaintiff's claim to be entitled to judgment against the defendant for the amount determined in the judgment of the 29th October, 2014, as being the amounts owing on the facilities granted by Anglo to the defendant.

Different Stage of Proceedings
26. It is correct, as observed by Counsel for the defendant, that the *Comer* proceedings were at an earlier point in time than the present proceedings when the application for substitution was made. However, it does not appear to me to require any difference of approach in this application. As pointed out by Kelly J. in *Comer*, the effect of an order of substitution is to take out of the picture completely the existing plaintiff *i.e.* IBRC. In applying for the order for substitution, it is foregoing its right of action against the defendant and the right to continue the proceedings. If the order for substitution is made, Stone is the only person entitled to continue the proceedings.

27. On the 11th August, 2014, when the applicants issued this application, the Court had not yet determined the issues outstanding following the hearings in June, 2014. Those issues fell into two parts as set out at para. 36 of the judgment delivered on the 29th October, 2014. The first were issues relating to quantum which have now been determined, and secondly, a number of issues pertaining to the entitlement of the plaintiff to obtain judgment against the defendant for the amount determined as due on the facilities advanced to the defendant. Following the judgment on the 29th October, there still remains outstanding the determination of the plaintiff's entitlement to judgment against the defendant in the sum of €31,542,125.93 (plus interest since the 3rd June, 2014, and less further receivership receipts). As the issue of the plaintiff's entitlement to judgment, albeit in an amount determined, remains outstanding, and as the applicants are in agreement that as between themselves, Stone, and not IBRC, is now the person entitled to the debt in respect of which judgment is sought, it is a necessary party to the proceedings, and hence, it is appropriate that the application be brought, as expressly provided for in the Rules of Court.

28. Accordingly, whilst the point of time in the proceeding at which the application for substitution was made is different in each, as the entitlement of the plaintiff to judgment against the defendant had not yet been determined in either, the principles according to which and the effect of the making of an order for substitution on the procedural motion is the same and does not require any different approach by this Court from that taken by Kelly J. in *Comer*.

Special Liquidators' Power to Assign Conduct of Proceedings

29. Counsel for the defendant submits that the right to prosecute and continue these proceedings against the defendant, is a statutory power and/or right of the special liquidators and is not a right title interest or benefit of IBRC, and so was not and cannot be transferred to Stone pursuant to the deed of transfer.

30. Counsel for the defendant relies upon a judgment in the English High Court of Ramsay J. in *Ruttle Plant Ltd. v. Secretary of State for Environment, Food and Rural Affairs (No. 3)* [2008] EWHC 238 (TCC), [2009] 1 All E.R. 448 and in particular para. 43 which he contends supports this proposition.

31. The facts of *Ruttle* are complex. However, essential facts relevant to a proper understanding of the passages relied upon by the defendant is that the liquidator of F had assigned the fruits of proceedings and also assigned the rights which he had to commence and conduct those proceedings. They were proceedings to be brought by F. However, importantly, the liquidator of F did not assign the underlying property or asset of F giving rise to the proceedings, and did not assign F's cause of action.

32. Having considered the relevant English authorities, Ramsay J took the view that there was no objection in English law to the liquidator assigning the fruits of proceedings. However, he considered the assignment of the liquidator's rights to prosecute and carry out the action or proceedings to be objectionable, and at para. 43, stated:

> "[43] In my judgment the reason why the assignment is objectionable is because the liquidator is assigning the rights he has under the 1986 Act and is thereby assigning a discretionary power which, being part of the statutory powers of a liquidator, is personal to the liquidator, just as is his appointment: see *Re Sankey Furniture Ltd. ex p Harding* [1995] 2 BCLC 594 at 600. The intention in this case, as demonstrated by the deed, is that the liquidator's right to prosecute and carry on the action is passed to a third party so as to deprive the liquidator of any control or 'interference' in those proceedings. In such circumstances I respectfully adopt what Lightman J said in *Grovewood Holdings plc v James Capel & Co Ltd* [1994] 4 All ER 417 at 425 [1995] Ch 80 at 89: 'I cannot see how a liquidator can properly or at all surrender his fiduciary power to control proceedings commenced in the name of the company'."

33. He then continued in the next two paragraphs to clearly distinguish between what he considered to be objectionable on the facts in *Ruttle* from a factual situation in which a liquidator exercises a power of sale of the property of the company and an intrinsic part of that sale is the right to commence or continue proceedings:

> "[44] There is an apparent inconsistency between the position where the bare cause of action is assigned and the position where the fruits of the action are assigned, with the control and the funding of the proceedings being carried out by the assignee. As raised at first instance in *Re Oasis Merchandising Services Ltd (in liq)* [1995] 2 BCLC 493 if a liquidator is entitled to sell a bare cause of action then he can by that route divest himself of all control. It is therefore argued that, if he could do so in the case of the assignment of a bare cause of action, why could he not do so on an assignment of the fruits of the action? I consider that there is a difference. When a bare cause of action is assigned as part of a sale of the property of a company, the liquidator is thereby exercising the power of sale granted to him and an intrinsic part of that sale is the right to commence or continue those proceedings. In the same way, a sale of property would include, as an intrinsic part of the sale, any cause of action together with a similar right to commence or continue proceedings.
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> [45] In this case, the assignment of the fruits of the action does not include either the bare cause of action or the right to commence or continue proceedings. Any rights in relation to proceedings are given separately by reference to the liquidator's powers."

34. Applying the above principles to the facts herein, Counsel for the defendant submits that what the special liquidators are purporting to do is to assign the statutory power given to them pursuant to s. 10(1) of the Act of 2013, and s. 231(1)(a) of the Companies Act 1963, as modified by the Act of 2013 in relation to the special liquidators which is not permissible.

35. Counsel for the applicants submits that in Ireland, as in England, in accordance with the case law and statutory regime, there is a distinction to be made between, on the one hand, property of the company and related causes of action which have arisen prior to the commencement of the liquidation, all of which may be sold or assigned by a liquidator pursuant to his power of sale, and on the other hand, powers vested in the liquidator by statute to commence proceedings which only arise upon the winding up and appointment of the liquidator. Counsel submits that the distinction is well established and that it is consistent with the judgment in *Ruttle*, and on the facts herein, the special liquidators are exercising a power of sale of assets of the company *i.e.* the debt due on the facilities advanced to the defendant. As put by Ramsay J. in *Ruttle*, an intrinsic part of the sale is a cause of action or right to commence or continue proceedings to recover the property or asset being sold.

36. Counsel for the applicants also drew attention to the judgment of Peter Gibson L.J. in the Court of Appeal in *Re Oasis Merchandising Ltd. (C.A.)* [1998] Ch. 170. Those proceedings concerned an assignment of the fruits of an action commenced by a liquidator against five directors under s. 214 of the Insolvency Act 1986, for wrongful trading. The company had no assets and the creditors were unwilling to fund the proceedings. The equitable assignment was made in return for the assignee agreeing to fund the action. The liquidator was to conduct the proceedings and any settlement negotiations were to be in accordance with the requirements and directions of the assignee, a litigation support company. The directors sought to stay the action on grounds that it was champertous and an abuse of process. An issue arose in the proceedings as to whether the fruits of wrongful trading proceedings were "the company's property" or not. At p. 181, Peter Gibson L.J., having considered a number of the statutory provisions and prior cases, stated:

> "Considerations such as these lead us to consider whether a distinction should not be drawn between assets which are the property of the company at the time of the commencement of the liquidation (and the property representing the same), including rights of action which arose and might have been pursued by the company itself prior to the liquidation, and assets which only arise after the liquidation of the company and are recoverable only by the liquidator pursuant to statutory powers conferred on him. The scheme of the Act of 1986 suggests that only the former falls within 'the property of the company' which an administrator or administrative receiver or liquidator can sell. Thus a right of action against directors for misfeasance which the liquidator (amongst others) can enforce under section 212 of the Act of 1986 and the fruits of such an action are property of the company capable of being charged by a debenture, because the right of action arose and was available to the company prior to the winding up. But with this can be contrasted the right of action by a liquidator, and the fruits of such an action, for fraudulent preference or fraudulent or wrongful trading, which are not the property of the company and are not caught by a debenture: see *Gough*, *Company Charges*, 2nd ed. (1996) p. 122."

37. Counsel for the applicants submits that a similar distinction exists under the relevant Irish statutory provisions between assets of the company which existed at the commencement of the winding up, including rights of action and proceedings already commenced, and those rights which only arise after or upon the commencement of the winding up and are recoverable by the liquidator pursuant to statutory powers given him. They submit that on the facts herein, the liquidator is purporting to exercise a power of sale of assets of the company and related causes of action and proceedings, all of which existed at the date of the winding up of IBRC.

38. In my judgment the submission made on behalf of the applicants on this issue is correct. Firstly, in a winding up by the Court, an official liquidator is given an express power of sale of all property, real and personal including "things in action" of the company (s. 231(2)(a) of the Act of 1963) which is not subject to prior sanction by the court, though of course pursuant to s. 231(3) it is subject to the control of the court and an application may be made by a creditor or contributory of the company in relation to the exercise of the power.

39. It is not in dispute between the parties that an intrinsic part of the sale of any property is the assignment of any cause of action relating to such property together with "a similar right to commence or continue proceedings" as stated by Ramsey J. at para. 45 of *Ruttle*.

40. The Companies Acts also distinguish between the powers of a liquidator to commence or continue proceedings in the name of and on behalf of the company and certain types of proceedings which the liquidator brings as the plaintiff or applicant. The former are governed by s. 231(1)(a) of the Act of 1963 and the sanction of the court or, if it exists a committee of inspection is required to commence such proceedings in the name and on behalf the company. This section has been determined also to apply to a decision by an official liquidator to continue existing proceedings in the name of the company: (see *Re Greendale Developments Limited (In Liquidation)* [1997] 3 I.R. 540). Section 231(1)(a) relates to those type of proceedings where the cause of action is the cause of action of the company and is applicable to such causes of action which existed at the date of commencement of the winding up.

41. The other type of applications or proceedings which may be brought by a liquidator are those in which the cause of action vests in the official liquidator by reason of the order for winding up and his appointment as official liquidator. One such well known example is the right of a liquidator to bring proceedings pursuant to s. 297A of the Act of 1963, for fraudulent or reckless trading of the company. Such an application may only be brought in the course of a winding up (or examinership proceedings under the Companies (Amendment) Act 1990), and by a liquidator (or receiver, examiner or any creditor or contributory of the company). It is not a cause of action of the company and only arises post commencement of the winding up.

42. While s. 231(1)(a) of the Act of 1963 requires an official liquidator to obtain sanction of the court, there is nothing in the section nor in the scheme of the Act of which it forms part which suggests that it should be construed as in any way limiting the express power of sale given to an official liquidator by s. 231(2)(a) to sell all property of the company including things in action which in turn includes causes of action. This applies regardless of whether proceedings have or have not yet been commenced pursuant to the cause of action related to the property being sold.

43. Pursuant to s. 10 of the Act of 2013, s. 231 of the Act of 1963 applies to the liquidation of IBRC subject only to the deletion of subss. (3) and (4) and as if in s. 231(1) the words "with the sanction of the court or of the committee of inspection" were deleted. Whilst these changes remove the role of the court in relation to the special liquidators of IBRC it does not alter the fundamental reasoning as above as to the distinction between the two types of causes of action identified namely the causes of action of the company which existed at the date of the commencement of the winding up and those causes of action vested in the special liquidators which only arise on or after the commencement of the winding up.

44. On the facts of this application the *prima facie* evidence put before the court is of an assignment by IBRC (in special liquidation) of certain of its property which it held at the date of commencement of the winding up *i.e.* the debts due on the facilities previously granted to the defendant. Accordingly it follows that the special liquidators did have power and are not precluded from selling such property and as part of such sale, assigning all rights to such property including causes of action and where proceedings in respect of the cause of action have already been commenced, assigning the proceedings.

45. In determining as a matter of law, that the special liquidators had the capacity and are not precluded from selling such property and assigning the causes of action and proceedings, I am not determining in any way the dispute as to the validity or effectiveness of the purported sale or assignment to Stone. That is as already indicated, a matter for another day. However, I am determining that as a matter of law the special liquidators had the capacity to enter into the purported transaction.

Maintenance and Champerty

46. It is common case that the torts of maintenance and champerty still subsist in Irish law. (See *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited* 2011 IEHC 357, [2013] 3 I.R. 654 at 659 and; *Waldron v. Herring* 2013 IEHC 294, [2014] 1 I.L.R.M. 62 and Greenclean Waste Management Limited v. Leahy and Others[2014] IEHC 314, (Unreported, High Court, Hogan J. 5th June, 2014)

47. In *Thema*, Clarke J. adopts the definition of maintenance in Halsbury's *Laws of England* (1st Ed. Butterworth & Co., 1907) Vol. 1 at p.51, para. 81, as "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by law as justifying his interference". He defines champerty in the same judgment as "a particular form of maintenance whereby the person concerned obtains a share in the subject matter or proceeds of litigation in return for assisting with funding the litigation concerned". As appears essential to both is that the person alleged to be improperly providing support to the litigation is a person who has "neither an interest in the action or any motive recognised by law as justifying its interference" or as is sometimes put a person who has "no direct or legitimate interest" in the proceedings.

48. Counsel for the defendant submits that by reason of the loan sale deed of the 31st March, 2014, and in particular certain of the terms which have not been redacted and are disclosed, including clause 11.1.8 that there is evidence before the court that IBRC and Stone are potentially guilty of maintenance or champerty by reason of control and/or support which Stone as purchaser is giving under the terms of the loan sale deed. Counsel also submits that the court is not aware of the full terms of the loan sale deed which when known may provide further evidence.

49. Notwithstanding that the court is not aware of the full terms of the loan sale deed, it does not appear to me that the defendant has made out a *prima facie* case that subsequent to entering into the loan sale deed, IBRC and/or Stone could be considered as committing torts of maintenance or champerty in relation to the continuation of these proceedings even if Stone was given certain rights in relation to the litigation pending the completion of the sale. The reason for this conclusion is that it does not appear to me that even on a *prima facie* basis, Stone may be considered to be a person who had no interest in these proceedings. By the loan sale deed of the 31st March, 2014, Stone purported to agree to purchase from IBRC the debts due on the facilities granted to the

defendant which are the subject matter of these proceedings. As purported purchaser of the facilities Stone *prima facie* has a legitimate interest in the cause of action being pursued against the defendant in these proceedings.

50. Accordingly, this ground of objection to the court making the order for substitution cannot be sustained.

Relief
51. The Court will make an order pursuant to O. 15, r. 14 of the Rules of the Superior Courts, substituting LSREF III Stone Investments Ltd. for Irish Bank Resolution Corporation Ltd. (in special liquidation) as plaintiff in the proceedings and an order amending the title of the proceedings accordingly.

52. I will hear counsel as to the directions to be given for the amendment of pleadings pursuant to O. 15, r. 15, following the substitution of Stone for IBRC as plaintiff. Stone will now have to plead its entitlement to judgment against the defendant in these proceedings. The defendant will have to plead in response thereto and in accordance with the decision of the court in the judgment (No. 3) delivered on the 29th October, 2014, is entitled to plead by way of defence thereto any issue arising from the purported agreement to sell the defendant's facilities to Stone in March, 2013, and the purported completion of the sale in 2014 and raise any defence in relation to those matters which it would have been entitled to raise against IBRC or is entitled to raise against Stone.

53. I also propose giving directions in relation to any potential applications for discovery following the exchange of amended pleadings in relation to discovery or the production of documents as it appears probable that there will be issues to be determined in relation to the current production of the loan sale deed and deed of transfer in redacted form.