

THE HIGH COURT

COMMERCIAL

[2014 No. 544 S.]

BETWEEN

IRISH BANK RESOLUTION CORPORATION

PLAINTIFF

AND

NOEL COMER AND DEIRDRE COMER

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Kelly delivered on the 30th day of July, 2014

1. I have before me an application which is brought by a company called Launceston Property Finance Limited and the notice of motion which grounds the application seeks, pursuant to O. 15 of the Rules of the Superior Courts, an order substituting that entity as plaintiff in these proceedings.
2. The proceedings began with Irish Bank Resolution Corporation Limited in special liquidation as plaintiff and Noel Comer and Deirdre Comer as defendants.
3. They began by way of summary summons which was transferred to the Commercial List and in due course an application for summary judgment came on before me. The claim is for just short of €10m.
4. At the hearing of the application for summary judgment, I declined to grant that order and instead adjourned the matter for plenary hearing and gave the usual directions.
5. This application is brought on foot of two affidavits which I will turn to in a moment. But before I consider the factual evidence which is placed before the court, it is, I think, important to indicate what this application is not and what it is. First of all, this is not the trial of these proceedings. Second, on this application I am not called upon nor do I purport to in any way make any adjudication upon either the validity or efficacy of either the sale agreement which underpins this application nor indeed of the notice which was given to the defendants and which is put in evidence before me.
6. Those matters, if they are in issue in the proceedings, will have to be dealt with at trial.
7. What is this application? It is an application brought pursuant to the relevant rules of court in which, as a result of circumstances which have occurred subsequent to the institution of the proceedings, it is sought to substitute one plaintiff for another. These are applications which occur on a fairly regular basis.
8. This particular case has given rise to a great deal of submissions both written and oral but before one gets to the legal submissions, one has to look at the facts. In this regard, it is important to point out that the evidence on this application is all one way because, although an opportunity was given to the defendants to file replying affidavits, they opted not to do so.
9. The evidence comes in the form of two affidavits, the first of which is sworn by Mr. Jonathan Hanley. This is what he says:-

"I am a director of Launceston Property Finance Limited and I make this affidavit on behalf of Launceston and with its authority and consent. I make this affidavit from facts within my own knowledge save where otherwise appears and where so otherwise appears, I believe the same to be true. I make this affidavit to ground an application to substitute Launceston as the plaintiff in the within proceedings"

And he refers to the pleadings when produced.

10. He then says under the heading "*The Facilities*":-

"In these proceedings, the plaintiff has sought payment in the sum of €9,912,929.03 on foot of a facility letter dated 25th November, 2008, in which the plaintiff granted the defendants six facilities.

I am advised that on 8th May, 2014, on the application for summary judgment, Mr. Justice Kelly remitted the matter for plenary hearing and gave consequential directions in respect of the pleadings. Those directions were complied with up to 5th June, 2014, when Mr. Justice Kelly agreed to suspend the directions and granted leave to bring an application to substitute Launceston for the plaintiff.

Clause 18.2 of the general conditions of personal loans as exhibited in an earlier affidavit provides that 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."

11. That piece of evidence is uncontroverted. It demonstrates that built into the contractual obligations undertaken by the defendants with the existing plaintiff there was the prospect or possibility or ability for a transfer or an assignment or a disposal of

the benefit of the agreement to be effected.

12. The affidavit evidence goes on under the heading "Assignment of the Facilities":-

"By loan sale deed in relation to a portfolio of facilities dated 28th March, 2014, the plaintiff (the assignor) together with the special liquidators agreed to sell to Launceston certain assets being facilities and related security as set out therein.

The assets which the plaintiff agreed to sell included the facilities and related security. Launceston is seeking the consent of the solicitors for the special liquidators to exhibit a redacted copy of the loan sale deed and it will be exhibited to a supplemental affidavit when and if it becomes available.

Pursuant to the loan sale deed, a deed of transfer was executed as between the plaintiff and Launceston, as assignee, on 23rd May, 2014, (the deed of assignment). Launceston is seeking the consent of the solicitors for the special liquidators to exhibit a redacted copy of the deed of assignment which will be exhibited to a supplemental affidavit when and if it becomes available.

Pursuant to clause 4.1 of the deed of assignment, the assignor unconditionally, irrevocably and absolutely transferred, conveyed and assigned to Launceston, all such rights, title, interest, benefits, liabilities and obligations as the assignor may have in the purchased assets subject to the benefit in each case of the related finance agreement, with effect from the completion date.

I say and am advised that the assignment of the facilities and related security connected to the within proceedings from the plaintiff to Launceston completed on 23rd May, 2014. I further say I am advised that by letter dated 6th June, 2014, from the plaintiff, the defendants have been notified of:-

(i) the agreement which was signed with facilities and all related security and ancillary rights; and

(ii) the date upon which the assignment occurred."

He exhibits what he described as the relevant letter as an exhibit to this affidavit. I will turn to that in due course.

"On 12th June, 2014, a copy of the letter of 6th June, 2014, was handed to Mr. Comer on behalf of both defendants by Mason Hayes and Curran Solicitors. I say and am advised that the facilities have been absolutely assigned by writing under hand of the assignor in circumstances in which express notice in writing has been given to the defendants as debtors. In circumstances where the deed of assignment has become effective as and from 23rd May, 2014 and where notice thereof has been given to the debtors in writing, the said assignment has become and is deemed to be effectual in law."

13. The exhibit to that affidavit is the letter dated 6th June of this year addressed to the defendants at their premises in Herbert Park, Ballsbridge. It is headed "Important information on your facilities" and points out that it concerns the commercial facilities with IBRC in special liquidation and carries the numbers which are set out at the top of the letter and it goes on to say:-

"Dear Customer

On 28th March, 2014, (the sale date) IBRC agreed to sell amounts owing to it in respect of both facilities and the facility letters guarantee and security and all other rights including any judgments and obligations relating to your facilities with IBRC (henceforth the facility documents) to Launceston Property Finance Limited (the purchaser) in accordance with the facility documents. The transfer of your facilities took effect on 23rd May, 2014. From the sale date amounts and obligations owing in respect of your facilities are owed to the purchaser. As part of the sale and in accordance with the facility documents all relevant details relating to your facilities and the facility documents have been provided to the purchaser. These details will be used by the purchaser for the continued performance and administration of your facilities."

14. The question is then posed:-

"How does this affect you? Notwithstanding the sale you are expected to continue to make payments in accordance with the terms of the facility documents. You will soon be issued with a closing statement. For the avoidance of doubt, the amounts owed under the facility have been transferred to the purchaser and continue to be payable. The facility documents will remain in place until all amounts payable under the facility documents have been irrevocably and unconditionally paid in full but from the sale date your obligations will be owed to the purchaser rather than IBRC."

15. This question is then posed "what action do you need to take?" The answer is:-

"You do not need to do anything at this time. The purchaser will be in touch in due course to provide you with new payment instructions and their contact details."

16. The letter goes on to pose two further questions:-

"You wish to repay your facilities? Have your contact details changed?"

17. The letter was signed by Kieran Wallace on his behalf and on behalf of Mr. Richardson, the joint special liquidators for and on behalf of Irish Bank Resolution Corporation Limited in special liquidation.

18. There is a second affidavit sworn by a director of Launceston Property Finance Limited and she gives the authority which she has to make the affidavit. She says as follows:-

"I make this affidavit supplemental to the grounding affidavit of Jonathan Hanley, sworn on 13th June for the purpose of

putting before the court the loan sale deed and the deed of assignment referred to in the affidavit of Jonathan Hanley."

19. She refers to a copy of the documents with redactions agreed on behalf of the special liquidators of Irish Bank Resolution Corporation in special liquidation and she then exhibits that redacted copy document.

20. She goes on to say:-

"I note that in the first line of the affidavit of Jonathon Hanley, he refers to himself as being a director of Launceston Property Finance Company Limited."

21. She states that is in error and that the word "*Company*" should not have been included therein. Mr. Hanley was not available to swear a corrective affidavit before the hearing of the motion and she refers to a company printout evidencing that both Mr. Hanley and she are directors of Launceston Property Finance Limited.

22. A good deal of the difficulty which has arisen here comes from the copy redacted document which accompanies her affidavit.

23. It is correct to say that nowhere in the affidavit evidence is there any reason or justification given for the redaction of this document. It would have been more helpful if there had been an explanation indicating that the redaction had taken place for whatever reason it did. The reason why there was redaction is probably because there is commercially sensitive material in the exhibit but I will not speculate on that.

24. What the document does demonstrate is that it is a deed that was executed on 28th March. It describes the parties and sets out the recitals. There are a whole series of definitions some of which are redacted. What it does demonstrate is that under para. 2.2 in the un-redacted part, subject to and in accordance with the terms of the deed, the vendor agrees 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 agrees to purchase the assets and assume the assumed obligations.

25. It goes on to say, by way of setting out the actions which are required on the assignment date, that following the assignment date and prior to the completion date, the vendor shall deliver to all relevant borrowers an appropriate notice.

26. Pursuant to the deed of sale, a deed of transfer was executed as between IBRC and Launceston, again on 23rd May. Clause 4.1 of the deed of assignment provides:-

"Subject to the terms of clause 2 of the loan sale deed and clauses 4.2 to 4.5 below, the assignor unconditionally, irrevocably and absolutely transfers conveys and assigns to the assignee all such rights, title, interests, benefits, liabilities, duties and obligations as the assignor may have in the assets subject to the benefit in each case of the related finance agreement with effect from the completion date but excluding the specified assets."

27. What is redacted, however, is clause 4.2 to which clause 4.1 is subject and that is a matter which has given rise to considerable criticism.

28. However, in the course of argument, it was accepted that the document which has been exhibited, read in respect of the material which is not redacted, demonstrates that there has been a sale and that there has been an assignment. Furthermore it was accepted in the course of argument that the notice which had been given by means of the letter of 6th June, 2014, on its face, (assuming of course that there is a valid underlying assignment), appears to comply with what is required by s. 28(6) of the Supreme Court Judicature (Ireland) Act 1877. That section provides:-

"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 been 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."

29. I was referred to various decisions during the course of the submissions and in particular to the decision of Edwards J. in *Waldron v. Herring* [2013] IEHC 294. Edwards J. had to consider that provision in the context of an application such as this and appears in the course of the judgment to make a determination that the assignment was a valid one and that the relevant statutory provisions which I have just cited had been complied with. I am making no such determination here. It seems to me that questions concerning the efficacy or validity of the assignment or the efficacy or validity of the notice are not matters that I am required to adjudicate upon at this juncture.

30. What I am asked to do is to consider a procedural application which, if it is granted, will have the effect of bringing to an end the entitlement of IBRC to further prosecute these proceedings. It will substitute for that entity, Launceston, who will take over the entitlement to prosecute the proceedings, subject to all of the imperfections that may have been present when the action was constituted as between IBRC and the defendants and subject also to proving at trial, that there has been a valid sale of the underlying assets, a valid assignment of the chose in action which is this action, and a valid notice given.

31. What I do have to satisfy myself about is whether there is *prima facie* evidence of that having occurred. In order to come within the relevant rule of court, there has to be evidence adduced which would justify the substitution of the existing plaintiff by Launceston.

32. That seems to me to be the standard of proof that has to be achieved. Much of the argument which took place concerning the deployment of material, the entitlement to redact, the reasons for redaction, the entitlement of the defendant to see the original document in un-redacted form are all matters, which in my view, are for another day.

33. There was also a constitutional argument made that the redactions were in some way an interference with the constitutional entitlement of the defendants. From that point of view, I want to point out that every aspect of this piece of litigation has been held in open court. I have read into the record of this judgment, every word of evidence which has been put before the court in the two affidavits grounding the application and I have referred word for word to the notice which was given and which purports to be a valid

notice. I have also read into the record as far as it is necessary, material from the redacted copy documents which constitute the major exhibit in the second affidavit.

34. I want to turn now for a moment to the rules of court in this regard.

35. The motion which is brought refers in rather broad terms only to O. 15 but without reference to any of its rules. It seems to me that the relevant rule from the point of view of this application is Order 15, rule 14. It provides for the making of an application to add or strike out or substitute a plaintiff or defendant. Such an application can be made to the court at any time before trial by motion or at the trial of the action in a summary manner.

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.

37. There was also reference made to O. 17, r. 4 which deals with changes in parties by death etc. Rule 4 provides:-

"If by reason of death or any other event occurring after the commencement of the cause or matter and causing a change or transmission of interest or liability or by reason of personal interest coming into existence after the commencement of the cause 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."

38. Arguably, that rule could also be applicable in the current case, although it does not mention substitution. It does contemplate the application being made *ex parte*. This demonstrates, it seems to me, the form of proof which is required, namely *prima facie* evidence which will justify the court in making the order sought.

39. Here there has been a decision made to deal with the matter on notice and I think in the circumstances that was the wise thing to do. If the order had been sought and granted *ex parte* it would probably have given rise to an application to discharge that order.

40. I propose to grant the order. It seems to me that the evidence is here to justify it and is in the two affidavits which are uncontroverted.

41. I accept that there is some justification for the criticism which is made concerning the self editing of the documents which were the subject of redaction without any explanation being given as to why that editing took place. But subject to that, I cannot perceive how any other criticism can be made. I am certainly unable to discern any disadvantage which flows to the defendant as a result of the order which I propose to make.

42. Counsel on behalf of the defendants made the case that I should not be concerned about that. He is entitled to stand on his rights and if the onus of proof has not been discharged then he is entitled to succeed in his opposition to this application. Of course, that is taken as read. No application can succeed unless there is put before the court sufficient evidence and material to satisfy the court that the necessary onus of proof has been discharged.

43. In my view, the onus of proof on a procedural motion of this sort is very different to the onus of proof which is required at the trial. I do not believe that it would 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 of a notice of that assignment should be made.

44. That would turn a procedural motion which, even under the rules is contemplated as one which can be made *ex parte*, into a sort of mini-trial of the action. That is not what is envisaged by the rules of court and is certainly not envisaged under the rules of the Commercial Division of the court.

45. In these circumstances, I am of the opinion that there has been made out a sufficient case to warrant the application succeeding and I propose to make the order which is sought.

46. I will, therefore substitute, Launceston Property Finance Limited as plaintiff in these proceedings in lieu of Irish Bank Resolution Corporation Limited in special liquidation.

47. The effect of that is to take out of the picture completely, Irish Bank Resolution Corporation Limited. It is now forgoing its right of action and conferring on Launceston, the entitlement to continue these proceedings. But that is subject to Launceston demonstrating at trial that they have such an entitlement. Launceston will have to demonstrate to the trial judge that it is entitled to bring this action on foot of the documents which are exhibited before me albeit in their redacted form.

48. The defendants at trial will be perfectly free to raise whatever issues they think are appropriate in relation to any alleged imperfections or invalidity as they see them in any of the documents which underscore the bringing of this application and the substitution order which I now make.