Neutral Citation Number: [2013] IEHC 294

THE HIGH COURT

Record Number: 2011/2644P

Between

TONY WALDRON

PLAINTIFF

-AND-

ANDREW HERRING, STEPHEN MULLEN, SLIGO HAULAGE & DISTRIBUTION LIMITED AND TOMMY MULLEN TRADING AS MULLEN EXPRESS TRANSPORT

DEFENDANTS

JUDGMENT of Mr. Justice Edwards delivered on the 28th day of June 2013

Introduction:
This matter comes before me as a motion in the Common Law Motion List where the moving party is at this point in time a non-party to the proceedings, i.e. Permanent tsb plc (hereinafter "the bank"), but who seeks to be joined to the proceedings either as a co-plaintiff in addition to the existing plaintiff, or as sole plaintiff in substitution for the existing plaintiff.

The application is made pursuant to O. 15 r. 2; alternatively pursuant to O. 15, r. 13 of the Rules of the Superior Courts. The motion was brought before the Master of the High Court in the first instance, and the Master refused the application. The matter now comes before me by way of an appeal against the Master's said order.

Background to the application:
The factual background is straightforward enough. In 2008 the present plaintiff was the registered owner of a property known as Bruce Betting at Greally's Corner, Roscommon, comprised in Folio 33182F of the Register of Freeholders for the County of Roscommon. The building is adjacent to a busy public road and the plaintiff was unlucky enough that it was struck by a lorry, and had damage caused thereto, twice within a number of months. There was a first incident on the 10th July, 2008, and a second incident on the 1st December, 2008.

The plaintiff commenced the proceedings herein by a plenary summons issued on the 22nd March, 2011. He has since delivered a statement of claim. The action is a negligence action in which plaintiff claims damages against the defendants jointly and severally for the damage caused to his building. The first, second and third named defendants are sued as being concerned with the first incident on the 10th July, 2008. The first named defendant is sued as the driver, and the second and/or third named defendants are sued as the owners, of the lorry that was in collision with his building on that date. The fourth named defendant is sued as being concerned with the second incident on the 1st December, 2008. He is sued as the owner of the lorry that was in collision with his building on that date. The common denominator in relation to the two accidents, which would normally result in separate proceedings being issued, is that the same building was damaged. It may be inferred from the fact that conjoined proceedings have been issued that some lack of clarity exists or potentially exists as to the degree of damage caused in each incident by the alleged concurrent (or perhaps, more correctly, successive) wrongdoers, and that it is anticipated that the trial judge may be required to attribute damage proportionately as between the defendants on the basis of the evidence adduced before him. If that be the case then the plaintiff was in order to constitute his proceedings in the manner in which he has done so.

The circumstances giving rise to the bank's interest in the proceedings are as follows. The plaintiff had borrowed a substantial sum of money from Irish Life & Permanent plc (now renamed as Permanent tsb plc (*i.e.* the bank)), and in November, 2008 a charge was registered as a burden on the plaintiff's said folio "for present and future advances repayable with interest" in favour of Irish Life & Permanent plc. Subsequent to the accidents described above, and the issue of the proceedings herein, the plaintiff, having run into financial difficulty in common with many other people in this country, was sued by the bank and had a substantial judgment recorded against him. The bank sought, successfully, to enforce its security and obtained an order for possession of the property in folio 33182F from Roscommon Circuit Court on the 22nd March, 2011. That order was duly perfected on the 13th April, 2011, and the bank secured actual possession on the 25th August, 2011. Therefore it is now full legal owner in actual possession of the property.

At the time at which the plaintiff commenced the proceedings herein he had not actually repaired the damage caused in the two accidents with which the proceedings are concerned. Indeed, it is entirely reasonable in the circumstances outlined to infer that he simply could not afford to do so. Accordingly, when the bank acquired ownership of the property it was still in a damaged state. Moreover, it was not just in need of being repaired at some point. On the contrary, it was considered to be in a dangerous state and so urgently in need of repair. As a result of this Roscommon County Council served a Dangerous Buildings Notice on the bank who then duly arranged for the necessary repairs to be carried out.

Understandably, having incurred a substantial repair bill, the bank would now like to recover the costs of doing so.

The purported assignment of the plaintiff's right of action to the bank
In light of the circumstances outlined above, the bank approached the plaintiff and inquired whether he was prepared to consent to an application to the High Court by the bank seeking to be added, alternatively substituted, as a plaintiff in the present proceedings. It seems that the plaintiff was disposed to be co-operative, his only requirements being that his actual outlays (his engineer's fees and his legal costs) would be discharged by the bank. This was acceptable to the bank, and so the plaintiff's solicitors wrote to the bank's solicitors on the 24th August, 2012, confirming the plaintiff's willingness to consent to the proposed motion, subject to an undertaking from the bank's solicitors in regard to payment of the said outlays.

The letter of the 24th August, 2012, was used to ground the motion before the Master but, unsurprisingly and, I believe, correctly, the Master took the view that it did not give the bank sufficient standing to allow it to be joined as a plaintiff, and that what was required was a valid assignment of the plaintiff's cause of action in favour of the bank.

However, things have moved on since the Master dismissed the application on the 16th October, 2012. The bank has now reverted to the plaintiff and has persuaded the plaintiff to effect a purported assignment of his right of action against the defendants to it. Once again, it appears that the plaintiff was willing to co-operate and he executed a document, on which reliance is placed before this Court, on the 27th November, 2012. The said document was then in turn executed by the bank's agent on the 7th December, 2012. The document is in the following terms:-

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ASSIGNMENT BY TONY WALDRON OF THE HEREIN CHOSE IN ACTION TO THE PERMANENT TSB PLC

I, Tony Waldron hereby declare that I no longer wish to act as Plaintiff in the above entitled proceedings and so do hereby assign my right to take this action as Plaintiff in the above entitled proceedings to Permanent tsb Plc as of the 4th day of October 2012.

This assignment entitles Permanent tsb Plc to prosecute this action as Plaintiff and to recover all damages due from the Defendants for the damage caused by the Defendants to the property, the subject matter of these proceedings and to recover all costs of the proceedings including my costs.

Without prejudice to this assignment Permanent tsb Plc agrees to discharge the costs incurred by me in respect of these proceedings as per the letter from John C. O'Donnell & Sons solicitors for Permanent tsb Plc dated the 4th October 2012 to O'Dea & Company Solicitors who act on my behalf.

Signed:	(signature appended) Tony Waldron	Date: 27 / 11/ 2012
Signed:	(signature appended) John C O'Donnell & Sons Solicitors For and on behalf of Permanent tsb Plc	Date: 7 / 12/ 2012

To:

Axa Legal Services

Solicitors for the First, Second and Third named Defendant

PO Box 111

Wolfe Tone House

Wolfe Tone Street

Dublin 1

To:

Ennis & Associates

Solicitors for the Fourth Defendant

3rd Floor Merchants House

27-30 Merchants Quay

Dublin 8"

The defendants' objections

Both sets of defendants object to the proposed joinder of the bank as a plaintiff in the proceedings, whether in addition to, or in substitution for, the existing plaintiff.

The defendants contend that neither O. 15, r. 2, nor O. 15, r. 13 contemplates, or allows for, the joinder of a plaintiff in the circumstances in which the bank seeks to be so joined in the present case. It is suggested that if the bank has, as it suggests, taken

a valid assignment of the plaintiff's right of action that assignment only entitles it to institute separate proceedings of its own and that it does not entitle it to "insinuate itself into proceedings which have already been issued and which are before the Court".

Moreover, it is further contended that in any event the purported assignment is invalid for want of consideration (*inter alia*); the solicitor for the first, second and third named defendants going so far as to suggest that it represents an attempt "to allow the plaintiff to pursue what is in effect in the nature of a subrogated claim" against the defendants, and describing it as a "champertous arrangement".

The validity of the purported assignment
The entitlement to pursue a cause of action constitutes a "*chose in action*". The term *chose in action* is used to describe an intangible property right or the right to possession of something that can only be obtained or enforced through legal action. Choses in action were either legal or equitable, in so far as the law of Ireland is concerned, up until the enactment of the Supreme Court of Judicature (Ireland) Act 1877 (hereinafter the Judicature Act). Where the chose could be recovered only by an action at law, as a debt (whether arising from contract or tort), it was termed a legal chose in action; where the chose was recoverable only by a suit in equity, as a legacy or money held upon a trust, it was termed an equitable chose in action. Before the Judicature Act, a legal chose in action was (subject to just a few exceptions) not assignable, i.e., the assignee could not sue at law in his own name. As a result, an action on an assigned chose in action required to be brought at law in the name of the assignor, though the sum recovered belonged in equity to the assignee. In equity all choses in action were regarded as being assignable, except those altogether incapable of being assigned, and so in equity the assignee might have sued in his own name, making the assignor a party as co-plaintiff or as defendant. The Judicature Act rendered the distinction between legal and equitable choses largely academic.

Common law courts and equity courts were fused together by the Judicature Act, and thereafter equitable rules (*i.e*. those developed in the equity courts) were said to prevail over common law rules. Even today, courts distinguish between common law and equitable rules. An assignment which fails to comply with statutory requirements is not necessarily invalid, for it may take effect as a perfectly good equitable assignment.

Section 28(6) of the Judicature Act provides that an absolute assignment by the assignor of any debt or other legal chose in action can pass the legal right to the debt or chose in action to the assignee. Four main conditions require to be satisfied for the purposes of s. 28(6), as confirmed recently by the High Court in *O'Rourke v. Considine* [2011] IEHC 191 (Unreported, High Court, Finlay Geogheghan J., 10th May, 2011):-

> First, the assignment must be for a debt or other legal chose in action.
>
> Second, there must be "absolute assignment" meaning that the assignor must not retain an interest in the subject matter of the assignment. Thus, assignment of part of a debt, assignment by way of charge, and conditional assignments are not covered by section 28(6) of the 1877 Act.
>
> Third, the assignment must be in writing by the assignor.
>
> Fourth, the debtor must be given express notice in writing of the assignment. A statutory assignment does not need valuable consideration (*i.e*. any form of payment) to be valid. The assignee can then sue the debtor in their own name, without joining the assignor as a party to the action.

The Judicature Act did not abolish the "judge-made" or equitable rules on assignment which, as stated above, can still be relied upon if the conditions for a statutory assignment are not met. Barron J. in *Law Society of Ireland v. O'Malley* [1999] 1 I.R. 162, at p. 169, stated that:-

> "an equitable assignment does not require any particular formula. Since its validity depends upon equitable principles, it is necessary to look to the intention of the assignor and whether what he did was in good faith."

However, other legislative requirements may still have to be met. For example, s. 6 of the Statute of Frauds (Ireland) 1695 provides that an assignment of a trust must be in writing.

In equity, an assignment of an existing debt does not need valuable consideration to be valid (*Law Society of Ireland v. O'Malley* [1999] 1 I.R. 162). Consideration may be necessary to support an assignment of a future debt, or where the assignor merely promises to make the assignment in the future.

Further, there is no need in equity to give notice of the assignment to the debtor, although it is recommended to prevent the debtor paying the assignor, and to give the assignee priority over other assignees. If the assignee brings an action against the debtor in such circumstances the assignor is joined as a co-claimant if he is willing to cooperate with the assignee, and as a co-defendant if he is not, for example, if he wishes to dispute the validity of the assignment.

An equitable assignor must be a party to a suit, whereas a statutory assignee can sue the debtor without joining the assignor as a party to the action.

The debtor can rely on any defences he would have had against the assignor at the time when he received notice of the assignment, and an assignee cannot recover more than the assignor could have done if there was no assignment.

The Court has carefully considered the purported assignment document and has concluded that it meets all of the requirements for the valid assignment of a chose in action, in this instance the plaintiff's right of action against the defendants, in accordance with s. 28(6) of the Judicature Act. First, it relates to a legal chose in action. Secondly, it is absolute. The plaintiff has retained no right to claim a share in the proceeds of the action, or in costs, nor is the assignment conditional. Moreover, the absolute nature of the assignment will be placed beyond any doubt if, in accordance with the plaintiff's clear preference, the bank is substituted for him as plaintiff in the action. Thirdly, it is in writing, and fourthly, the defendants have been duly notified.

The absence of a valuable consideration is irrelevant.

The suggestion that the plaintiff is in reality seeking to pursue a subrogated claim does not stand up to critical analysis. Subrogation is a legal remedy intended to prevent unjust enrichment. It is not a cause of action. This is clear from the judgment of Millet LJ in *Boscawen v. Bajwa* [1996] 1 W.L.R. 328 who stated, at p. 335:-

> "Subrogation … is a remedy, not a cause of action: see *Goff & Jones, Law of Restitution*, 4th ed. (1993), pp. 589 et seq.; *Orakpo v. Manson Investments Ltd*. [1978] A.C. 95, 104, per Lord Diplock and *In re T. H. Knitwear (Wholesale) Ltd*. [1988] Ch. 275, 284. It is available in a wide variety of different factual situations in which it is required in order to reverse the defendant's unjust enrichment. Equity lawyers speak of a right of subrogation, or equity of subrogation, but this merely reflects the fact that it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on well settled established principles and in defined circumstances which make it unconscionable for the defendant to deny the propriety interest claimed by the plaintiff. A constructive trust arises in the same way. Once the equity is established the court satisfies it by declaring the property in question is subject to a charge by way of subrogation in the one case or a constructive trust in the other."

Moreover, in *Orakpo v. Manson Investments* [1978] A.C. 95 (which was referred to with approval both by Murphy J. in the High Court and by Blayney J. in the Supreme Court in *Highland Finance (Ireland) v. Sacred Heart College of Agriculture* [1998] 2 I.R. 180; [1992] I.R. 472), Lord Salmon stated:-

> "The test as to whether the courts will apply the doctrine of subrogation to the facts of any particular case is entirely empirical. It is, I think impossible, to formulate any narrower principle than that the doctrine will be applied only when the courts are satisfied that reason and justice demands that it should be."

In this Court's view there is no basis whatsoever for believing that the doctrine of subrogation could apply, or be relied upon, in the circumstances of the present case. Far from the plaintiff seeking to unjustly enrich himself, the evidence is that he is co-operating entirely with the bank, *i.e.*, the party that has incurred the expense of repairing the building, and has done so to the extent of assigning his right of action to the bank.

The Court also disagrees entirely with the suggestion that there is anything champertous about the arrangement entered into between the plaintiff and the bank. It is clear following *Thema International Fund PLC v. HSBC Institutional Trust Services (Ireland) Limited and others* [2011] 3 I.R. 654 that maintenance and champerty still subsist in Irish law. "Maintenance" is the intermeddling of a disinterested party to encourage a lawsuit. "Champerty" is the maintenance of a person in a lawsuit on condition that the subject matter of the action is to be shared with the maintainer. It is therefore unlawful for a party without a legitimate interest to fund the litigation of another, or to fund litigation in return for a share of the proceeds. However, there is nothing in the circumstances of the present case to suggest that the bank lacks a legitimate interest. Its interest is patently obvious. Moreover, it is not offering to fund the litigation in return for a share in the proceeds. On the contrary, it wants to be joined as a party itself and take over the litigation, and is quite content to release the plaintiff from any further responsibility for maintaining or carrying on the action. The fact that it has agreed to re-imburse the plaintiff for his outlays to date does not in the Court's view constitute either maintenance or champerty.

The applicability of orders 15(2) and 15(13) RSC
Order 15, r. 2 states:-

> *"Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."*

Order 15, r. 2 is, in this Court's view, intended to apply in situations where an action is commenced in which, by reason of a *bona fide* mistake, the wrong person is named as plaintiff. That this is the position is clear from cases such as *Southern Mineral Oil v. Cooney* (No 2) [1999] 1 I.R. 237 and *BV Kennemerland Groep v. Montgomery* [2000] 1 I.L.R.M. 370. No such situation arises here. There was no mistake. At the time that the plaintiff commenced his proceedings he was fully entitled to do so. The bank had not yet become owner and was not yet in possession, and the plaintiff's right of action had not yet been assigned. The Court is satisfied in the circumstances that it would not be appropriate to substitute the bank for the plaintiff under Order 15, rule 2.

It is necessary in the circumstances to consider whether O. 15, r. 13 could apply in the alternative. It provides:-

> *"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."*

The Court must be concerned at the end of the day with doing justice, and it is inimical to the interests of justice that a tortfeasor or other wrongdoer should escape being made liable, where for technical or legal reasons, a person who ought to be a party to proceedings is not a party to those proceedings. Order 15, r. 13 gives the Court the necessary flexibility to enable it to add the name of any person *"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."* Moreover, this can be done *"at any stage of the proceedings".* The application does not require to be brought by one of the existing parties. An order can be made *"either upon or without the application of either party".* Whatever about the position at the time that the matter was before the Master, it could hardly be suggested that at this stage the bank lacks the necessary standing to ask the Court to add it to the proceedings in substitution for the plaintiff, in circumstances where it has taken a valid legal assignment of the plaintiff's interest and the plaintiff has made it plain that he does not personally wish to continue the proceedings in circumstances where he is no longer the owner of the property or interested therein. Finally, the order can be made *"on such terms as may appear to the Court to be just".*

This Court has considered all of the evidence in this case, in the detailed affidavits and documents exhibited thereto, filed by the parties and opened to it. It has also considered and taken account of two cases to which it was specifically referred by counsel in the course of oral argument, namely *Three Rivers District Council & Ors v. Governor and Company of the Bank of England* [1996] 1 Q.B. 292 and *Fincoriz S.A.S. Di Bruno Tassan Din e C v. Ansbacher and Company Ltd, Arbourfield Ltd and Bruno Tassan Din* (Unreported, High Court, Lynch J., 20th March, 1987). In this Court's view it is entirely appropriate and in order in the circumstances of this case that the bank should be added to the existing proceedings as plaintiff in substitution for the existing plaintiff pursuant to

O. 15, r. 13 of the Rules of the Superior Courts, and the Court will so order. The making of such an order is necessary, in the Court's view, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the present proceedings. Further, the existing plaintiff is hereby discharged from the proceedings. The Court will further direct that the bank file and serve upon the defendants an amended plenary summons and statement of claim within 21 days from the date of perfection of this Court's order, and that the defendants be at liberty to file and serve an amended defence within a further period of 21 days from the date of delivery of the bank's amended plenary summons and statement of claim. Thereafter, normal time limits and pleading and procedural rules in accordance with the Rules of Superior Courts are to apply. The defendant's costs of the motion herein, and the motion before the Master, and all the costs associated with the re-constitution of the action, including the amendment of the defendants' pleadings, must in the circumstances be borne by the new plaintiff, i.e., the bank, such costs to be taxed in default of agreement.