

THE HIGH COURT

[2013 No. 3254 S]

BETWEEN

FRIENDS FIRST FINANCE BY ORDER  
EMBERTON FINANCE LIMITED

PLAINTIFF

AND

AIDAN MOLONEY

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 21st day of October, 2019

**Background**

1. One of the legacies of the economic crash is that various financial institutions, in reducing their exposure to bad loans, have engaged in loan sales to other financial institutions. Given the scale of the problem of bad loans these sales have amounted to thousands of loan agreements. Where proceedings have been taken to recover monies or enforce securities before a loan sale has taken place, this necessitates an application to the court to substitute one plaintiff for another. This has led to numerous applications before this court.
2. It is well established that such applications may be made *ex parte*, pursuant to O. 17, r. 4 of the Rules of the Superior Courts (RSC). This arises from the procedural nature of the application. A number of judgments, both of the Court of Appeal and the High Court, have set out the proofs that are required for such an application and, importantly, the steps that should be taken to safeguard and protect the interests of the defendant(s) involved.
3. The issue that arises in this case is whether such orders, substituting one plaintiff for another in proceedings, can be made by a "*global*" or "*omnibus*" order. In the instant case, an order for substitution is sought not only for the above entitled proceedings but also for some 368 other actions listed in the Schedule to the affidavit of Mr. Andrew McCudden, Solicitor instructed by the acquiring financial institution.

**"Global" or "Omnibus" orders**

4. There are a number of factors to be considered. In the absence of a "*global*" or "*omnibus*" order, a separate application would have to be brought in each of the 369 actions listed in the Schedule. Were the applications to be successful, a separate order would have to be drawn up in each of the cases. I think, based on experience of dealing with these applications over the past two years or so, that the numbers involved will run into the thousands. From an administrative aspect, this would impose an enormous burden on the Registrars of the High Court, who already have to bear a considerable workload.
5. *However, the matter cannot be decided on the basis of administrative convenience. As these applications are made ex parte, the court has to pay particular attention to safeguarding the rights of the defendant(s) involved. If a procedure can be adopted which allows for the making of "global" or "omnibus" orders which would not limit or diminish the rights of the defendant(s) involved, then I can see no objection to such a course.*

6. This matter has been considered by the court on a number of previous occasions. Most recently, Simons J. in *Start Mortgages DAC v. Kavanagh & Anor.* [2019] IEHC 216 stated:
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"37. The legitimacy of employing an omnibus application of this type has been confirmed by the High Court (McDermott J.) in *Irish Bank Resolution Corporation v. Kennedy* [2016] IEHC 395. McDermott J. indicated that this was an appropriate way to proceed in relation to proceedings before the High Court. On the particular facts of the case, however, McDermott J. indicated that it would not be appropriate in the context of Circuit Court proceedings given the division of jurisdiction of that court over different localities. In particular, McDermott J. did not consider that the administrative benefits which arise in the context of the High Court would be available in the context of the Circuit Court."

7. Though the case before Simons J. concerned a change in the status of "*a company of limited liability*" to "*a designated activity company*", I believe the same principles would apply to an application such as the one before this court.
8. I am satisfied that there is no objection in principle in making the orders sought by way of a "*global*" or "*omnibus*" order, provided that the rights and protections afforded to the defendant(s) involved are in no way diminished. I will now set out how, in my opinion, this can be achieved.

**Conditions for the making of "Global" or "Omnibus" orders**

9. A Schedule of other actions may be exhibited in a particular case before the court. The Schedule should set out sufficient information to identify each of the actions involved, including record numbers. Cases where proceedings have been served and cases where proceedings have been issued but not served should be scheduled separately.
10. In each application to the court for a "*global*" or "*omnibus*" order there should be an affidavit, from a Solicitor instructed in the matter, deposing that in respect of each action listed in the Schedule he/she has personally satisfied himself/herself that: -
- (i) There has been a valid transfer of the loan and/or security involved to the party being substituted as plaintiff; and
  - (ii) Valid notice has been given by way of "*goodbye*" and "*hello*" letters to the persons involved.

The documentation evidencing the above should be exhibited in the grounding affidavit. In making an order the court may rely on the aforesaid.

11. It seems to me that the number of actions listed in a Schedule ought to be limited to no more than 100. Listing a greater number of actions in the Schedule increases the chances of errors occurring.

12. When the court is satisfied that a "*global*" or "*omnibus*" order can be made, the following steps should be taken in respect of each of the actions listed in the Schedule: -
- (i) A copy of the Order substituting the plaintiff should be served on each of the defendant(s) concerned; and
  - (ii) The defendant(s) are to be informed by notice in writing of the following: -
    - (a) That a copy of the affidavit and exhibits relevant to the particular action grounding the application are available on request;
    - (b) That an application may be made to court, on notice, to set aside so much of the order as affects the defendant(s) involved; and
    - (c) Informing the defendant(s) of their entitlement to contest the transfer of the loan and/or security involved at the hearing of the action.
13. Where proceedings have been issued but not served, the above steps may be taken when the proceedings are being served.
14. There have been a number of applications for substitution of plaintiffs where judgment has already been obtained. I am of the view that such applications should be made in each case and not be the subject of a "*global*" or "*omnibus*" order. However, as this issue does not arise in the instant proceedings, I will not rule on the matter.

#### **Notice of intention to proceed**

15. An issue has arisen as to whether or not a notice of intention to proceed is required in advance of the making of an application for substitution. Order 122, r. 11 of RSC does state that where there has been no proceedings for one year from the date of the last proceedings, that the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In my view, as an application to substitute one plaintiff for another is procedural in nature and may be made on an ex parte basis, a notice of intention to proceed is not required. In reaching this conclusion, I refer to *Cullen v. Redland Tile Company Limited* [1973] N.I. 75 which held that "*a proceeding*" is an act of some formality which is done in furtherance of the action. The purpose of an application for substitution of a plaintiff is to ensure that the relevant parties are before the court. In my view, it would be appropriate for the notice of intention to proceed to be in the name of the newly substituted plaintiff and can be served along with the documentation referred to at para. 12 above.

#### **Conclusion**

16. By reason of the foregoing, I am satisfied that, subject to the matters set out herein, it is appropriate for the court to make "*global*" or "*omnibus*" orders in applications such as this.