[2018] IEHC 70

THE HIGH COURT

2015 No. 1844 P

Between:

NIGEL MORROW

Plaintiffs

– and –

FIELDS OF LIFE TRUST LIMITED and TREVOR STEVENSON

trading as FIELDS OF LIFE TRUST

Defendants

– and –

HATTY LIMITED

Third Party

JUDGMENT of Mr Justice Max Barrett delivered on 5th February, 2017.

I

Application for Set-Aside of Third Party Notice

1. It is common case between the defendants and the third party that Hatty Limited is and was the wrong party to be joined to the within proceedings, making unanswerable Hatty Limited's application (brought pursuant, *inter alia*, to O.16, r.8(3) of the Rules of the Superior Courts 1986, as amended (RSC)) to have the third party notice set aside. In passing, the court notes that there was suggestion by the defendants that Hatty Limited, rather than bringing the within application in its present form, ought more properly to have entered a defence to the effect that it was the wrong party. However, O.16, r.8(3), RSC, provides that "[T]*hird party proceedings may at any time be set aside by the court",* albeit that notwithstanding the clear and unqualified wording of the rules in this regard the courts have historically required that such applications should be brought as soon as is reasonably possible (see, *e.g.*, *Boland v. Dublin City Council* [2002] 4 I.R. 409). Given that it is common case that Hatty Limited has nothing to do with these proceedings, it seems to the court that, application having now been brought by Hatty Limited by reference, *inter alia*, to O.16, r.8(3), the third party notice ought to be set aside without further ado, so that Hatty Limited is not troubled a moment further by involvement in proceedings to which it ought never to have been party and in circumstances where its being joined to those proceedings was not due to any action or inaction on its part. The technical basis for the third party notice being set aside is that the claim made by the defendants against the third party (Hatty Limited) does not fall within any of the categories set out in O.16, r.1, RSC.

II

Application to Amend Title of Third Party

2. Also before the court is a motion by the defendants seeking an order of the court "amending the *Title of the Third Party from 'Hatty Limited' to 'J Hatty & Company'*". The jurisdictional basis for this motion in the within proceedings is not identified in this motion. However, it seems to the court, that the application which it is sought to make in this regard is made under O.63, r.1(15), RSC, and thus is an application that ought to be made to the Master of the High Court in the first place. Under O.63, r.1(15), RSC, the Master may make "[a]*n order for the correction of clerical errors or errors in the names of parties in any proceeding*". However, for the reasons outlined hereafter, the Master would in this instance face an insurmountable difficulty in giving the order sought. To understand why, it is worth recounting briefly how the wrong party came to be joined to the within proceedings.

3. The dispute at the centre of these proceedings concerns Mr Morrow's claim that back in November 2012 he suffered severe personal injuries while assisting, as a volunteer with Fields of Life Trust Limited, in the construction of a school in Uganda. Mr Morrow issued a personal injuries summons on 6th March, 2015. Thereafter, on 8th December, 2016, the first-named defendant issued a motion seeking liberty to issue and serve a third-party notice on the insurance broker whom it claims arranged its PI insurance. Curiously, although it appears that the solicitors for the first-named defendant knew that the said insurance broker was J Hatty & Co., a UK-based partnership, they sought to join Hatty Limited, a UK-based company. How could this have happened? A solicitor for the defendants avers to this aspect of matters in the following terms:

> *"The background to the Application to join the Third Party is as follows. The Application to join the Third Party was initially drafted identifying J Hatty & Co as the proposed Third Party. On the 16th December 2016, the Plaintiff's Solicitor wrote to this Deponent advising that the correct entity was Hatty Limited, following which this Deponent carried out a search which was handed into court on the 16th January 2017, on the occasion of the Third Party Application being made. The search documentation was handed into Court with an amended copy of the Motion striking out the reference to J Hatty & co and replacing it with the entity Hatty Limited. In these circumstances the Third Party Order was made identifying Hatty Limited as the Third Party to these Proceedings and the Deponent served the Third Party proceedings on Hatty Limited".*

4. So what happened is a simple yet significant mistake: the defendants wanted to join the broker, their solicitor rightly thought for some time that the broker was Person X, yet mistakenly but deliberately proceeded to join Person Y, knowing that Person Y was not Person X but believing, by the time the motion to join issued, that Person Y was the broker.

5. As mentioned above, under O.63, r.1(15), RSC, the Master, in the first instance, may make "[a]*n order for the correction of clerical errors or errors in the names of parties in any proceeding*". In *Sandy Lane Hotel Ltd v. Times Newspapers Ltd* [2011] 3 I.R. 334, the Supreme Court per Hardiman J., at 339, held that despite the use of the conjunctive form "*or*" (which conjunction is defined in the *Oxford Online Dictionary* as meaning "*used to link alternatives*") "*the phrase 'errors in the names of parties'*" which follows the conjunction "*or*", "*must be construed in the same sense as the proceeding phrase, with which it is* eiusdem generis*, 'clerical errors'*". In other words, the phrase "*errors in the names of the parties"* falls to be read as a residual phrase that sits within the genus

"*clerical errors*". The *ejusdem generis* rule is typically applied where the drafts-person has included a general residual clause so as to ensure that items which might inadvertently be omitted from a preceding list are in fact included; and it is somewhat difficult to see that a '*clerical error'* in the name of a party (ignoring the fact that O.63, r.1(15) refers to "*errors*" not '*clerical errors'*), would not be caught by the phrase "*clerical errors*" and would be perceived as requiring residual phraseology to ensure that clerical errors in the names of the parties also fell to be caught by r.1(15). So there is, it might perhaps be contended, a certain logical appeal to treating the phrases "*clerical errors*" and "*errors in the name of the parties*" as separate and adopting the approach taken by Johnson J. in the High Court decision in Sandy Lane, which decision focuses on the intention of the party guilty of the mis-naming and the potential for injustice in the event that an application under r.1(15) were to meet with a favourable response. It is perhaps notable too that what might be styled the more stringent approach adopted by the Supreme Court in Sandy Lane appears to have been informed in part by the sense that, per Hardiman J. at 339, the "*misguided state of mind*" which arose in that case was one "*with which one cannot have much sympathy, given that it was made by or on behalf of 'a consortium of businessmen', in the course of a complicated series of arrangements made for tax planning purposes, in which they obviously had the benefit of the best legal and taxation advice.*" In the within proceedings, by contrast, the mistake was a good faith error made by a solicitor acting for a charity which is being sued in negligence and but wishes to join its broker to the proceedings. Yet neither this difference of scenario nor any of the foregoing affords the court a basis on which to distinguish Sandy Lane and the conclusion of the Supreme Court therein (which conclusion transcends the facts at play in that case) that, to borrow from the judgment of Hardiman J. in *Sandy Lane*, at 339, "*Having regard to the structure of O. 63, r. 1(15)…the phrase 'errors in the names of parties' must be construed in the same sense as the proceeding phrase, with which it is* eiusdem generis , '*clerical errors'. Either category of error must be construed in contradistinction from another sort of error arising from 'lack of knowledge' or 'wrong information'*". The decision of the Supreme Court in *Sandy Lane*, by which this Court, and the Master, are bound, and the nature of the error that arose here, which seems to the court to be more one of "*misguided state of mind*" than a mere '*clerical error'*, has the result that the jurisdiction existing under O.63, r.1(15) could not properly be invoked in the case at hand.

6. Mooted at the hearing of the defendants' application (curiously, by Hatty Limited) was the possibility that the defendants may wish to make application under O.15, RSC, seeking to join individual partners of J Hatty & Co. to the within proceedings in place of the now-departed Hatty Limited. The court is conscious that such an application may present future difficulties for the defendants, not least given the provision in O.15, r.13 that

> *"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, and the proceedings as against such party shall be deemed to have begun only on the making of the order adding such party",*

which last phrase may yet yield a motion in the within proceedings in which the question of delay in serving the third-party proceedings will come sharply into focus.

7. It did not seem to the court, at hearing, that the defendants had decided fully how they wished to proceed in the event that the court was to conclude, as it has concluded, that their application to amend the title of the third party could not succeed. That being so, the court will give the defendants time to consider this judgment and decide what further motion they may wish to bring in light of this judgment.