

THE HIGH COURT

[2014 No. 112 S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

DEREK LEE AND THOMAS LEE AND EVARISTAS IHAURULA

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 6th November, 2015.

1. This is an application for an order pursuant to Order 15 Rule 2 of the Rules of the Superior Courts to add Bank of Ireland (UK) plc. Bow Bells House, 1 Bread Street, London, EC4M 9BE, England as a plaintiff in these proceedings in respect of the claim set out at paragraph 1 of the special endorsement of claim on the summary summons or, in the alternative, adding the same party as a plaintiff pursuant to Order 15 Rule 13.

2. As presently constituted the plaintiff claims money due and owing in respect of a loan facility made available to the defendants and a further amount due on foot of a letter of guarantee and indemnity.

3. The first and more substantial claim seeks the recovery of the sum of €722,092.00 being capital and interest due as of the 8th January, 2014 in connection with a loan made available to the defendants by facility letter dated 21st November, 2007 which allegedly fell due for repayment on demand when the defendants defaulted on their obligations. The sum claimed is the balance due in respect of an eighteen month cash advance of €780,000.00 granted for the following purposes:

(a) €723,000.00 to assist with the purchase of a licensed premises known as Molly's Bar, Dunfanaghy, Co. Donegal and its associated liquor license and

(b) €57,000.00 as interest roll-up for the eighteen month term of the facility.

4. The second part of the claim relates to payment of the sum of €17,554.39 as the balance of monies due by the defendants, to the plaintiff, on foot of a letter of guarantee and indemnity dated 2nd April, 2008 whereby the defendants guaranteed to pay sums of money then due, or thereafter due, to the plaintiff by Molly's Bar Dunfanaghy Ltd. to a limit of €15,000.00 together with interest.

5. The plaintiff granted the two facilities that are the subject matter of the present proceedings. However, it is claimed that as a result of the restructuring of Bank of Ireland Groups' business, completed in 2010, the loan facility number 3000527936 which is the basis of the claim set out in paragraph 1 of the special endorsement of claim, was transferred to the proposed additional plaintiff, Bank of Ireland (UK) plc. The guarantee and indemnity which underpin the second element of the claim was not transferred to that entity and remains vested in the plaintiff.

6. The vesting of the loan facility in the proposed additional plaintiff became operative as of 00.01 a.m. on the 1st November, 2010 pursuant to the terms of an order of the High Court of England (Chancery Division – Companies Court) (Henderson J.) dated 29th October, 2010 pursuant to the provisions of s. 112 of the Financial Services and Markets Act 2000 (United Kingdom). It is therefore claimed that all the rights and entitlements in respect of the said loan facility were transferred to and vested in Bank of Ireland (UK) plc. as of 1st November, 2010.

7. It is also claimed that a demand for repayment of monies due on foot of the loan facility was made on behalf of Bank of Ireland (UK) plc. on the 24th January, 2012 correctly and in accordance with the terms of the vesting facility and the English Court order. The customers affected by the new scheme of arrangement were sent a letter informing them of the transfer from the plaintiff to the proposed additional plaintiff.

8. The plaintiff now claims that the proceedings as presently constituted were initiated without reference to the transfer of the entitlements in respect of the loan facility to Bank of Ireland (UK) plc. It is said that this arose by reason of a bona fide mistake which is now regretted. It is also claimed that the defendants and their legal representatives were fully aware of the Bank of Ireland (UK) plc.'s interest in the loan facility as evidenced by a letter of 8th April, 2014 sent prior to the filing of the plaintiffs notice of motion for judgment which referred to "your client: Bank of Ireland (UK) plc."

9. In the meantime an appearance was entered on 12th February, 2014 on behalf of Derek Lee, and a notice of motion together with affidavit and exhibits seeking judgment in default of defence against Mr. Derek Lee, the first named defendant, issued on the 24th April, 2014 and was duly served. No attempt was made to amend the pleadings at that stage.

10. In a replying affidavit to that motion Mr. Lee outlines the history of his dealings with the plaintiff in relation to the loan facility and the guarantee. He makes various observations about the letter of demand, on foot of which the summary proceedings were initiated. That letter, dated 16th April, 2012, nominates the plaintiff as the entity to which money due under the loan facility is repayable and on behalf of whom the formal demand was made. A letter of demand from Bank of Ireland (UK) plc. to Mr. Lee issued on the 24th January, 2012.

11. By order made 12th December, 2014 the Master of the High Court refused an application to adjourn the motion to allow the plaintiff to issue a motion pursuant to Order 15 Rule 2 seeking to add Bank of Ireland (UK) plc. as a plaintiff in respect of the loan facility debt. The Master dismissed the plaintiff's motion for liberty to enter final judgment. By notice of motion dated 18th December, 2014 the plaintiff sought an order discharging that order pursuant to Order 63 Rule 9. By further notice of motion dated 11th May, 2015 the Plaintiff seeks the addition of Bank of Ireland (UK) plc. as a plaintiff in respect of the main claim set out in the special

endorsement of claim, or an order to the same effect pursuant to Order 15 Rule 13. The parties are satisfied that the Master's order should be set aside.

12. It is clear that the mistake made in this case within Bank of Ireland Groups was not simply a mis-description of the plaintiff but a mis-identification of the entity in which this cause of action was vested. The Governor and Company of the Bank of Ireland had no interest whatsoever in this cause of action once the transfer had taken place to a separate legal entity. It is clear that the consequences and transfer of these interests pursuant to the order of the English High Court must have been well known to the Bank of Ireland Group and to the plaintiff.

13. Order 15 Rule 2 of the Rules of the Superior Courts provides:

"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."

14. Order 15 Rule 13 provides that:

"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. ..."

15. Order 15 Rule 14 provides that:

"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."

16. The plaintiff accepts that these proceedings were instituted without taking into account the transfer of the Plaintiff's interest in the cause of action arising under the loan facility to Bank of Ireland (UK) plc. The customers affected by the scheme were sent a letter informing them of the transfer between 3rd and 6th September, 2010 and consequently, it is submitted that the defendants were on full notice of the interest of the proposed new plaintiff.

17. Order 15 of Rule 2 was considered in *Southern Mineral Oil Ltd. v. Cooney* (No. 2) [1999] 1 I.R. 237. The applicants sought a declaration pursuant to s. 297 of the Companies Act, 1963 that the respondents were knowingly parties to the carrying on of the applicant's business with intent to defraud their creditors and that they should be made personally liable for the debts and liabilities of the applicants. The liquidator of Southern Mineral Oil Ltd. applied to substitute himself as applicant in place of the applicant company. It was submitted on behalf of the liquidator that Order 15, Rule 2 allowed for the joinder of a plaintiff where the Court was satisfied that the action was commenced in the name of the wrong person through a *bona fide* mistake and that it was necessary for the determination of the real issues in dispute to do so. The respondents submitted that the rule had no application because it was intended only to cover situations where a party was mistakenly described or named so that the wrong party ends up suing or being sued and that no evidence had been led in on behalf of the applicant of any *bona fide* mistake which would allow the rule to be invoked.

18. Shanley J. concluded that the liquidator could not be substituted as no evidence had been led regarding the occurrence of a *bona fide* mistake within Order 15, Rule 2. He added:

"The liquidator clearly intended to institute the proceedings in the name of the companies in liquidation and he did so believing this was the correct way to proceed. As Millet J. said in *Re Probe Data Systems* [1989] BCLC 561, the intended applicant and the actual applicant were one and the same person. The liquidator's mistake (if mistake it be) was to sue in the companies' names in the mistaken belief that the companies were possessed of the cause of action as opposed to the liquidator himself. This is not a category of mistake to which O. 15, r. 2, applies ..." (page 247)

19. In applying the principles set out in *Re Probe Data Systems* to the exercise of the jurisdiction vested under Order 15, Rule 2 Shanley J. stated that two requirements must be satisfied namely:

(a) the mistake sought to be corrected must be a genuine mistake, and

(b) the mistake was not misleading or such as to cause any reasonable doubt as to the identify of the intended plaintiff.

20. In *B.V. Kennemerland Group v. Montgomery & Ors* [2000] 1 I.L.R.M. 370 Geoghegan J. permitted the substitution of a plaintiff by a company with which it subsequently merged and to which all assets and liabilities of the plaintiff company had been transferred. The Court concluded that it was perfectly clear on the facts that the defendants knew at all material times that the wrong company had been named as plaintiff and concluded that justice required that the substitution be made. However, the learned judge did not address the distinction drawn by Shanley J. between the nomination of a party as plaintiff in whom, it is wrongly believed, the cause of action was vested, and a simple mistake in which the appropriate plaintiff was not joined, though it was always intended to join that party as the party seized of the cause of action but the party actually nominated was mistakenly described. This distinction was also explained in the judgment of Millet J. in *Re Probe Data Systems* as follows:-

"But in my judgment that, or something extremely similar, is precisely what happened in the present case. The official receiver clearly intended to make the application in his own name and not in the name of the Secretary of State and did so in the genuine but mistaken belief that he himself was the person with a locus standi to make the application. The intended applicant and the actual applicant were one and the same. The official receiver's intention was mistaken but that is a mistake of a kind which cannot be corrected by amendment under (the Rule) ... It is a case where A has sued in the mistaken belief that he was the person with the cause of action and not a case where he recognised that B had the cause of action and intended to make B the applicant but mistakenly described or named him as A."

21. It was made perfectly clear in the conduct of these proceedings, from the making of the initial demand in the name of the

plaintiff, to the issuing of the summary summons, to the issuing of the notice of judgment in default of defence and in its grounding affidavit to that motion, that the intended plaintiff was The Governor and Company of the Bank of Ireland and not Bank of Ireland (UK) plc. The affidavits do not contain a clear statement as to why this was so, or the nature or origin of the mistake made and now relied upon. The Court was informed that a particular person was responsible for the mistake but this is not set out in detail on affidavit.

22. The Court is not satisfied that this is a case contemplated by Order 15, Rule 2 (see also *IBRC v. Lavelle* [2015] IEHC 321 per Baker J.). It is clear from the evidence that it was intended to join the Plaintiff from the outset and that, at all material times, it mistakenly considered itself to be vested with the cause of action in respect of the loan facility.

23. The scope of the jurisdiction under Order 15, Rule 13 was considered by the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519. Murphy J. stated:

"As the first sentence of O. 15, r. 13 indicates, this provision was originally made to alleviate the hardship which was caused by the rigid application of what might now be described as "legal technicalities". Whilst many of those problems were eliminated by the enactment of the Judicature Acts both here and in England, it has been held that the discretion conferred by O. 15, r. 13 should be exercised in those cases where, before the Judicature Acts, a plea of abatement would have succeeded (see *Wilson & Sons & Co. v. Balcarres Brook Steamship Company* [1893] 1 Q.B. 422 C.A.). Furthermore the words "cause or matter" in O. 15, r. 13 mean the action as it stands between the existing parties (*Amon v. Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357 at p. 369). Certainly the court has jurisdiction to refuse to add parties for the purpose of introducing a new cause of action. ..." (page 533).

It is clear in this case that if the order sought is granted, the substitute plaintiff will pursue the same cause of action hitherto pursued by the present plaintiff.

24. The Rule was further considered by Edwards J. in *Waldron v. Herring and others* [2013] 3 I.R. 323. The plaintiff was the legal owner of a property that had a charge registered in favor of the non-party, a bank. The property was damaged in two separate incidents by the defendants and rendered unsafe. The plaintiff commenced proceedings against the defendants for damage caused to the property. Subsequent to the commencement of proceedings the plaintiff was sued by the non-party bank and had a substantial judgment registered against him. The bank successfully enforced security and obtained an order for possession of the property thereby becoming full legal owner in actual possession. The plaintiff assigned his right of action to the bank and the bank agreed to reimburse the plaintiff for his outlays in the proceedings. The bank then brought an application seeking to be joined in the proceedings as a plaintiff in substitution for the existing plaintiff. The defendants opposed the application and submitted that a valid assignment of the plaintiff's right of action only entitled the non-party bank to bring proceedings in its own name and not to insinuate itself into proceedings already issued. Edwards J. discharged the plaintiff from the proceedings and substituted the non-party bank as plaintiff under Order 15, Rule 13. The learned judge stated (paragraph 32):-

"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 taking 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 be proper to the Court to be just."

I consider that it is appropriate to adopt the approach taken by Edwards J., to this case.

25. I am satisfied on the evidence that the cause of action in respect of the substantive claim in this case became vested in the Bank of Ireland (UK) plc. on 1st November, 2010. The cause of action was assigned to it pursuant to a court order in England. The defendants were made aware of the transfer of assets to the proposed new plaintiff: the correspondence confirms this. The cause of action the subject matter of the proceedings remains the same if the new plaintiff is substituted. It is open to the first named defendant to advance any ground of defence upon which he wishes to rely if the substitution is made and I am not satisfied that any unfairness will be caused as a result. I am satisfied that it is necessary to permit the joining of Bank of Ireland (UK) plc. as plaintiff in the proceedings in respect of the substantive element of the claim because it is necessary to enable the Court to effectually and completely adjudicate upon the case and address all the issues in the case. The Governor and Company of the Bank of Ireland will remain as the plaintiff in the proceedings in respect of the claim based on the guarantee. The plaintiff must serve an amended summary summons and the Court will hear counsel as to any further directions that may be required in the matter.