

THE HIGH COURT

2017 No. 42 S.

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

PADDY MCKEOWN AND ADELAIDE MCCARTHY

DEFENDANTS

JUDGMENT of MR JUSTICE DAVID BARNIVILLE delivered the 21st day of April 2020

Introduction

1. On 1 April 2020 I delivered judgment on an application by Everyday Finance Designated Activity Company ("Everyday") for an order that it be substituted as plaintiff/respondent in the proceedings in place of the existing plaintiff/respondent, Allied Irish Banks plc ("AIB")(the "substitution order") or, in the alternative, that it be added as a co-plaintiff/co-respondent (the "joinder order"). The application was originally made to the Court of Appeal, as the defendants had appealed to that Court from the judgment and order of the High Court (Costello J) granting summary judgment against them, and that appeal was pending before the Court of Appeal. Everyday's application was remitted by the Court of Appeal to be determined by the High Court.
2. On 28 November 2019, the Court of Appeal dismissed the defendants' appeal. The Supreme Court subsequently refused to grant the defendants leave to appeal to that Court.

The Judgment

3. In my judgment of 1 April 2020, I noted that while Everyday had originally sought orders in the alternative, it confirmed during the course of the hearing that the order which it was ultimately seeking was an order that it be joined as an additional plaintiff to the proceedings (the joinder order). The defendants opposed the application on several grounds. I dismissed those grounds of objection and concluded that Everyday was entitled to an order pursuant to Order 17 rule 4 RSC joining it as an additional plaintiff to be proceedings.

The COVID-19 Direction

4. My judgment was delivered electronically as required by the direction of the Chief Justice and the Presidents of the Court Jurisdictions dated 24 March 2020 in light of the COVID – 19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risks (the "COVID – 19 direction").
5. Having received the judgment, the defendants drew attention to the fact that there were some paragraph numbering errors in the judgment originally sent to the parties and posted on the courts.i.e website. The errors in the paragraph numbers were corrected and a revised version of the judgment with the correct paragraph numbers was subsequently posted on the website. Apart from correcting the errors in the paragraph numbers, the judgment is otherwise identical to that previously sent to the parties.

6. In accordance with the COVID – 19 direction, the parties were invited to communicate electronically with the court on issues (if any) arising out of the judgment and, in the absence of agreement as to the form of order to be made, the parties were invited to submit concise written submissions electronically. The parties were unable to agree on the question of costs or on the form of order to be made on foot of my judgment and they exchanged concise written submissions on those issues.

Defendants' Initial Written Submission

7. On 14 April 2020, the defendants furnished a written submission which made the following points. First, the defendants referred to the errors in the paragraph numbers in the judgment (such errors have since been corrected).
8. Second, the defendants requested the court to make no order as to costs in respect of Everyday's motion. The defendants advanced that submission for the following reasons:
 - (1) The defendants contended that Everyday had delayed in bringing its application to be substituted or joined and ultimately only brought that application shortly prior to the hearing of the defendants' appeal in the Court of Appeal. This subjected the defendants to a "significant workload" when they were preparing for the appeal in the Court of Appeal;
 - (2) The defendants contended that their opposition was primarily to Everyday's application to be substituted as the plaintiff/respondent in the proceedings in place of AIB and that Everyday dropped that application and merely sought to be added as a co-plaintiff/co-respondent to the proceedings. They submitted that such an application did not require all of the affidavits which the defendants had to prepare in response to the application for the substitution order and that they were, therefore, put to unnecessary work;
 - (3) The defendants submitted that the court had made "*several references in [the] judgment to the flawed motion application*" brought by Everyday. The defendants had relied on those flaws in defending Everyday's application. It would not have been necessary for them to have done so had the motion not contained the errors referred to. On that basis, it was contended by the defendants that it would be fair, just and equitable for no order as to costs be made against them in respect of Everyday's motion.

Everyday's Written Submission

9. Everyday furnished a written submission on 15 April 2020. In summary, in that submission, Everyday made the following points: First, Everyday applied for an order for costs against the defendants in respect of the motion and submitted that costs should "*follow the event*". It noted that the court had rejected all of the objections raised by the defendants and found those objections to have no merit.
10. Second, Everyday requested the court to make further directions in respect of a motion which Everyday intends to bring "*to enable it to enforce the order of the High Court (Ms Justice Costello) made 12 May 2017 (perfected 18 May 2017) (the "intended motion")*", by

amending the said order so that Everyday be substituted for Allied Irish Banks plc as the party entitled to enforce same." Everyday requested the court to make directions in respect of the intended motion including the following:

- (a) an order permitting the motion booklets from the present motion to be lodged as part of the intended motion;
- (b) a direction that the intended motion be issued and listed for further directions before the Judge of the Commercial List, on a date and in a manner to be determined by the court.

11. Everyday contended that the court has jurisdiction to make directions in those terms in respect of the intended motion on a number of grounds. First, Everyday had sought "*such further or other order*" in the motion seeking the substitution order or, alternatively, the joinder order. Second, the judgment is relevant to the intended motion (reference was made to paragraphs 55 and 86 of the judgment). Third, the judgment was delivered by me, as the Judge of the Commercial List, with responsibility for case management of the proceedings. Fourth, Everyday submitted that the intended motion concerns "*issues arising (if any) out of the judgment*" within the meaning of paragraph 2 of the COVID – 19 direction.

Defendants' Further Written Submission

12. The defendants furnished a further written submission in response on 15 April 2020. In summary, the defendants made the following points in that further submission: First, the defendants reiterated the submission that there should be no order as to costs on Everyday's motion. Second, the defendants disputed Everyday's entitlement to bring the intended motion, which the defendants contended would be contrary to Everyday's application for the joinder order and would also be contrary to the terms of my judgment. Third, the defendants contended that the court should not make the further directions sought by Everyday in respect of the intended motion.

Costs

13. I deal first with the question of costs. I have considered the submissions made by Everyday and by the defendants. I have concluded that Everyday should be awarded *some* of its costs of the motion but not *all* of those costs. This is not a case of where it can be said that costs should simply "*follow the event*" as such, and that Everyday should recover its costs on that basis under order 99 rule 1(3) RSC. Everyday originally sought and pursued an application for orders in the alternative, namely, a substitution order and, in the alternative, a joinder order. Everyday maintained that position for the first (half) day of the hearing on 28 November 2019. When the case resumed before me on 14 January 2020 (after the Court of Appeal had dismissed the defendants' appeal and while the defendants' application for leave to appeal was still pending before the Supreme Court), Everyday confirmed that the relief which it was pursuing was the joinder order as opposed to the substitution order (as explained by me at paragraph 14 of the judgment). I decided Everyday's application on that basis and found that it was entitled to the joinder order sought.

14. I do not accept that the defendants are correct in their contention that their main objection was to the substitution order and that they did not really have much (if any) objection to the joinder order ultimately pursued by Everyday. From recollection, I afforded the defendants the opportunity to consider whether they wished to continue to oppose the application, after counsel for Everyday had confirmed to the court on the resumption of the hearing on 14 January 2020 that Everyday was pursuing the joinder order, as opposed to the substitution order. The defendants were afforded that opportunity during the course of the first defendant's replying submissions. I rose to allow the defendants a short period to consider the position. However, having done so, the first defendant sought a seven day adjournment of the application which I refused. The first defendant then continued his replying submissions in full opposition to Everyday's application. The defendants continued to oppose Everyday's application on all of the grounds referred to in the judgment. The approach taken by the defendants, therefore, required me to reserve judgment and ultimately to deliver my judgment. If the defendants had indicated at that stage that they were not opposing Everyday's application to be joined as an additional party to the proceedings, I would have made the order sought by Everyday and would, in all probability, have made no order as to costs. However, they did not do so.
15. Nor do I accept the submission advanced by the defendants that the application for the joinder order was a mere procedural order, whereas the application for the substitution order was something more substantial. As I noted at paragraphs 58 and 59 of the judgment, Peart J in the Court of Appeal in *McDermott* described an application to substitute a party for another party as a "*simple, straightforward, and perhaps formal application*" which, echoing the words of Kelly J in *Comer*, is not intended to give rise to a mini trial. Those observations were made in respect of an application for a substitution order as opposed to an application for a joinder order and apply equally to both such applications. Therefore, I do not accept the submission that the fact that Everyday elected on the second (half) day of the hearing to pursue the joinder order (as opposed to the substitution order) should deprive Everyday of all of its costs of the application. I am satisfied that the defendants were determined to oppose Everyday's application, whether it was for a substitution order or for a joinder order. I do, however, accept that the fact that Everyday elected on the second (half) day of the hearing to pursue the joinder application only is relevant to assessing the extent of the costs which should be ordered in its favour.
16. I do not accept that the fact that the application was made to the Court of Appeal in October 2019, a week or so prior to the hearing of the appeal by that court, is relevant to my decision as to whether Everyday should be deprived of its costs of the application. The fact that Everyday waited until then to bring the application did not mean that the defendants could not have consented to the application for the joinder order at that stage. Instead, the defendants opposed the application on several grounds, but curiously did not do so before me on the grounds of delay.

17. The defendants are correct in stating that I commented on a number of errors in the motion issued by Everyday. For example, at paragraph 77 of the judgment I noted that the notice of motion contained an error, in that it should have been issued by Byrne Wallace as solicitors on behalf of Everyday and should have made clear at the outset that the application was being made on behalf of Everyday as the intended plaintiff/respondent. However, I went on to state that I did not accept that the error was a fatal one or that there was any breach of the provisions of Order 7 RSC, for the reasons set out at paragraphs 78 to 86 of the judgment.
18. I also found that the document furnished by AIB to demonstrate its consent to Everyday's application contained an error in the description of AIB. At paragraph 103 of the judgment, I observed that the description of the AIB entity referred to in the document was careless and that greater care ought to have been exercised in the preparation of the consent document. Nonetheless, I concluded that there was no doubt as to the AIB entity which was actually providing its consent to Everyday's application, namely, the existing plaintiff in the proceedings.
19. Despite these errors, which were identified in the judgment, I ruled against all of the objections raised by the defendants in reliance on those errors. The defendants fairly and correctly accept that they did not succeed in their objections and that they are bound by the rulings made by me on those objections in the course of my judgment.
20. For these reasons, while Everyday decided ultimately to pursue the application for the joinder order and not to pursue the application for the substitution order, and while I decided that the joinder order should be made, and rejected all of the defendants' objections to that order, I believe that it would not be a fair or just exercise of the court's discretion in relation to costs to order the defendants to bear all of the costs of Everyday's motion. I am satisfied that the appropriate order to make in the circumstances is that the defendants should be responsible for half of the costs incurred by Everyday in bringing its motion. The court has express jurisdiction to order that a party pay a portion of another party's costs under s. 168(2) of the Legal Services Regulation Act 2015 I will, therefore, order the defendants to pay half of Everyday's costs of the motion, such costs to be adjudicated upon in default of agreement. I will not grant a stay on the order for costs as I do not believe that there is any basis for such a stay.

The Balance of the Orders and Further Directions Sought.

21. To give effect to the judgment, first of all, I will make an order that Everyday be joined as an additional plaintiff to the proceedings (in addition to AIB) (as stated by me at paragraphs 5 and 136 of the judgment). I make that order pursuant to Order 17 rule 4 RSC.
22. As regards the balance of the directions sought by Everyday in its written submissions, I have reached the following conclusions. The proceedings were previously entered in the Commercial List and were case managed and dealt with in that List and were ultimately heard and determined by Costello J, sitting as a judge in the Commercial List. Insofar as Everyday now seeks directions in relation to a motion which it intends to bring (the

"intended motion"), I am in a position to make directions in relation to that intended motion. By making such directions, however, I am in no way expressing a view as to whether the intended motion is well founded or should succeed. I am merely giving directions to enable Everyday to bring the intended motion. I am satisfied that I have jurisdiction to make those directions in my capacity as the Judge of the Commercial List, in respect of proceedings which were previously entered in and have been dealt with throughout in the Commercial List.

23. As regards the further directions sought by Everyday at paragraphs 6(a) and (b) and paragraph 7(c) of Everyday's written submissions, I will do the following.
24. I will give liberty to Everyday to bring the intended motion. I am not entirely certain as to what Everyday intends by seeking permission for the motion booklets from the present motion to be lodged as part of the intended motion. I do not believe that a specific direction is required in that regard. In any event, the motion papers in respect of the present motion can be referred to in the intended motion as "when produced" in court. There is no need to lodge them again at this stage.
25. Everyday's intended motion should be issued by 5 pm on Friday, 1 May 2020 and made nominally returnable for Monday, 11 May 2020 at 11am. The motion will not be heard that day and the parties need not attend in court. I will allow the defendants a period of three weeks from 11 May 2020 to file any replying affidavit they wish to rely upon in response to Everyday's intended motion (such replying affidavit or affidavits must be filed and furnished to Everyday's solicitors by 5pm on 8 June 2020). Everyday will then have a further period of two weeks from receipt of any such replying affidavit(s) to furnish any further affidavit (i.e. by 5pm on 22 June 2020). Everyday's intended motion will be listed for mention on Friday, 26 June 2020 at 10.45am to fix a date for the hearing of the motion. It is unclear at this point in time whether it will be possible for the parties to attend in court on that date. That will depend on the status of the Government restrictions in place at the time. If necessary, directions for the listing of the case can be given by the court by correspondence. There will also be liberty to apply by correspondence.