



THE COURT OF APPEAL

[2015/000114]

Kelly J.
Finlay Geoghegan J.
Irvine J.

BETWEEN

AIDAN McGUINNESS

PLAINTIFF / APPELLANT

AND

KENMARE PROPERTY COMPANY LIMITED AND SHANE McCARTHY

DEFENDANTS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

RESPONDENT TO APPEAL

JUDGMENT of Mr. Justice Kelly delivered on the 21st day of December 2015

1. This is the plaintiff's (Mr. McGuinness) appeal against an order of the High Court (Noonan J.) of 26th January 2015. On that occasion, the judge dismissed his application to join the respondent to the appeal, Irish Bank Resolution Corporation Ltd. (In Special Liquidation) (IBRC) as a co-defendant in these proceedings.
2. The first defendant in the action, Kenmare Property Company Ltd. (Kenmare), is a company to which IBRC has assigned loans previously advanced to Mr. McGuinness together with associated securities. The second defendant (Mr. McCarthy) is a receiver who was appointed by Kenmare on foot of Mr. McGuinness's alleged failure to repay the loans following service of a demand for repayment.
3. Neither Kenmare nor Mr. McCarthy took any part in the hearing in the High Court or this appeal.

The Proceedings

4. These proceedings commenced with the issue of a plenary summons dated 12th January 2015. It is clear that the summons, as presented for issue in the Central Office of the High Court, had IBRC named as first defendant. The summons was issued with its name struck out. Presumably this was because of the fact that IBRC is in liquidation and by s. 6 of the Irish Bank Resolution Corporation Act 2013 (the Act), which governs that liquidation, no action can be commenced against IBRC, save with leave of the High Court (see s. 6(2)(b)).
5. Having issued the summons without IBRC named as defendant, Mr. McGuinness applied to the High Court to join it as a defendant to the action. His application was opposed by it.

The Endorsement of Claim

6. Mr. McGuinness's summons contains the following general endorsement of claim:

"The plaintiff's claim:-

- (i) Damages for negligence, breach of duty, including statutory duty, breach of contract and negligent misrepresentation by the first named defendant, its servants or agents regarding the negligent mismanagement and overcharging on Loan Accounts 1402/504401/01, 1402/504401/02 and 1402/504401/03 causing the plaintiff continuing and irreparable loss and damage.*
- (ii) Damages for negligence, breach of duty, including breach of statutory duty, breach of contract and negligent misrepresentation by the first named defendant in negligently mis-selling and grossly mismanaging the fund known as AIAC Whitgift Geared Property Fund.*
- (iii) A declaration that the said loan (sic) are not properly and lawfully transferred to the second named defendant, thereby rendering the appointment of the third named defendant as a receiver over the properties in suit null and void.*
- (iv) A declaration that a lis pendens be registered over the property in suit, namely, apartments 26, 28, 30, 32, 34 and 36 Marlanstown Park, Mullingar, County Westmeath now comprised within Folio 2665L County Westmeath.*
- (v) Damages for breach of contract, negligence arising from the conflict of interest of the defendants in this matter, thereby occasioning irreparable loss and damage to the plaintiff.*
- (vi) Costs.*
- (vii) Interest pursuant to the Courts Acts."*

7. As that endorsement of claim refers to three defendants, it was clearly drafted in contemplation of IBRC being the first defendant as was the case when the writ was originally presented for issue to the Central Office of the High Court.

Joinder

8. The Rules of the Superior Courts confer wide powers on the court to join a defendant who ought to be joined (see for example O. 15, r. 30). The burden of proof on a plaintiff who seeks such an order is a light one. In this regard, the observations of Laffoy J. in *Allied Irish Coal Supplies v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519 are relevant. Laffoy J. said:

"... it seems to me that counsel for the plaintiff is correct in asserting that the onus on the plaintiff is no greater than to demonstrate that it has a stateable case against the [proposed defendant]. Moreover, it seems to me that on an application such as this it is not appropriate to attempt to resolve conflicts of evidence such as the conflicts which arise on the affidavits filed in this matter, and that the proper approach is to determine whether there is a stateable case on the basis that the plaintiff's version of the disputed facts is the true version."

9. In this case, there is of course the added complication of s. 6(2)(b) of the Act. It requires the consent of the High Court to be obtained before any action or proceeding can be "issued" against IBRC. The test that the High Court has to apply on such an application was identified by Laffoy J. in *Wright-Morris v. Irish Bank Resolution Corporation Ltd.* [2013] IEHC 385. That judge took the view that the court should apply the same test which it would apply in considering an application under s. 222 of the Companies Act 1963 for leave to commence proceedings against a company in liquidation. Laffoy J. said in the course of her judgment:

"Although the wording of s. 6(2)(b) of the Act of 2013 is somewhat different to the wording of s. 222 of the Act of 1963, and s. 6(2)(b) was specifically enacted as a substitute for s. 222, I consider that the Court's discretion in relation to each provision should be exercised in the same way. Accordingly, the criterion which the Court should apply is whether it is right and fair in the circumstances for the Court to give consent to the proposed proceedings. Obviously, if the issues intended to be raised can be conveniently decided in the course of the winding up, it is in everybody's interest that that is the route a claimant against IBRC should take."

10. It is conceded by IBRC that the two-fold test which Mr. McGuinness has to meet is not a particularly high one. Even so, it is contended that he has failed to surmount that low threshold because it is said he has failed both in his plenary summons and affidavit evidence to establish even a stateable case against IBRC. I will come to consider this topic later in this judgment, but before doing so, it is necessary to consider the factual background to the litigation.

Relevant Facts

11. The plaintiff allegedly borrowed large sums of money from IBRC on foot of two facility letters dated respectively the 5th November, 2007 and the 1st January, 2009. Under the first facility letter, two facilities of €1 million and €600,000 were advanced. Under the second facility letter, three facilities were advanced in the amounts of €1 million, €600,000 and €170,000. Each facility was allegedly repayable on demand and was secured by *inter alia* mortgages over five apartments at Mullingar, Co. Westmeath and an assignment over Mr. McGuinness's interest in the AIAC Whitgift General Property Fund.

12. IBRC was placed in special liquidation pursuant to the Act. The special liquidators were instructed by the Minister for Finance to sell the assets of IBRC including the right to demand repayment of all loans advanced by it and the securities associated therewith so as to realise funds which would be applied to discharge the claims of IBRC's creditors.

13. In March 2014, IBRC agreed to sell to Kenmare the loans which it had advanced to Mr. McGuinness together with the associated securities. The actual transfer of the loans took effect from the 23rd May, 2014. Mr. McGuinness was notified of this transfer in a letter from IBRC dated the 6th June, 2014.

14. Kenmare demanded repayment of the loans. When they were not repaid, Mr. McCarthy was appointed as receiver over the secured properties. It is not clear on the evidence available whether Kenmare has sought to enforce its security over the Whitgift Fund. From a transcript of a hearing which took place before Gilligan J. concerning a separate application in this litigation, counsel for Kenmare is quoted as saying *"I have simply acquired the loan and I am seeking to enforce the loan by way of possession of the properties and by way of application for a summary judgment"*.

15. No statement of claim has yet been delivered in these proceedings, but it is clear from the endorsement of claim that the plaintiff makes allegations of negligence, breach of duty and negligent misrepresentation against IBRC. The contention which is made by IBRC is that Mr. McGuinness has failed to demonstrate that he has a stateable case against it. As the loans have been sold and transferred to Kenmare, it and it alone has the entitlement to call them in. Any relief to which Mr. McGuinness might be entitled is referable only to Kenmare because IBRC no longer has any interest or rights arising out of the loans. Thus, it is said, Mr. McGuinness has no right to seek to litigate against IBRC in respect of the reliefs which he seeks in the endorsement of claim on the plenary summons. Before considering the validity of this submission it is important to ascertain the attitude of Kenmare to all of this.

The Attitude of Kenmare

16. As no statement of claim has yet been delivered, no defence has been forthcoming from Kenmare. It is however possible to ascertain what its attitude will be to the claims which are sought to be made by Mr. McGuinness. That can be done by examining the transcript of a hearing which took place before Gilligan J. on another aspect of this litigation in July 2015 at which Senior Counsel for Kenmare made its position clear. He said:-

"I of course as the acquirer of the loan have no knowledge of the circumstances in which this investment was sold to Mr. McGuinness or any of the matters that he alleges in that regard, which is why the position in relation to IBRC is of some significance. Mr. McGuinness has unsuccessfully sought to join IBRC and certainly I just want to flag to the court, it would be part of my defence to say I can have no responsibility as the acquirer of the loan in respect of the mis-selling claims that he makes. Those mis-selling claims must lie against IBRC."

17. Gilligan J. then asked:-

"Is it your case that if IBRC are not a party then Mr. McGuinness can't raise that issue?"

Mr. McGrath in answer:-

"Well, he can't – my position is that he cannot obtain relief against me because I am not the defendant to those claims. Insofar as he has a claim arising out of mis-selling, it is against IBRC who missed, according to Mr. McGuinness mis-sold the investment to him. I have simply acquired the loan and I am seeking to enforce the loan by way of possession of the properties and by way of application for a summary judgment. So, the question as to whether IBRC is a party, is, as I say, something of some significance and what I was going to suggest to the court is that the court make directions that

would close pleadings as between Mr. McGuinness and the existing defendants and then the matter would be put back until after the 7th December, until we see the outcome of Mr. McGuinness's appeal."

Gilligan J. then said:-

"Surely we have to have the result of the appeal."

Mr. McGrath: "If the court has that view in relation to the matter – I do think it is important and I do want to flag so that Mr. McGuinness is fully aware that we will be defending those claims of mis-selling on the basis that we have no responsibility and it is IBRC's responsibility."

18. This information was not of course before Noonan J. when he made the order under appeal. No objection was taken to it being exhibited before us and in any event it is admissible pursuant to the provisions of O. 86A r. 4(b).

19. Thus, Mr. McGuinness now finds himself in a dilemma. He has been refused leave to join IBRC. He contends that his claims in the plenary summons cannot be fully met and accommodated by the action proceeding solely with Kenmare and Mr. McCarthy as defendants. Kenmare, through its counsel, has made it very clear that any claims which he may care to make in respect of any negligent misrepresentation or mis-selling will be defended by it on the basis that it has no responsibility for them and that that is a matter solely for IBRC.

20. It is in this context that this Court is called upon to decide whether or not the order under appeal is correct.

No stateable case

21. IBRC contend that Mr. McGuinness has no stateable case against it. The reason for this is that IBRC no longer has any interest in or right to demand repayment or otherwise enforce the loan repayment obligations. By reference to the provisions of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877, it is argued that where a debt is assigned from one person to another, that latter person becomes the creditor in respect of the particular debt and becomes entitled to exercise all remedies enjoyed by the person who was formerly the creditor in respect of that debt. The subsection reads:-

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

22. The IBRC argument runs that having regard to that statutory provision, as the loans in question have been assigned to Kenmare, it (Kenmare) has the exclusive right to demand repayment and enforcement of the loan obligations. Thus, any action seeking to restrain the enforcement of those obligations must be brought against Kenmare. It is argued that Mr. McGuinness thus has no right to litigate in respect of the reliefs sought in the general endorsement of claim on the plenary summons.

23. I have no difficulty in accepting the validity of that argument in respect of reliefs 3, 4 and 5 identified on the general endorsement of claim. Relief 3 seeks a declaration that the loans had not been properly and lawfully transferred to Kenmare and that accordingly the appointment of Mr. McCarthy is void. Equally the declaration concerning the *lis pendens* can be dealt with by Kenmare. The claim for damages at para. 5 of the endorsement of claim is one which arises out of an alleged conflict of interest because of Kenmare's employment of a former official of IBRC. Again that is a matter that falls to be dealt with by Kenmare.

24. I have a good deal more difficulty in accepting the validity of the IBRC argument in respect of the reliefs sought at paras. 1 and 2 of the summons, a difficulty bolstered by the clear intention of Kenmare to plead that any allegation concerning negligent misrepresentation or mis-selling of the loans is a matter in respect of which it washes its hands. Kenmare says those reliefs fall to be dealt with exclusively by IBRC. Notwithstanding that, counsel for IBRC contends that the reliefs sought at paras. 1 and 2 of the endorsement of claim fall to be dealt with exclusively by Kenmare.

25. Reliefs 1 and 2 are somewhat augmented by the contents of para. 22 of the affidavit relied upon by Mr. McGuinness in his application to the High Court. There he said:

"I say that neither Eileen or myself owe any sum to Kenmare Property Finance or Pepper Financial Services in that:-

(1) The facilities would have been cleared in full back in 2009 had the associate director carried out what had been verbally agreed at the meeting in the Hermitage hotel in Portlaoise in January 2009.

(2) A deed of ownership of the loan book has not been provided by Pepper Property Finance Limited or Kenmare Finance Limited.

(3) A deed of appointment of Pepper Finance has not been provided.

(4) In the event that the court finds any amount due which is denied there is an overcharge because of the use of a 360 day year.

(5) The amount of €1,736,713.26 demanded is incorrect.

(6) If the receiver is allowed to take over Revenue will be denied VAT receipts on rent received and also on the eventual sale of the properties."

26. While some of these matters clearly can be dealt with by Kenmare allegations concerning the events which took place years prior

to Kenmare's arrival on the scene may not.

27. Mr. McGuinness has also made it clear that his claim for damages will be limited to such amount as is sufficient to discharge the entire of his alleged indebtedness to Kenmare.

28. A good deal of criticism was made concerning the content of the affidavit evidence relied upon by Mr. McGuinness because it is said it does not provide particulars as to how the investment and associated loans were mis-sold or how IBRC acted negligently in its dealings with Mr. McGuinness.

29. I am not inclined to accept the validity of this criticism. It is true that the affidavit evidence is not presented in a form that might be expected if legal professional help was available to Mr. McGuinness. Nonetheless, he certainly, to my mind, demonstrates sufficient information as to his dealings with IBRC personnel to satisfy the low threshold that has to be surmounted in an application under s. 6(2)(b) of the Act, were it not for the complication of the loans having been assigned to Kenmare. In other words, if the loans had not been transferred to Kenmare, I would be of opinion that Mr. McGuinness should be granted leave under section 6(2)(b).

The issue

30. Does, therefore, the transfer of the loans to Kenmare preclude the joinder of IBRC?

31. IBRC contends that this question has to be answered in the affirmative. It says that that is so having regard to the wording of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877, some 19th century English decisions and one modern Irish authority.

32. The wording of s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 makes it clear that the assignment of a debt is subject to all equities. Thus, Kenmare is entitled to no greater entitlements than IBRC.

33. Furthermore, those equities include any rights of set off. That is clear not merely from the wording of the section, but also from the cases to which the court was referred. They are *Young v. Kitchin* [1878] 3 ExD 127 and the *Government of Newfoundland v. The Newfoundland Railway Company* [1888] 13 App.Cas AC 199. The latter case approved the decision in *Young v. Kitchin* and held that there was an entitlement to set off a counterclaim for unliquidated damages in circumstances where that set off availed against the assignee and where the claim and counterclaim had their origin in the same portion of the same contract, the obligations of which gave rise to them being closely intertwined.

34. In the course of his judgment Lord Hobhouse said:-

"Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also gave rise to the subject of the assignment."

These cases and others were considered by Lynch J. in his decision in *International Factors (Ireland) Limited v. Midland International Limited* (Unreported, 9th December, 1993).

35. That decision is quoted in Dr. Breslin's book "*Banking Law*" 3rd Ed. 2013 at para. 11/125, where the author says:-

"An assignee takes the asset assigned to him subject to equities – including any rights of set off – arising before the assignment. . . . The consequences of this can be seen in International Factors (Ireland) Limited v. Midland International Limited. In that case a company factored its debts to the plaintiff. Prior to that it had supplied faulty bathroom equipment to the defendant. The defendant incurred expense in repairing the equipment. There was, therefore, a breach of contract by the company. This was held to give rise to a right of the defendant to set off its expenses against sums due to the company and, after the factoring, to the plaintiff. As this right arose prior to the assignment of the debts, the defendant was held to be entitled to set off its expenses against the debts owed by it to the plaintiff."

36. I have no difficulty in accepting the principle that the assignee takes subject to equities and that those equities include a right to set off, but I do not accept that that gives rise to the result sought for by IBRC.

37. The cases cited and the principles established in them, do not appear to me to be applicable in this case.

38. In the cases relied upon, the assignee was the plaintiff in proceedings. The defendant was a counterclaimant seeking damages arising out of a breach of the assigned contract. In this case, Mr. McGuinness is the plaintiff. He is not merely seeking damages for breach of a contractual obligation, but also in respect of alleged tortious activity on the part of IBRC and its officials. If he succeeds in his claim for damages for such activity, he will utilise it in set off against any monetary obligations which he may have on foot of his borrowing. I do not think that any unliquidated damages which may be awarded to him in tort can be regarded as "*flowing out of and inseparably connected with the dealings and transactions which gave rise to the subject of the assignment*" per Lord Hobhouse.

39. Furthermore, to exclude IBRC from the proceedings would be to place Mr. McGuinness at a considerable litigious disadvantage. First, he would immediately be confronted with a line of defence which I have already identified on the part of the Kenmare to the effect that it has no liability in respect of any tortious activities on the part of IBRC or its officials. That line of argument may or may not be successful, but I do not think that it would be fair or appropriate that Mr. McGuinness should be put to the hazard in respect of it. Second, if IBRC are not defendants in the proceedings, he will not be in a position to obtain discovery against them other than on a non party basis. Whilst these matters would not of themselves be determinative they add weight to the case in favour of the joinder of IBRC.

40. In these circumstances I have come to the conclusion that the nature of the tortious claim which is sought to be advanced by Mr. McGuinness is such as to justify the joinder of IBRC. Accordingly, I would allow this appeal and grant leave to pursue the claim against IBRC pursuant to s. 6(2)(b) of the Act.

41. I would point out that the case which Mr. McGuinness wishes to make is far from straightforward and I would counsel him if at all possible to obtain professional help to pursue it.