



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 345

Record Number: 2018/19

**Peart J.
Whelan J.
Baker J.**

BETWEEN:

**ANN NOLAN, ELIZABETH NOLAN, JOHN NOLAN, PATRICIA NOLAN,
SALLY NOLAN, AND QUEST CAPITAL TRUSTEES LIMITED**

PLAINTIFFS/RESPONDENTS

- AND -

**DILDAR LIMITED, CIARAN DESMOND, COLM S. MCGUIRE AND DERVALL M. O'HALLORAN TRADING UNDER THE STYLE AND TITLE
OF MCGUIRE DESMOND SOLICITORS, A FIRM, JOHN MILLETT, PINNACLE TRUSTEES LIMITED, DILDAR LIMITED, AND JOHN
MILLETT INDEPENDENT FINANCIAL ADVISORS LIMITED**

DEFENDANTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 31ST DAY OF OCTOBER 2018

1. This is an appeal brought by Dillon Kenny and Darren Kenny from an order of the High Court (McGovern J.) made on the 18th December 2017 refusing their application to be joined as defendants to the within proceedings pursuant to Ord. 15, r. 13 of the Rules of the Superior courts ("RSC").

2. As appears from the *ex tempore* judgment of the trial judge, their application was refused because the trial judge considered that he would be giving them "a procedural advantage" if they were added as defendants because as defendants they would not be assuming any burden of proof. He went on to note however that the appellants would not be unduly prejudiced by his refusal of their application because it would be open to them to commence their own proceedings against the present plaintiffs, where the issues that concern them could be ventilated, and in the event that such proceedings were commenced, those proceedings could be admitted to the Commercial Court and consolidated with the present proceedings, so that all issues could be addressed at the same trial.

3. As it happens, these appellants have by now issued their own proceedings in which the plaintiffs in the present proceedings are named as defendants (Record No: 2018/2009P). That occurrence has led them to submit that the present appeal is therefore moot. I will come to that question in due course.

4. The present proceedings concern a claim by the plaintiffs ("the Nolans") that they are the beneficial owners of certain lands in Cork which I shall for convenience refer to simply as "the Nemo lands". These lands are registered in the name of Dildar Limited, which is a company registered in the Isle of Man. It was incorporated for the purpose of acquiring the Nemo lands. The central issue is whose money was used for the purchase of the lands through Dildar Limited.

5. The plaintiffs claim to be the beneficial owners of the lands because, they say, their pension fund monies held by Oaklands Property Trust were used for the purchase of the lands by Dildar Limited. Their statement of claim describes the rather elaborate financial structures put in place by their advisers for the investment of their pension funds, and certain financial transactions that occurred prior to the completion of the purchase, which they say establishes that their pension fund provided the finance for the purchase of the Nemo lands. They make many claims against their advisers in these proceedings which are not relevant to the present appeal, and I need not elaborate upon. But ultimately it was Dildar Limited which purchased the Nemo lands. In their statement of claim the Nolans seek, *inter alia*, a declaration that Dildar Limited holds its interest in the lands on a trust for them.

6. In the defence delivered on behalf of the 5th, 6th and 8th defendants it is denied that the Nolans are the beneficial owners of Dildar Limited. That question is clearly an issue to be decided in the proceedings, and the Nolans, as plaintiffs, will bear the onus of proof if they are to achieve the declaratory relief they seek.

7. What has given rise to the application by the appellants to be joined in the proceedings is that they claim to be the beneficial owners of Dildar Limited. They wish to be able to defend the plaintiffs' claim to be declared the beneficial owners, and to assert their own claim in that regard, in the unusual circumstances described below.

8. The appellants seek to be joined as defendants because the administrator of Dildar Limited in the Isle of Man has made it known that he will be taking a neutral position in the proceedings in relation to the ownership question (the company itself having previously supported the claim of beneficial ownership made by the Kennys). The Kennys anticipate therefore that the Nolans will be facing what they describe as "an open goal" when making their claim for a declaration that they are the beneficial owners of Dildar Limited, as there will be no party before the court to make the case that they are not. They consider that they are now the only appropriate '*legitimi contradictores*', and ought to be joined so that they can defend the plaintiffs' claim to a declaration, and also seek their own declaration as to ownership by way of a counterclaim.

9. This change of position on the part of the administrator of Dildar Limited is put forward by the appellants as an exceptional circumstance justifying their being joined as defendants so that (a) they can defend the plaintiffs' claim to beneficial ownership, and

(b) so that they can assert by way of counterclaim their own claim to beneficial ownership. The appellants contend that their joinder will ensure that the necessary parties are before the court so that all necessary issues can be properly and fairly determined by the court. They submit that their interests are directly affected by the determination of the plaintiff's claim to ownership, and that they must be allowed to defend their interests, now that the administrator of Dildar Limited has indicated that he will be adopting a neutral position in the matter.

10. In their application to be joined as defendants Darren and Dillon Kenny claim that the funds used by Dildar Limited to purchase the Nemo lands came from Kenny family funds, and that it was they who procured the incorporation of Dildar Limited for the purchase of the lands. They refer to the fact that even the name of the company consists of the first three letters of the first names of Dillon and Darren Kenny.

11. I should mention also that in November 2017 the plaintiffs herein have commenced other proceedings in the Isle of Man for the purpose of determining the ownership issue. However, the appellants consider that the Irish courts are the appropriate forum to that question to be decided.

12. This summary of the background and the relevant issue for the purposes of this appeal is necessarily somewhat truncated, but I believe it suffices to provide a context within which the appellants' application for joinder, and this appeal, may be considered, though I will refer later to certain passages from the grounding affidavit and replying affidavit filed.

13. Leaving aside for the moment the respondents' submission as to mootness, the parties do not disagree as to the applicable legal principles to be applied by a court considering the joinder of non-parties as defendants to proceedings. The starting point is Ord. 15, r. 13 RSC which provides, as relevant:

"13. ... 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..."

14. The power to join necessary parties is a discretionary one. A number of judgments which have clarified the circumstances in which the Court should exercise that discretion in favour of permitting a non-party to be added as defendants to existing proceedings. For example, in *Fincoriz S.A.S. Di Bruno Tassin Din e C v. Ansbacher & Co. Ltd* [1987] IEHC 19 Lynch J. held:

"In order that a person may be joined as a defendant without the consent and, a fortiori, against the wishes of the plaintiff there must be some exceptional circumstances. The exceptional circumstances must be such that the added defendants are persons who ought to have been joined as defendants by the plaintiff in the first instance, or alternatively even if it was not unreasonable that they were not joined as defendants by the plaintiff in the first instance it is shown at the time of the application to the Court to join them that their presence before the Court will as a matter of probability be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter."

15. The Court was referred also to the judgment of Ryan J. (as he then was) in *Persona Digital Telephony Ltd and anor v. The Minister for Public Enterprise and ors* [2014] IEHC 78 where at paras. 32 and 38 he stated:

"32. The fundamental question is what is the just procedural decision in the circumstances of the case? Is it the case that Denis O'Brien ought to have been joined? Or is his "presence before the court necessary in order to enable the Court to effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter?"

38. It is clear that there must be very exceptional circumstances before the choice made by a plaintiff as to whom to sue will be interfered with by the addition of another defendant. Having said that, the rule envisages that the court will make a decision that is not dependent on the consent of the plaintiff. It follows that the absence of such consent is not determinative of the application. It is also relevant that the plaintiff is not deprived of his right to sue any defendant. The decision is concerned with what is necessary to do justice, that is, to decide all the questions involved in the case effectually and completely."

16. Both parties referred the Court to what was stated by Clarke J. (as he then was) in *Fitzpatrick v. FK* [2007] 2 I.R. 406 as follows:

"8. It is important, in analysing the circumstances in which it is appropriate to join parties, to distinguish between what counsel for the plaintiffs described as "precedential interest" in the outcome of proceedings on the one hand and what might properly be called a "direct interest" on the other. ... The mere fact, therefore, that the decision in one case may have a value as precedent which can directly affect subsequent cases cannot, in my view, justify joining parties who might be affected by that precedent in the case in which the precedent may well be set. The sort of "interest" that a party must have in order for it to be proper to join that party must be a more direct interest.

9. In ordinary litigation it is difficult to see how it can be said that a party can be properly regarded as being required to be a *defendant* in proceedings unless some relief is claimed as against that party or where the relief claimed, if granted, would *directly* interfere with that party's interests. Therefore persons may be entitled to be involved as a party in proceedings in which, for example, identifiable assets might be sold by order of the court where such party claims an interest in the relevant asset and where the court order, if made, would, as a necessary consequence, affect that party's interests. The review by Finnegan P. in *O'Brien the Personal Injuries Assessment Board (No. 1)* [2005] 3 I.R. 328 of the circumstances in which it is possible for a party to intervene because of having such an interest, is of relevance in that context. In each of the cases mentioned the party seeking to intervene must establish a *direct* interest in the very subject matter of the litigation." [Italics provided in original]

17. As I have already stated, Dillon and Darren Kenny claim to be the beneficial owners of Dildar Limited. Darren Kenny's grounding affidavit sets out the basis of their claim to the beneficial ownership of Dildar Limited. He says that the company was set up in the Isle of Man on the instructions of his father, Paul Kenny, and that he did so "on the applicants' behalf for the explicit purpose of acquiring the relevant property" [i.e. the Nemo lands], and also that those lands were purchased using only Kenny family resources. He states at paras. 9 - 12 of his affidavit:

"9. Following the commencement of these proceedings, we instructed Michael Powell, solicitors to come on record for

Dildar IoM to resist the plaintiffs' claim to the relevant property on the basis explained above. (Michael Powell solicitors also came on record for the seventh defendant, an Irish company also called Dildar Limited which is engaged in the development of the relevant property.)

10. Since these proceedings were begun, however, the plaintiffs have purported to advance a new claim (one not made in these proceedings), namely that they are also the beneficial owners of Dildar IoM. As a result of that new claim being asserted by the plaintiffs, Mann Made Corporate Services Limited ("Mann Made"), the Manx corporate services provider that administers Dildar IoM, considered itself inhibited from acting in accordance with the instructions of the applicants and has felt constrained to adopt a neutral position as between the Kennys and the Nolans. The effect of that position by Mann Made is that our solicitors no longer have instructions from the sole director of Dildar IoM for the defence of these proceedings insofar as they concern the Kennys.

11. Plainly, however, the Kenny interest in these proceedings remains, given that the applicants own Dildar IoM, which in turn owns the relevant property. The plaintiffs' claim to the relevant property would most appropriately be resisted by the applicants, where it can no longer be resisted by Dildar IoM for the reasons explained at paragraph 10 above.

12. Moreover, the beneficial ownership of Dildar IoM having been put in issue, that question should also be determined in these proceedings, where in substance it is no more than another way of asking who owns the relevant property, which will turn largely on who paid for it. And in this regard the applicants' interest in that question is plain, as the beneficial owners of Dildar IoM."

18. The plaintiffs submit that before the Court could countenance granting this application to be joined to their proceedings, the appellants would have to address the contradiction between what they now contend to be the position as to the ownership of Dildar, and what was previously stated by Paul Kenny (father and uncle respectively of Dillon and Darren Kenny) to be the position at certain meetings with Mann Made in September 2015 that took place in the Isle of Man and which are recorded in notes of these meetings which are exhibited in a replying affidavit sworn by Bernard McEvoy, the solicitor acting for the plaintiffs.

19. In his affidavit Mr McEvoy refers to these meetings and to certain correspondence between John Millett, one of the defendants, and Mann Made in which the controversy as to the source of funds is referred to, as is Mr Millett's failure to prove conclusively that the source of the funds was Kenny funds, as he had undertaken to do in September 2015. Having referred to the unresolved controversy surrounding the source of funding asserted by the Kennys, Mr McEvoy states at paras. 12 - 13 of his affidavit:

"12. As the extract above and the exhibited documents from which they are drawn demonstrate, multiple contradictory assertions of beneficial ownership structure and fund sources for Dildar IoM have been advanced to date on behalf of members of the Kenny family to the directors of Dildar IoM.

13. Statements previously made by Paul Kenny to Dildar IoM present a very unclear picture. The applicants have already exhibited financial statements corroborating their account of how their monies represent the source of funds used to acquire assets on behalf of Dildar IoM. It is striking that, notwithstanding the Kennys' claimed to have been the victims of error, they never once alerted the Nolans to the issues regarding ownership. Given all this, if Darren Kenny and Dillon Kenny are seeking the unusual relief of being joined as defendants to proceedings, it is incumbent upon them to make clear their interest and make proper effort to vouch that monies have come from their own resources for the purposes of acquiring [the Nemo lands]. In particular, it is necessary that the applicants in this motion would tender appropriate evidence to vouch the source of funds which form the basis of their claim to the beneficial interest in the property held by Dildar IoM."

20. The source of funding for the Nemo lands purchase by Dildar Limited is clearly an issue that will be before the Court whether or not the appellants are joined. The plaintiffs when seeking a declaration that they are the beneficial owners will have to adduce what evidence they can to establish an entitlement to such declaration. It seems to be that in circumstances where the administrator of Dildar Limited has chosen to adopt a neutral position, there will be no other party before the Court who can oppose the case advanced by the plaintiffs. It also seems clear that the appellants have a direct interest in the claim being made by the plaintiffs, and that they are not seeking to intervene simply for the purpose of pursuing some "precedential purpose", as referred to by Clarke J. in *Fitzpatrick v. F.K* [supra].

21. The plaintiffs have argued that before the appellants could be joined they would have to explain and resolve the contradictions between the position as to ownership put forward by Paul Kenny in his interactions with Mann Made at the meetings referred to in September 2015, and the case now sought to be advanced by the appellants, and that until those issues are addressed they should not be permitted to be joined. In my view, to require the appellants to go that far would be for the Court to trespass too far and unnecessarily into the merits of the appellants' case. This is an interlocutory application, the Court should tread carefully, and not reach a point of deciding as a matter of probability whether or not the appellants have a good case. In my view what is required is for the appellants to show something in the nature of a *prima facie* case – an arguable case shown to be rationally based, and which goes beyond mere assertion. In my view the appellants have achieved that position. I accept completely that what they have sworn to as the factual background from their point of view may have the frailty of being contradicted by previous statements to Mann Made by either Paul Kenny and/or by John Millett. It will be a matter for the trial judge to reach a determination on the basis of what evidence is adduced by both sides on that issue. But I do not believe that the appellants are required at the point at which they are seeking to be joined in order to defend against the plaintiffs' claim to a declaration, and to put forward their own case by way of counterclaim, to go further than they have gone thus far. While there may be difficulties ahead perhaps for them given the prior positions taken by Paul Kenny/John Millett, that will be a matter for evidence and cross-examination at the trial. In my view, and to adopt the language of an interlocutory injunction application, the appellants have demonstrated a fair issue to be tried.

22. The next question is whether it suffices that the appellants have commenced their own proceedings against the present plaintiffs in which they seek a declaration as to the beneficial ownership of Dildar Limited. There is little doubt that in due course the pleadings in those proceedings could be completed and an application could be made to have them consolidated with the present proceedings, and that would achieve the same situation whereby the appellants would be able to advance their case by way of a defence and counterclaim to the plaintiffs' claim for a declaration. But it is a needlessly cumbersome way forward in my view. Not only would it involve a duplication of effort by the parties themselves both in terms of time and costs, but it places an additional burden upon court resources which should be avoided where reasonably possible. Further a consolidation of those fresh proceedings with these proceedings is procedurally complex and burdensome. In my view these difficulties can be avoided if the appellants are simply joined as defendants, with appropriate directions for the delivery of pleadings, including a counterclaim. For the same reasons I do not consider that the present appeal is moot on account of the fact that the appellants have instituted their own proceedings subsequent to the refusal of their application in the High Court.

23. The gravamen of the trial judge's decision was that by being joined as defendants the appellants would gain an unfair procedural advantage over the plaintiffs. But he then went on to say that they could in any event bring their own proceedings which could be consolidated with the present proceedings. I very respectfully disagree with the trial judge's reasoning in this regard. He was of the view that if joined as defendants the appellants would not have any burden of proof. I do not agree. If the defendants are asserting a claim to the beneficial ownership of Dildar Limited they will have to do so by way of a counterclaim. They will plead their case as a counterclaim. In relation to that case which they seek to put forward by way of counterclaim they will of course, and as a matter of law, have to discharge the burden of proving their counterclaim. If they fail to discharge that burden their counterclaim for a declaration will fail. I do not consider that the basis for the trial judge's decision is correct.

24. For these reasons I would allow this appeal, and order that the appellants be joined as defendants, and would direct that a defence and counterclaim be delivered within 21 days, with such other directions as may be considered appropriate, having heard the parties' submissions in this regard, so as to ensure as far as possible that no further delay in the determination of all the issues raised in the proceedings occurs.